

BUREAU OF THE ASSEMBLY OF STATES PARTIES

Seventh meeting

11 September 2020

via WebEx remote link

[Draft] Agenda and decisions

The meeting was chaired by the President of the Assembly, Mr. O-Gon Kwon. The Vice Presidents of the Assembly, Ambassador Jens-Otto Horslund (Denmark) and Ambassador Michal Mlynár (Slovakia), also participated.

1. United States measures taken against the ICC

The Second Vice-President of the Court, the Prosecutor and the Registrar provided updates to the Bureau, further to the briefing by the Heads of organs to the 8 September joint meeting of the Bureau working groups.

Judge Perrin de Brichambaut stated that the measures imposed by the United States Administration constituted a grave attack on the Court, States Parties and the Rome Statute system. He expressed the support of the Presidency for the Prosecutor and the senior staff member in her Office who had been designated on 2 September, and noted that the continued and unhampered operation of the Office of the Prosecutor was vital for the Court's mandate. He expressed appreciation to the Registrar, who had taken steps to address the potential and real impact of the measures. He also thanked the Assembly President and States Parties for the support expressed for the Court, and noted that the Court needed the explicit and active support of all States to continue to fulfil its mandate.

The Prosecutor, Ms. Fatou Bensouda, thanked the Assembly Presidency for the clear and firm support demonstrated, including in reaction to the 2 September sanctions. The inclusion of the issue on the agenda of The Hague and New York Working Groups indicated the seriousness with which States Parties viewed the challenges which the Court faced. She highlighted that the attack on the Court was politically motivated, and that the Court needed the support of States Parties as custodians of the Rome Statute system, and noted that the sanctions had the potential to affect the Court's ability to operate. Further, she encouraged States to take action to confront the challenges to the Court and its fight against impunity for atrocity crimes.

The Prosecutor noted that States Parties' leadership was needed at this time. The Court's leadership stood together on this challenge. As Prosecutor, she would not shy away from the mandate given by States Parties. She would also do her best to ensure business continuity. She welcomed the engagement with States Parties, and urged this to continue, highlighting productive meetings she had had with, inter alia, the EU Political and Security Committee and United Nations Ambassadors in New York on this common challenge.

The Registrar, Mr. Peter Lewis, paid tribute to the host State, the Netherlands, and to other States that had provided support to the Court. The Court relied on the intervention of States to ensure its continued operations. In that regard, he had established contact with relevant States Parties and welcomed the broad support of States Parties. The situation regarding designated individuals remained a concern to the Court. The Court had to have a

long term view of the situation and was looking into the arrangements that could be made in the future.

Bureau members reaffirmed their unequivocal support for the Court and its personnel, and welcomed the President Kwon's swift issuance of a press release.¹ The concrete impacts of the measures were a matter of great concern, and the full ramifications still remained to be seen. The sanctions were viewed as an attack not only on the Court, its staff, and States Parties, but also on the victims. The Registrar and the Court were commended for managing to mitigate the consequences of the measures.

States were encouraged to make statements in support of the Court at the high-level week of the United Nations General Assembly, as well as to act jointly at the bilateral and regional levels. Discussions were on-going in the European Union on addressing the unprecedented measures against an independent international Court, and it was suggested that all States Parties raise this issue at the upcoming Assembly session. Bureau members welcomed the Swiss initiative² and encouraged States to support it. Further, it was suggested that the issue of US measures could be discussed in the facilitation on cooperation since US sanctions could also have an impact on cooperation by States Parties.

It was suggested that action should be taken not only by those States directly affected but by all States Parties. A unified reaction was required in addressing the situation. It was important that all friends of the Court, i.e. States, NGOs, the academic community etc. raise their voices.

The President assured the Court that States Parties would do their utmost to support the Court and its personnel.

2. Election of the Prosecutor – the next steps

The Bureau continued its consideration of the next steps regarding the election of the Prosecutor scheduled to take place at the nineteenth session of the Assembly.

The President recalled that the Committee on the Election of the Prosecutor had submitted its report, containing an unranked shortlist of four candidates for the position of Prosecutor, on 30 June 2020.³ Hearings for the shortlisted candidates with States Parties and civil society had been held on 29 and 30 July 2020. On 7 August, following discussions in the Bureau, the President had shared with States Parties the planned modalities for the consultation process foreseen in the Terms of Reference. He noted that he and the Vice-Presidents were making every effort to ensure the consultations were structured, efficient, inclusive and transparent.

