



BUREAU OF THE ASSEMBLY OF STATES PARTIES

Second meeting

14 February 2023

Agenda and decisions

The meeting was chaired by the President, Ms. Silvia Fernández de Gurmendi. Vice-President Ambassador Kateřina Sequensová (Czech Republic) also participated.

1. Detailed proposal for a tenure policy- presentation by the Registrar

The Registrar presented the Courts' detailed proposal for a tenure policy. At the twenty-first session, the Review Mechanism had asked the Court¹ to elaborate a proposal that addressed the concerns of the Committee, for the consideration of States Parties.

The Registrar indicated that the Court agreed with the IER recommendation to limit its future tenure policy to P5 and above.² He added that this matter had already been generally explored by the Committee on Budget and Finance ("the Committee") at its two meetings in 2022. In its initial assessment, the Committee had raised some concerns based on legality risks of the introduction of the policy at the Court and the experience of other organizations, e.g. the Organization for the Prohibition of Chemical Weapons (OPCW). In its second assessment, the Committee had recommended that the Assembly consider the high costs involved in such a policy and the experiences of other international organizations before deciding on the introduction of a tenure policy. The Committee was of the opinion that greater mobility of staff should be one advantage of a tenure policy. It had recommended that the Court consider being fully part of the United Nations mobility process, allowing for greater mobility between the Court and other related international institutions. The Committee had not seen the new detailed proposal by the Court

The Registrar clarified that the draft proposal had been agreed by the three Principals of the Court. While the proposal was not a draft of changes required, a decision by the Bureau was needed for the Court to develop a basic framework going forward. Tenure would be attached to the appointment for each position, not the staff member. The Registrar indicated that some flexibility was needed to keep talented individuals. He clarified that if a staff member secured a different position at the Court at the P5 or D1 level, a new tenure period would start to apply linked to the new post.

With regard to the term, he noted that the IER had recommended a tenure between five and nine years, and that the Court proposed to adopt a tenure policy of seven years. The discretion of the Prosecutor and the Registrar would be needed on an exceptional basis to extend the period of tenure based on set criteria clearly established in the tenure policy. Any extension would be for a limited fixed term and could not be subject to further extension. He noted that this would work similarly to when judges' terms are extended where a case overruns their term in office in order to finish the case. He added that very few positions would fulfil that criteria in the Court, and this would not apply to subsidiary bodies of the Assembly.

¹ ICC-ASP/21/Res.4, para. 9.

² IER recommendation R105.

As regards the timing for introducing the Tenure policy, the Registrar noted that the implementation of the proposal would entail changes to the Staff Rules and Regulations, which would require the approval of the Assembly, and amendment to the Court's Administrative Instructions would be required as well. While actual implementation would require extensive legal preparation, the date of 1 January 2024 seemed feasible provided that there was agreement between the Court and the Bureau as soon as possible on the Court's proposal.

The Registrar also indicated that the IER did not recommend that Tenure be applied to existing post holders and instead suggested that the Court encourage long serving officers to retire early to allow tenure to be established as quickly as possible. However, in the absence of a fund to encourage staff members to leave, the reality was that the majority of existing staff would remain at the Court until their retirement. Based on their ages, half of the existing group of 48 posts holders would retire over the next 10 years, with the remaining half retiring over the following 10 years.

The Registrar noted that it was not unknown, for example in the United Nations system, for changes to terms and conditions of staff, e.g. changes to retirement ages, to be phased in over a long period of time. He indicated that the change in tenure was designed to change the culture of the Court, in order to encourage fresh thinking and bring more dynamism to the Court. However, a 20-year time frame to bring about such a change in culture seemed to contradict the apparent purpose of the recommendation.

In addition, due to legal risks, the Court agreed with the IER in not applying the new tenure provisions with retroactive effect to existing staff, as this would be unfair because they would not have adequate time to manage their transition. He also noted that the Court lacked the resources to recruit so many senior staff in such a short a time, which would have a significant impact in business continuity at a time when the Court was under considerable pressure to perform.

