



Assembly of States Parties

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Options for securing payment of withdrawing States Parties' contributions to the loan granted by the host State*

Executive Summary

1. This report addresses the recommendation of the Committee that the Court propose legally binding and enforceable financial solutions aimed at securing the collection of withdrawing States Parties' full contributions to the loan granted on the basis of the agreement concluded between the Court and the host State.
2. The Court has carefully considered different financial solutions and carried out the requested legal analysis. As a result, and as previously reported to the Committee, the Court has concluded that States Parties that withdraw from the Rome Statute remain responsible for the payment of their related share of the loan granted by the host State for the Court's permanent premises, as this is considered an accrued financial obligation, within the meaning of article 127(2) of the Rome Statute.
3. However, there is no mechanism in place to coercively collect the amount due should a State Party fail to fulfil the said obligation.

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I. Introduction

1. At its thirtieth session, the Committee on Budget and Finance (“the Committee”) considered amendments to the Financial Regulations and Rules concerning the financial obligations of withdrawing States Parties. In this regard, “concerning the instalments for the host State loan, the Committee recalled that according to the Rome Statute the obligation to pay the full amount of the loan does not cease upon the withdrawal of a State Party. However, the Committee noted that there is no mechanism to coercively collect the due amount. Recognizing this risk and its potential consequences, the Committee recommended that the Court propose as soon as possible a financial solution that is legally binding and enforceable with a view to avoiding similar situations in the future and report thereon to the Committee at its thirty-first session in September 2018.”¹

2. This paper, prepared by the International Criminal Court (“the Court”) for the thirty-first session of the Committee, responds to the Committee’s recommendation.

II. Possible options for securing payment of withdrawing States Parties’ contributions to the host State loan

3. The proposed amendments to the Financial Regulations and Rules,² as requested by the Assembly of States Parties (“the Assembly”)³ and recommended by the Committee⁴ stipulate that “a State Party shall not be discharged, by reason of its withdrawal from the Rome Statute, from any financial obligations, including, but not limited to, that State Party’s contribution to the total costs of the permanent premises”.

4. In relation to the above amendment to the Financial Regulations and Rules, the Court provided the Committee, at its thirtieth session, with a legal assessment of the legal obligation of withdrawing States Parties’ to pay in full their share in the loan granted by the host State. The Court explained that:

“There are sound legal grounds supporting the position that (i) the States Parties that have resorted to the loan granted by the host State for the payment of the construction costs for the permanent premises are legally obliged to pay their related share in its entirety; and (ii) such obligation does not cease upon the withdrawal of a State Party from the Rome Statute. This is because the obligation to contribute to those costs was accrued while that State was a party to the Rome Statute, in the sense of article 127(2) of the Rome Statute.”⁵

5. Therefore, States Parties that withdraw from the Rome Statute remain responsible for the payment of their annual contributions to the loan after the withdrawal takes effect. In sum, the withdrawing States Parties are obliged to pay their share of the loan in full.

6. The following considerations must be taken into account for the purpose of assessing the financial solutions to be considered by the Committee:

(a) The Loan Agreement⁶ was concluded between the Court and the host State and establishes, among other things, the obligations of the Court vis-à-vis the host State. The Court is responsible for (i) collecting the annual contribution (capital and interest) from States Parties that have resorted to the loan modality and (ii) delivering that amount to the host State in accordance with the payment schedule provided in the annex to this report.

(b) Pursuant to article 7.1 of the Loan Agreement, “[s]hould the Court imputably fail to pay interest and/or redemption payments to the [host] State on the dates specified in [the] Agreement, the Court shall be deemed to be in default.”

¹ ICC-ASP/17/5, para.137.

² CBF/30/7.

³ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixteenth session, New York, 4-14 December 2017* (ICC-ASP/16/20), vol. I, part III, ICC-ASP/16/Res.1, section P, para. 2.

⁴ ICC-ASP/17/5, para. 136.

⁵ CBF30/16S01.

⁶ Loan agreement between State of the Netherlands (Ministry of Foreign Affairs) and International Criminal Court (ICC), F123/FS18/G231, Version of 20 March 2009.

(c) Under article 7.3 of the Loan Agreement, when in default, the Court “will be obliged to pay interest equal to the statutory interest of The Netherlands”.