Vice-President Mlynár provided an update on the first round of consultations, highlighting the importance of the shared goal of the Assembly electing the Prosecutor by consensus. He noted that, based on the views expressed during the consultations, it was not yet possible to provide a meaningful assessment of the support for each of the shortlisted candidates. At the same time, some States Parties had called for extending the group of candidates under consideration, by including those candidates who had been interviewed by the Committee (provided they gave their consent). President Kwon noted that a further round of consultations would be undertaken and the Bureau would consider the matter again at a future meeting.

¹ <https://www.icc-cpi.int/Pages/item.aspx?name=pr1534>

² By which the Government of Switzerland would deliver a letter to the United States Government regarding the sanctions.

³ ICC-ASP/19/INF.2, Add.1 and Add.2.

President Kwon also recalled that the initial nomination period for the election would end on 22 September, and proposed to extend the nomination period for one month, i.e. until 22 October 2020, to give the consensus-building process additional time to reach a conclusion. It was agreed that a proposal would be circulated to Bureau members in this regard. President Kwon and Vice-President Mlynár also reiterated that formal nominations by States Parties were not expected or encouraged at this stage.

3. Preparations for the nineteenth session of the Assembly

a) Contingency planning

The President and the Secretariat reiterated the shortcoming of holding the upcoming nineteenth session of the Assembly in New York including a) the uncertain availability of conference rooms at the United Nations Headquarters due to pandemic, social distancing measures and need to accommodate its own meetings; b) the need of the Assembly to have at least two conference rooms available in order to accommodate one delegate for each of the 123 States Parties; c) severe constraints for Court officials, including Secretariat staff, to travel to New York; d) substantive servicing of the session without the Secretariat staff; and e) the measures by the United States taken against the Court whereby potential additional measures could have a further impact upon travel and participation in the session.

The President further recalled the “Non-paper on mitigating measures for the conduct of ASP19” as prepared by the Presidency of the Assembly, which was disseminated on 3 September 2020, setting out the main issues and possible options for the upcoming session.

The President further recalled the proposal by the Vice-President Mlynár put forward during the third joint meeting of The Hague and New York Working Groups on 8 September 2020:

- (i) To allow for the business continuity, the substantive part, including adoption of the budget and ASP mandates would take place in The Hague in December, allowing for virtual participation of all participants who would choose not to be physically present in the conference room. The social distancing measures would be fully observed, including the use of face masks, availability of hand sanitizers, etc. If the social distancing measure will allow for physical participation of some members of the non-governmental organizations we would proceed in that manner. Furthermore, in terms of sequencing of the agenda items, the Secretariat also indicated that certain decisions, including the new conditions of service for the judges should be adopted before the election of six judges, as it is indispensable to reduce the risk of possible claims and subsequent costly litigation before ILOAT as in the 2007 situation.
- (ii) A resumed session would then be devoted to elections and would take place as early as possible in January/February 2021 at the UNHQ in New York. The judges will only assume office for a nine-year term as of 11 March 2021 and that therefore the elections could be held during a resumed session in January/February 2021, as has been done in the past. It was also pointed out that paragraph 72 of the 2021 Proposed Programme Budget “provides for the remuneration of 14 full-time judges,” meaning only the two newly elected judges would be called to full-time service in 2021.

It was noted that there was a need for a decision as soon as possible in order to confirm the venue and allow for proper planning by all concerned. It was further pointed out that the Bureau bears in mind the needs of the Court, in particular given the crucial challenges it faces this year.

Some delegations expressed their flexibility on proposal by the Vice-President. It was noted that the appropriate contingency planning and temporary division might be necessary but without setting future precedents.

The host State expressed that there are numerous shortcomings in regards to holding the session in New York, indicating that the Assembly is welcome to meet in The Hague and urged the Bureau to come up with way forward.

Some Bureau members indicated that it was a bit premature to rule out the Assembly session in December in New York as further clarity on availability of conference rooms could be provided by the new President of the General Assembly who will only assume office in mid-September. It was also noted that the costs of holding the session in The Hague would be higher. A view was expressed that the whole session could be rescheduled to 2021.

Some delegations supported the hybrid format and expressed that the procedure for the election of six judges could be inspired by the United Nations Security Council elections.

Regarding informal consultations and side events, it was noted that they could be held in virtual form.

The Vice-President reiterated that the situation regarding pandemic can change but stressed that the Bureau needs to make the decision allowing the Presidency to come up with the solution. He noted there has been ongoing dialogue with the United Nations and the Bureau needs to make the decision while there is still room availability in World Forum Convention Centre. He indicated that the Court principals as well as the Court and Secretariat staff cannot travel and that presence of the Court elected officials was indispensable to express the support for the Court. He noted that the negotiations can be held over WebEx while numerous agenda items could be undertaken by the Assembly in The Hague while postponing the elections to early January/February 2021.