The Registrar indicated that the Court's proposal would apply the tenure provisions prospectively to existing staff. Once the tenure policy was adopted and relevant changes in the legal framework promulgated, the tenure policy would apply to P5 and D1 positions that became naturally vacant through staff resignation, retirement, etc. as well as to incumbent staff members at the time of their contract renewal. He noted that this meant that staff at the P5 and D1 levels would start their seven-year tenure at their next contract renewal following the formal adoption of the tenure policy, if they had not resigned or retired before. This approach would result in the entire group of 48 staff being on tenured appointments by 2027.

The Registrar noted that when considering the proposal on tenure, the Court took into account the financial, legal and administrative challenges and risks, as well as the negative experience of other organizations applying tenure, and eliminated some and would continue to eliminate or mitigate the risks every step of the way when implementing it, in consultation with the Bureau.

The Registrar noted that the effective net average direct yearly costs for the Court of this proposal would be approximately €480,000, mainly due as a result of increased recruitments, which were estimated to be between seven to eight positions a year.

In response to questions, the Registrar clarified that once an individual in a lower position (P4) gets a P5 or D level position, the staff member would not be able to return to the previous post after the seven-year period. With regards to the issue of extension on an exceptional basis, the Registrar proposed that the Assembly could monitor this, similarly to how it monitors the transition of judges in the Study Group on Governance.

As regards extending the tenure policy to junior grades, the Court had considered this option but it would have a great impact on the Court, namely on the productivity gap and the stratospheric costs such a measure would entail. With regards to concerns over moving the same individuals over the same positions, the Court had foreseen this and would apply safeguards, but it would be a minor issue

given that the positions in question were quite specialized at the Court. Concerning pension rights, the Registrar noted that the policy would inevitably have an impact on the younger individuals currently employed at the P5 or D levels, as it would give them less time to build up their pensions. This is why the Court thought it would be important to give them as long as feasibly possible to allow them to plan for their future.

The President indicated that in order to be able to approve the policy at the twenty-second session of the Assembly, decisions should be made quickly. She therefore proposed to that The Hague and the New York Working Groups meet as soon as possible to continue the discussions in a joint meeting, if possible. The Bureau then would take it up again at its next meeting scheduled for March 10 and agree on the way forward.

2. Adoption of the terms of reference of the due diligence process for the election of judges

The President recalled that the Assembly's mandate to the Bureau was contained in paragraph 82 of the omnibus resolution, and noted that the Bureau had considered the 23 January 2023 version of the draft proposal at its 31 January meeting, and the Bureau's working groups had considered it at their 1 and 2 February meetings, respectively. States had made comments at these meetings.

The Head of the Independent Oversight Mechanism (IOM), Mr. Saklaine Hedaraly, introduced the revised draft, dated 6 February 2023, which reflected the modifications to the 23 January version based on comments made during the meetings and received in writing, including a modified paragraph 14 text to reflect comments following consultations with the Advisory Committee on Nomination of Judges (ACN).

Some Bureau members expressed support for the revised draft proposal. A query was raised whether paragraph 5 was in full compliance with the Rome Statute since there would be automatic disqualification from further consideration should a candidate fail to submit a completed questionnaire or provide the required consent. In addition, a question was raised in relation to paragraph 5, in which it was recalled that it would be a State Party nomination, whether compliance with the Rome Statute had been considered in case disqualification of the candidate would apply according to the provision as drafted in paragraph 5.

A query was made as to what would happen should the report submitted to the President of the Assembly contain an allegation, emphasizing some reputational risk given that the nomination would have been made by a State Party.

A suggestion was made that the inclusion of "where feasible" under paragraph 6 was not necessary. In response, the Head of the IOM explained that the reason for the inclusion was that the sentence included "shall", as such, the addition was meant to indicate that it must be done, if feasible for the State Party".

A suggestion was made in relation to paragraph 18 that the text "whose identity is known", be deleted as it was not considered necessary and could further complicate matters in cases of identities which may be not known but assumed/identifiable somehow. In response, The Head of the IOM noted that it was a valid point and that if States Parties agreed, the suggested addition could then be removed.