(d) Pursuant to article 7.4⁷ of the Loan Agreement, “[i]f for reasons beyond its control (force majeure) the Court is not able to comply with its obligations under this Agreement, the Court will promptly notify the State. The Court and the State shall consult on how best to mitigate the consequences of the force majeure, taking into account the interests of both parties.”

(e) The Court has a risk-averse investment policy and investments held by the Court generate income which is far below the fixed interest of 2.5 per cent of the Loan Agreement. In accordance with its Financial Regulations and Rules, the Court cannot make long-term investments. Even if that were possible, the Court does not have the capacity to make sophisticated long-term investments. As a result, the Court will be unlikely to generate interest income which is equal to or higher than the interest rate established in the Loan Agreement, especially in current market conditions. The amount due would not be limited to the interest but also to the capital, as stipulated in article 7.1 of the Loan Agreement.

7. Some of the options that could be envisaged to secure the payment of withdrawing States Parties’ contributions to the loan are as follows:

(a) The host State forfeits the contribution of the withdrawing State Party, both capital and interest, by considering the non-payment of that State Party’s contribution a force majeure event, pursuant to article 7.4 of the Loan Agreement. For this option, it would be necessary to consult the host State and seek its agreement on qualification of the non-payment by the withdrawing State Party as a force majeure event, pursuant to article 7.4 of the Loan Agreement, which could lead to the full waiver of the amount due (capital and interest). Therefore, the effectiveness of this solution is limited, as it depends on the agreement of the host State to qualify the non-payment as a force majeure event.

(b) The host State forfeits the interest related to the withdrawing State Party’s contribution, by considering the non-payment of that State Party’s contribution a force majeure event, pursuant to article 7.4 of the Loan Agreement. In this scenario, the Court would charge the capital to the withdrawing State Party at the time of withdrawal and repay the host State. For this option, it would be necessary to consult the host State and seek its agreement on the qualification of the non-payment by the withdrawing State Party as a force majeure event, pursuant to article 7.4 of the Loan Agreement, which could lead to the partial waiver of the amount due (interest only). Therefore, the effectiveness of this solution is limited, as it depends on (i) the agreement of the host State to qualify the non-payment as a force majeure event; and (ii) the cooperation of the withdrawing State Party, as that State Party would still be required to pay the capital.

(c) The Court collects from the withdrawing State Party the full amount (capital and interest) payable for the duration of the loan at the time of withdrawal and repays the host State immediately. The effectiveness of this solution will depend exclusively on the willingness and cooperation of the withdrawing State Party and it may be difficult to achieve.

(d) The Court continues to bill the withdrawing State Party according to the yearly loan instalments for the duration of the loan. The effectiveness of this solution will depend exclusively on the willingness and cooperation of the withdrawing State Party. It may, therefore, be difficult to achieve. This option will work well if the withdrawing State Party makes payment promptly as billed. However, if at some stage that State Party discontinues or delays payments, the Court will face liquidity issues as it would still be obliged to honour its financial obligation deriving from the host State Loan Agreement.⁸

⁷ Before considering resorting to this exception (article 7.4 of the Loan Agreement), the Court shall make all genuine and good faith efforts to collect the funding from the defaulting State Party. Such efforts are essential to demonstrate that the Court has exhausted all actions at its disposal to secure the timely fulfilment of its obligations under the Loan Agreement.

⁸ At the time of drafting this report, outstanding contributions from States Parties in respect of repayment of the host State loan, including both principal and interest, amount to €1,048,917.

(e) The Court collects from the withdrawing State Party the full amount (capital and interest) payable for the duration of the loan at the time of withdrawal. As in options (iii) and (iv), the effectiveness of this solution will depend exclusively on the willingness and cooperation of the withdrawing State Party. In this scenario, the Court would pay the instalments as they fall due to the host State for the duration of the loan. Any interest accrued on the amounts held by the Court (both positive and negative) should be taken into consideration for this option. In this regard, any interest income would be returned to the withdrawing State Party. However, should there be a scenario of negative interest in the next 27 years, the Court would most likely have to bear the cost.

8. The amounts to be collected from a withdrawing State Party will be calculated after offsetting all amounts reimbursable to that State Party, pursuant to the proposed amendment to Financial Regulation 5.11.

