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**Report of the Bureau on the arrears of States Parties**

**Note by the Secretariat**

Pursuant to resolution ICC-ASP/3/Res.8 of 10 September 2004, the Bureau of the Assembly of States Parties hereby submits the report on the arrears of States Parties for consideration by the Assembly. The attached report reflects the outcome of the informal consultations held by the New York Working Group of the Bureau.

## Report of the Bureau on arrears of States Parties

1. In December 2004, the Bureau of the Assembly of States Parties to the Rome Statute of the International Criminal Court ("the Court") decided to establish two standing working groups, one in The Hague and the other in New York, in accordance with resolution ICC-ASP/3/Res.8 adopted by the Assembly at its third session. In February 2005, the Coordinator of the Working Group in New York, H.E. Ambassador Allieu Ibrahim Kanu (Sierra Leone), appointed three facilitators for the issues attributed to the Working Group. This report reflects the outcome of the consultations conducted by the facilitator on the issue of "Arrears of States Parties".

### I. Consultations

2. Between March and July 2005 the facilitator held numerous informal consultations with experts from the Registry of the Court, the Secretariat of the Assembly of States Parties and the Committee on Budget and Finance on questions of finance and contributions. He also contacted specific States Parties to the Rome Statute and met with representatives of the Coalition for the ICC. Furthermore, he had the opportunity to talk to the Secretary of the United Nations Committee on Contributions and to discuss United Nations experience with regard to arrears.

3. The facilitator held two meetings with interested States Parties in New York on 18 April 2005 and 7 July 2005. An updated draft report was then sent out to the permanent missions of all States Parties in New York with a request for comments by 29 July 2005.

### II. Findings

#### Status of contributions as of June 2005

4. Assessed contributions and advances to the Working Capital Fund are calculated on the basis of the budget adopted and the amount of the Working Capital Fund determined by the Assembly of States Parties. Subsequently, the Registrar of the Court informs the States Parties of their commitments in respect of annual assessed contributions and advances to the Working Capital Fund.<sup>1</sup> As of 1 January of the following calendar year, the unpaid balance of such contributions and advances is considered to be one year in arrears.<sup>2</sup>

5. By the time of drafting of this report, in late June 2005, the Court had completed two financial periods (2002/03 and 2004) and was halfway into its third financial period (2005). Outstanding assessed contributions for the 2002/03 financial period amounted to €1.150 million (3.7 per cent) and for the 2004 financial period to €4.450 million (8.4 per cent).<sup>3</sup> Eleven States Parties had not made any contributions so far, and just four of those States Parties were responsible for 89 per cent of outstanding contributions for the 2002/03 and 2004 financial periods. With regard to the 2005 financial period, it is significant that delays in payment of contributions have increased compared to earlier financial periods. At the end of June 2005, only 69 per cent of contributions had been received, compared with about 65 per cent at the same time in 2004. What looks like an improvement is in fact the opposite, as in 2004 the Court had originally invoiced only 75

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<sup>1</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session*, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), ICC-ASP/1/3, part. II,D, Financial Regulations and Rules, regulation 5.5.

<sup>2</sup> *Ibid.*, regulation 5.6.

<sup>3</sup> Assessed contributions only; advances to the Working Capital Fund not included.

per cent of the assessed contributions. In its April 2005 report the Committee on Budget and Finance expressed concern about this development.<sup>4</sup>

6. Non-payment and delayed payment of contributions have been of concern to the Bureau of the Assembly of States Parties almost since the establishment of the Court. On several occasions, the President of the Bureau has personally written to a number of foreign ministers and heads of States inviting them to pay their States' contributions fully and on time. When the facilitator enquired about the reasons for non-payment or delays in payment of contributions, States Parties repeatedly gave one of the following explanations:

- The delay was the result of an unexpected growth in the Court's budget, which made it necessary to request additional funds from the relevant government authorities in order to meet the total amount of contributions due.
- The non-payment was the consequence of limited fiscal resources, as a result of which the government was unable to honour its obligations in respect of the total of contributions owed to international organizations.
- In addition, a number of participants in the consultations felt that the notification of States Parties about their non-payment or delayed payment of contributions needs to be improved.