The Secretariat reiterated that the host state travel policy as indicated during the 4 August 2020 Bureau meeting whereby “diplomats can enter the Netherlands irrespective of the purpose of their travel” and participation of “other participants” would be assessed by the Dutch Ministry of Foreign Affairs if the request by an international organization for the participation of such persons in a conference is well substantiated allowing them to be considered to be part of the exception category of persons to whom the travel restrictions do not apply to enter the Netherlands. The Secretariat also pointed out to the tentative costs of holding a three day session in The Hague as indicated in the “Non-paper on mitigating measures for the conduct of ASP19”. It was also noted that the Court only has three staff members in New York, which would not be sufficient to service the elections. The United Nations could provide technical servicing but not the substantive one, noting that the United Nations Office of Legal Affairs had 14 staff members providing substantive servicing for International Tribunal for the Law of the Sea (ITLOS) election. Regarding the visas for the Court staff, the Secretariat reiterated that the travel ban was in effect since 14 March.⁴ The Bureau was informed that the World Forum Convention Center was hoping to have a decision by the end of August and informed that they also indicated availability in early February 2021.

The President indicated to the Bureau that he would proceed with distribution of the letter and the draft decision regarding the way forward.

⁴ US Permanent Mission in New York, Note verbale HC-40-20, dated 2 September 2020 and Proclamation 9993 issued by the President of the United States, dated 14 March 2020. <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/>.

b) Seating arrangements

In accordance with Assembly decision ICC-ASP/1/Decision.4, the President drew lots to determine the State Party that would occupy the first desk on the Assembly floor: Mauritius.

4. Independent Expert Review- update

The Bureau took note that the Group of Independent Experts would present their report to States Parties and all relevant stakeholders on 30 September 2020 in accordance with the timeline set in resolution ICC-ASP/18/Res.7, and a joint meeting of the working groups of the Bureau would be held on 7 October 2020, at which the Experts would respond to questions.

5. Advisory Committee on Nominations of Judges- update

The Bureau took note that the Advisory Committee on Nominations of Judges had completed its interviews of the 20 candidates on 28 August 2020, and that it would hold further meetings to finalize its assessment of the candidates. The Committee would present its report by the end of September, in accordance with decision of the Bureau to extend the deadline for its presentation, given the circumstances of the COVID-19 pandemic.

6. Modalities for the roundtables with candidates for election as judges

The Bureau had before it a paper titled “Modalities for 2020 Public Roundtables for Judicial Candidates”, dated 4 August 2020, which had been approved by the New York Working Group.

The Director of the Secretariat briefed the Bureau on the arrangements and budget for the roundtables, including on the estimated total cost of four interpreters recruited for four days locally in The Hague⁵ and for four interpreters recruited for four days from outside of The Hague.⁶ The Bureau further took note that the possible October dates when no Court hearings were scheduled were in the weeks of 19 and 26 October, and that the roundtables could be held as of 15:00 (Central European Time).

The Bureau approved a maximum budget of €23,488 for the judicial roundtables and requested the Secretariat to proceed with the arrangements for the judicial roundtables and to keep the Bureau updated on the progress.

7. Independent Oversight Mechanism

a) Activity report, January to June 2020

The Bureau had before it the “IOM Activity Report to the Bureau of the Assembly of States Parties: 1 January to 30 June 2020”, dated 13 August 2020 which the Head of the IOM has submitted pursuant to resolution ICC-ASP/12/Res.6.

The Bureau took note of the Activity report of the IOM.

⁵ €9040.

⁶ €23,488

b) Contract extension for the Head of the IOM

The Bureau recalled the term of the Head of the IOM, Mr. Saklaine Hedaraly, would expire on 31 October 2020. Since he had been appointed by the Registrar on the recommendation of the Bureau, it was necessary for the Bureau to formally request the Registrar to extend his contract.

The Bureau agreed to request the Registrar to extend the contract of the Head of the IOM for a further three years, i.e. until 31 October 2023.

8. Election of the President and the Bureau for the twentieth to twenty-second sessions

The President requested all regional groups to continue their consultations in order to identify the States that would form the next Bureau, as well as to identify two candidates for election as Vice-Presidents, taking into account the principle of regional rotation.

The Bureau would return to this item at a future meeting.

* * *