9. The Loan Agreement does not provide the possibility for upfront loan redemptions or other specific solutions for withdrawing States Parties. Hence, options (iii) and (v) would require renegotiation and amendment of the host State Loan Agreement.

10. The Assembly may also wish to consider the creation of a reserve, for example by establishing a trust fund, to address any shortfalls between States Parties' accrued financial obligations and their payment. This reserve would be utilized to pay the instalments due from the defaulting State that has withdrawn while the Court continues to make efforts to recover the funds.

III. Conclusion

11. Although the Rome Statute and the Assembly⁹ provide sound grounds to support the position that the obligation to pay the full loan amount does not cease upon a State Party's withdrawal from the Rome Statute, **there is no mechanism in place to coercively collect the due amount**, if a State Party fails to fulfil this obligation.

12. All options present challenges for the Court and options (iii) to (v) pose possible high risks of contributions being uncollectible. The Court considers the following to be the most viable option:

(iii) The Court collects from the withdrawing State Party the full amount (capital and interest) payable for the duration of the loan at the time of withdrawal and repays the host State immediately. In order to afford this option the required force, it is recommended that the full discharge of this financial obligation be considered an additional requirement for the withdrawal to be considered effective.

13. This option would mitigate the risk and the consequences of non-payment of the loan instalments to the host State if the amounts due are not collected from the State Party withdrawing from the Rome Statute. However, in order to implement this option, the following actions are required:

(a) Renegotiate the Loan Agreement in order to establish the possibility for the Court to pay the total amount due from a State Party in a single instalment.

(b) Amend the Rome Statute in order to establish that discharge of the accrued financial obligations be considered an additional requirement for the withdrawal to become effective. Under article 127 of the Rome Statute, withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date, and no other requirements are established in order for the withdrawal to become effective. Any such amendment must follow the procedure set out in article 121 of the Rome Statute.

14. Notwithstanding, States Parties may wish to opt for the application of the dispute settlement mechanism already established and set out in article 119 of the Rome Statute. According to this provision, "any [...] dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations

⁹ *Official Records ... Sixteenth session ...2017* (ICC-ASP/16/20), vol. I, part III, ICC-ASP/16/Res.1, section P, para. 1.

within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.”

15. This mechanism will have to be triggered by the States Parties themselves against any State in breach of its accrued financial obligations arising while that State was a Party to the Rome Statute (i.e. withdrawing States Parties that do not pay their annual contribution to the loan, pursuant to article 127 of the Rome Statute). Therefore, the effectiveness of the solution would depend firstly, on the willingness of States Parties to initiate such a process every time a breach occurs and, subsequently, on the final decision to be taken in each specific case.

16. The Court seeks the Committee’s advice on the possible way forward.

Annex

Payment Schedule

<i>Period</i>	<i>Amount</i>	<i>Payment date</i>
Jan-Jun 2016	1,191,050	01/02/2017
Jul-Dec-2016	1,792,564	01/02/2017
2017	3,585,127	01/02/2018
2018	3,585,127	01/02/2019
2019	3,585,127	01/02/2020
2020	3,585,127	01/02/2021
2021	3,585,127	01/02/2022
2022	3,585,127	01/02/2023
2023	3,585,127	01/02/2024
2024	3,585,127	01/02/2025
2025	3,585,127	01/02/2026
2026	3,585,127	01/02/2027
2027	3,585,127	01/02/2028
2028	3,585,127	01/02/2029
2029	3,585,127	01/02/2030
2030	3,585,127	01/02/2031
2031	3,585,127	01/02/2032
2032	3,585,127	01/02/2033
2033	3,585,127	01/02/2034
2034	3,585,127	01/02/2035
2035	3,585,127	01/02/2036
2036	3,585,127	01/02/2037
2037	3,585,127	01/02/2038
2038	3,585,127	01/02/2039
2039	3,585,127	01/02/2040
2040	3,585,127	01/02/2041
2041	3,585,127	01/02/2042
2042	3,585,127	01/02/2043
2043	3,585,127	01/02/2044
2044	3,585,127	01/02/2045
2045	3,585,127	01/02/2046
Jan-Jul 2046	1,792,564	01/02/2047