Three of the eleven States Parties who have not yet made any payment in respect of any financial period of the Court were also in arrears with their assessed contributions to the United Nations and had requested exemption from the loss of voting rights under Article 19 of the Charter of the United Nations in 2004. Moreover, four of the eleven had not participated in the third session of the Assembly of States Parties. It is noteworthy that few of the representatives from permanent missions in New York who were contacted on this issue were aware that their State was in arrears of contributions to the Court. It is furthermore notable that none of the States Parties contacted by the facilitator cited factors other than financial or technical reasons for non-payment or delayed payment of contributions, such as lack of political support for the Court.

### **Implications of non-payment and delayed payment of contributions**

7. According to the Registry of the Court, the current non-payment or delayed payment of contributions has not placed financial constraints on the Court (entailing a cash-flow crisis) at this stage. This is mostly due to underspending by the Court. For the 2004 financial period the Court's overall financial implementation rate was 81.4 per cent, which resulted in a total unencumbered balance of €9.876 million. However, underspending is characteristic of any start-up operation and is expected to decrease in the coming years. Meanwhile, the possibilities for so-called "cross-borrowing", a common practice in the United Nations, between the appropriation sections of the Court are very limited.<sup>5</sup> Non-payment or delayed payment of contributions is therefore likely to create financial constraints for the Court in the future and must be addressed at an early stage by the Court and the States Parties. Finally, the experience in other international organizations shows that the more arrears States accumulate, the less able and willing they become to discharge them in full. In the long term this could have serious implications for the Court.

8. Regulation 4.7 of the Financial Regulations and Rules of the Court, as amended by resolution ICC-ASP/3/Res.4, stipulates that any cash surplus in the budget at the close of any financial period shall be apportioned among States Parties in proportion to the scale of assessments and surrendered to those States Parties whose contributions for the financial period have been paid in full. Naturally, States Parties who have not paid their contributions will not participate in the distribution of any cash surplus. However, due to their non-payment the actual surplus is smaller than the calculated difference between budget and performance

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<sup>4</sup> *Report of the Committee on Budget and Finance on the work of its fourth session*, para. 8 (ICC-ASP/4/2).

<sup>5</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session*, ICC-ASP/1/3, part. II,D, Financial Regulations and Rules, regulation 4.8.

(amount originally budgeted minus amount effectively spent by the end of the financial period).<sup>6</sup> Hence, in the event of a cash surplus, States Parties who have paid their contributions receive less than their due.<sup>7</sup>

9. According to article 112, paragraph 8, of the Rome Statute, a State Party which is in arrears in the payment of its financial contributions could lose its voting rights.<sup>8</sup> This rule will become applicable for the first time later this year, as the upcoming fourth session of the Assembly of States Parties will be the first one to take place after the completion of two full years (2003 and 2004). As of late June 2005, eleven States Parties had not yet made any payment for any financial period, which means that up to 10 per cent of the membership might be excluded from voting, including in elections, at the fourth session of the Assembly of States Parties. The number of States ineligible to vote may be even higher at the time of the election of judges in January 2006, since by then outstanding contributions for 2004 and 2005 will qualify as arrears. While decisions taken and elections participated in by 90 per cent of the membership would be perfectly adequate from a legal point of view, their legitimacy would leave something to be desired. Moreover, the exclusion of so many States Parties from voting, including in elections, might send the wrong signal about the existing political support for the Court from the States Parties to the Rome Statute.

10. With regard to the possible loss of voting rights, the relevant rules and regulations of the Court do not contain any guidelines beyond article 112, paragraph 8, of the Statute. In particular, there are no further detailed regulations governing possible exemption from loss of voting rights, such as the criteria applicable and the body eligible to prepare the relevant decisions for the Assembly of States Parties.

