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Report of the Court on the options for replenishment of the Contingency Fund***Introduction**

1. In 2004, at its third session, the Assembly of States Parties to the Rome Statute of the International Criminal Court (hereinafter “the Assembly”) approved the establishment of a contingency fund in the amount of €10,000,000.¹ The actual cash currently held in the Contingency Fund amounts to €9,168,567, representing the cash surplus for the 2002-2003 financial period as mandated by the Assembly.² The Assembly decided further that the Fund should be limited to a period of four years and that in 2008 the Assembly should decide on the Fund’s future.³ In accordance with that decision, at its seventh session the Assembly decided to approve the recommendation of the Committee on Budget and Finance (hereinafter “the Committee”) that the Contingency Fund be extended indefinitely and be maintained at its current level for 2009.⁴ At its eleventh session, the Committee suggested three options for replenishing the Contingency Fund.⁵ At its twelfth session, the Committee requested that the Court explore the three options for the Contingency Fund and report on the same at the Committee’s thirteenth session.⁶ The purpose of this paper is to present the Court’s recommendations on the three options for replenishing the Contingency Fund.

Background

2. The Contingency Fund was originally established to provide the Court with the flexibility to respond to unforeseen situations. It was recognized early on that the Court cannot always predict how situations and cases will develop, and therefore some budget flexibility was required in order not to hamper urgent Court operations. Hence the creation of a contingency fund with the specific purpose of meeting:

- Costs associated with an unforeseen situation following a decision by the Prosecutor to open an investigation;

* Previously issued as ICC-ASP/8/CBF.2/4.

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third session, The Hague, 6-10 September 2004* (International Criminal Court publication ICC-ASP/3/25), part III, resolution ICC-ASP/3/Res.4, para.1.

² *Ibid.*, para. 2.

³ *Ibid.*, para. 6.

⁴ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication ICC-ASP/7/20), vol. I, part III, resolution ICC-ASP/7/Res.4.

⁵ *Ibid.*, vol. II.B.2, paras. 134-141.

⁶ ICC-ASP/8/5, para. 112.

- Unavoidable expenses for developments in existing situations that could not be foreseen or could not be accurately estimated at the time of adoption of the budget; or
- Costs associated with an unforeseen meeting of the Assembly.

3. The Court indicated in its proposed budgets for 2007 and 2008⁷ that its budgetary policy is one of strict reliance on established facts to justify all expenditures requested. The Court does not budget for any activity if there is no clear indication that it will occur in the following year. This commitment to accurate budgeting has been endorsed by the Committee⁸ on several occasions, with a clear understanding of the correlated requirement that a contingency fund should cover any unexpected expenditure.

4. With the broadening of the Court's operations, the probability of unexpected circumstances and requirements is increasing. As a consequence, it is of utmost importance for the continuity of the Court's operations that it should be able to rely on this facility to finance unexpected needs.

5. In this context, the options for replenishing the Contingency Fund are discussed below.

Options review

Option 1: *"First, the Assembly could replenish the Fund from time to time as was necessary."*⁹

6. The term 'as necessary' as a mechanism for replenishment is undefined and causes some concerns: the Court would not be aware of the need for funds until such time as the unforeseen circumstance arose. The cycle of annual meetings of the Assembly would not be timely enough to approve rapid additions to the Contingency Fund, leaving the Court faced with potential financial deadlock. Without a clear replenishment schedule this option would create difficulties for the Court in its operational and budgetary planning.

7. The Court would therefore not favour this approach, there appears to be no clear and systematic replenishment of funds drawn from the Contingency Fund, which would hamper the planning and response time of the Court in the event of an unforeseen situation.

Option 2: Automatic replenishment of the Contingency Fund¹⁰

8. This option calls for automatic replenishment of the Contingency Fund by amendment to the last sentence of regulation 6.6 of the Financial Regulations and Rules. As a consequence of the amendment, any amount drawn from the Fund would then be added to the assessment of States Parties for the following year.