It was stated that in 2023 it was the first time that the due diligence process would be used and in future improvements could be made to the permanent vetting mechanism, based on the experience acquired in the 2023 process.

The President highlighted the question on what would happen should a candidate not respond to the questionnaire. The Head of the IOM clarified that pursuant to the ACN guidelines, a possibility to provide reasons for the non-submission of the questionnaire was contemplated. However, the case

would be more serious if the refusal to provide information related to information on the moral character of the candidate.

The Head of the IOM also clarified that on paragraph 14, the ACN felt very strongly on its position and the resulting draft had been done in a spirit of compromise.

The President clarified that if there was a serious allegation it could go to the Bureau. The situation at hand, being very different than previous elections- as in this case nominations would be made by States Parties- it should be handled in a way that was respectful of States. She further suggested that more details could be sought regarding the automatic disqualification of a candidate, e.g. the President could approach the nominating State or the Bureau could be approached.

The President proposed that that the Head of the IOM send a clean version addressing the few issues raised during the meeting. The Bureau would then proceed to adopt the draft proposal via a silence procedure. Should there be any issue, it could be addressed during the next Bureau meeting on 10 March 2023.

3. Other matters

a) Twenty-fifth anniversary of the adoption of the Rome Statute- update

The President will brief the Bureau in greater detail at its 10 March meeting. As regards the commemoration of the twenty-fifth anniversary of the adoption of the Rome Statute, the Secretariat had sent a “Save the date” message to States Parties and all stakeholders on 6 February. The flyer indicated that the celebrations will be held on 17 July 2023 in New York and on 12 to 13 October in Siracusa, Italy.

b) Election of the Registrar

The President drew to the attention of the Bureau that, on 10 February 2023, the plenary of judges had elected Mr. Osvaldo Zavala Giler (Ecuador) as Registrar. On behalf of the Bureau, she congratulated Mr. Zavala Giler on his election and wished him the very best in his mandate.

The solemn undertaking³ will be held on 5 April 2023, and Vice-President of the Assembly, Ambassador Kateřina Sequensová, would represent the ASP Presidency.

c) Appointment of mandate holders

The Bureau appointed the representatives that had been nominated by the New York Working Group (see annex).

The Coordinators of the New York Working Group and of The Hague Working Group will continue consultations in order to identify the outstanding facilitators and focal points, and would inform the Bureau of the nominations in the respective working groups.

As regards the appointment of a facilitator for the allocation of seats on the Committee on Budget and Finance,⁴ the Vice-President in New York, Ambassador Bob Rae, was pursuing consultations in order to identify a facilitator. The President hoped that the appointment could be done soon via a silence procedure.

³ Pursuant to article 45 of the Rome Statute.

⁴ See Decision ICC-ASP/21/Dec.1.

d) Activities of the President

The President had visited New York from 30 January to 3 February 2023, during which time she met with the President of the Economic and Social Council and the United Nations Legal Counsel. She also engaged with the diplomatic community in New York as well as civil society. In addition, she participated in the meeting of the New York Working Group on 2 February for the first time during her mandate, met with the State Party representative on the Review Mechanism, Ambassador Michael Kanu (Sierra Leone), and participated in a breakfast for Permanent Representatives hosted by the Permanent Mission of Liechtenstein, to whom she extended her appreciation.

She had held a number of meetings related to commemoration of the twenty-fifth anniversary and would brief the Bureau on 10 March.

Annex

Mandate holders of the New York Working Group appointed by the Bureau

Facilitators

- a) *Geographical representation and gender balance in the recruitment of staff of the Court*
 - Mr. Marvin Ikondere (Uganda)
- b) *Review of the procedure for the nomination and election of judges*
 - Mr. Matúš Košuth (Slovakia)

Bureau focal point

- a) Scheduling of Assembly sessions,
 - Mr. Pedro Muniz Pinto Sloboda (Brazil)

Ad country focal points

- a) Non-cooperation
 - Argentina, Ireland and Romania

Working Group on Amendments

- H.E. Mr. Juan Manuel Gómez Robledo Verduzco (Mexico)
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