⁷ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifth session, The Hague, 23 November to 1 December 2006* (International Criminal Court publication, ICC-ASP/5/32), part II.D.5, para. 14; and *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November to 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. II.A, para. 36.

⁸ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November to 14 December 2007* (International Criminal Court publication ICC-ASP/6/20), vol. II.B.2, para. 54.

⁹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication ICC-ASP/7/20), vol. II.B.2, para. 138.

¹⁰ *Ibid.*, para. 139.

9. The automatic replenishment of the Contingency Fund would have the advantage of providing ready access to funds in the event of an unforeseen situation facing the Court. This pool of ready funding would enable the Court to respond as needed and without delay. Also, an established, time-bound funding mechanism would enhance Court planning based on certain knowledge of the amount of funding available.

10. In sum, this option would be favoured by the Court, as it provides a systematic replenishment mechanism of known quantity, thereby enhancing the planning ability of the Court to meet unforeseen situations as they arise. Moreover, the current authorized contingency fund level of €10 million euros would be sufficient to meet all but the most extreme situations.

Option 3: *“The Assembly could decide no longer to hold funds in a Contingency Fund and instead continue to provide the commitment authority (...) with a new provision to charge the costs to States Parties at the end of the financial period.”*¹¹

11. This option assumes that funds would no longer be held in a contingency fund. In lieu of cash funding, the proposal is to maintain the Court’s ‘commitment authority’ as per regulation 6.7 of the Financial Regulations and Rules, but instead of drawing on the Contingency Fund in keeping with current practice, the new provision would allow the Court to charge the costs to States Parties at the end of the financial period.

12. This option assumes that enough funds are available to the Court to finance unforeseen situations. In order for this option to be viable, both contributions and expenditures would have to continue as in past years, i.e. consistent early contributions from the States Parties and a general surplus from the Court’s budget at the end of the year.

13. In terms of expenditures, the Court is continuing to increase staffing towards authorized levels and is for the first time incurring costs with regard to the commencement of trials. The Court is achieving ever higher implementation rates, leaving fewer resources to fund unforeseen situations as envisioned under this option. Staffing has increased from 587 at 31 December 2008 to 669 at the end of June 2009. Budget implementation for 2008 was 5.4 per cent higher than 2007 and is currently, at the end of June 2009, 9.3 per cent ahead of 2008 levels of implementation.

14. In respect of the collection of contributions, the Court has some concerns that these will remain at the rate of the last few years. At the end of June 2009, collected contributions stood at 67 per cent of assessed contributions for 2009. This rate is 30 per cent lower than the collection rate of 2008. If the Court were to encounter simultaneously the constraints of slower contributions and the need to fund unforeseen events, it could find itself in a position of being unable to carry out necessary Court operations due to lack of funds.

15. The increased rate of budget implementation and increased uncertainty in the timing of contributions could place the Court in a precarious situation should this option be accepted.

16. The response time required to obtain additional funds for unforeseen circumstances is also a constraint inherent in this option. The time required to obtain contingency funding would prevent the Court from acting promptly, for example to make an arrest. A mechanism would need to be established whereby States Parties could rapidly be assessed for emergency contributions to fund an unforeseen situation. The collection of such contributions would have to be greatly accelerated in order effectively to support the unforeseen situation.

¹¹ Ibid., para. 140.

17. In summary, it is recommended that this option be avoided, as it could pose a risk to timely, efficient operations, and the slow response could damage the reputation of the Court.

Conclusion

18. The Court's accurate budgeting policy relies on the existence of a contingency fund, especially in the context described above of broadening activities and improving budget implementation. It therefore depends on a fully replenished contingency fund, despite the fact that the Court has so far made limited use of the Fund in practice. Any change in the set-up or structure of this budgetary support would have repercussions on the Court's budgetary policy, and the future implications would require careful evaluation. As a consequence, it is recommended that the Committee adopt option 2. The reasons in favour of option 2 are:

- a) Systematic replenishment, enhancing the Court's planning ability;
- b) Enhanced response time of the Court with ready funds available in sufficient quantity;
- c) Known level of funding.

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