### III. Recommendations

#### Promotion of the timely, full and unconditional payment of contributions

11. In the course of the consultations held by the facilitator, representatives of the States Parties stressed that efforts should be made to encourage timely, full and unconditional payment of contributions. In particular, States Parties expressed the hope that the loss of voting rights due to non-payment of contributions could be avoided.

12. In its April 2005 report the Committee on Budget and Finance expressed concern that only 21 States Parties had thus far paid their 2005 contributions in full and that eleven States Parties had not yet made any payment for any financial period. The Committee recommended that the Court take any additional measures that would encourage States to pay their contributions.

13. In the organizations of the United Nations system and other multilateral and regional organizations, measures to encourage the payment of arrears have been considered repeatedly.<sup>9</sup> Meanwhile, delayed payment or non-payment of contributions of various kinds remains a significant challenge to many

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<sup>6</sup> Ibid., regulation 4.6.

<sup>7</sup> Example: For the 2004 financial period, the unencumbered balance amounts to €9,876,000. A State Party whose contribution for the financial period has been paid in full and amounts, according to the scale of assessments, to 2.5 per cent should receive €246,900. However, due to the non-payment of contributions by others in the amount of €4,450,000, that State Party would receive only €135,650.

<sup>8</sup> Article 112, paragraph 8, of the Rome Statute: "A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party."

<sup>9</sup> See, for example, the report of the United Nations Committee on Contributions on *Information on some multi-year payment plans and incentive and disincentive measures applied by organizations of the United Nations system and other multilateral and regional organizations* (UN doc A/56/11/Add.1), or the most recent report of the Committee on Contributions on *Measures to encourage the payment of arrears*.

international and regional organizations. For the large majority of States Parties to the Rome Statute, contributions to the Court involve relatively low figures.<sup>10</sup> At this stage, therefore, it is not recommended that elaborate incentive schemes should be developed and penalties imposed, such as restricting access of States Parties in arrears to recruitment and procurement opportunities, charging interest on or indexation of arrears, multi-year payment plans, or a rebate upon early payment combined with a penalty for late payment. However, depending on the development of the total amount of arrears and the financial situation of the Court, States Parties may wish to consider such measures in the future.

14. During consultations, the following recommendations were discussed and found broad support among interested States Parties:

#### **Recommendation 1**

- **The Court should notify States Parties on a quarterly basis of the status of contributions, including a list of States Parties in arrears. Such notification should be addressed to capitals as well as to the relevant embassies and permanent missions in The Hague and New York.** In order to ensure that the relevant people receive the necessary information and act accordingly, it may be necessary to reach out to several representatives of any one State Party.

#### **Recommendation 2**

- **The Court should publish on its website, and update on a regular basis, information on the status of contributions, including a list of States Parties in arrears. Public knowledge of which countries have and have not paid their contributions may encourage States Parties to pay their contributions fully and on time.**

Some participants in the consultations felt, however, that the publication of information on the status of contributions ("naming and shaming") might provoke adverse reactions from the States Parties concerned.

#### **Recommendation 3**

- **The Court should continue to provide States Parties at an early stage with information on ongoing planning in respect of the budget for the following financial period.** Without prejudice to the relevant recommendations by the Committee on Budget and Finance and to the decisions of the Assembly of States Parties, such early information should enable the States Parties to take necessary precautions that will enable them to pay their contributions without delay.

#### **Recommendation 4**

- **States Parties, in particular the members of the Bureau of the Assembly of States Parties, should take every appropriate opportunity to remind other States Parties who are in arrears of their financial commitments to the Court.** It is important to make representatives of States Parties in arrears aware of the facts and the possible implications for the Court of non-payment or delayed payment of contributions and to encourage them to intervene with the relevant authorities of their own governments.

#### **Application of article 112, paragraph 8, of the Rome Statute**

15. According to article 112, paragraph 8, of the Rome Statute, "A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and

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<sup>10</sup> The total amount of arrears due from the eleven States Parties who have not yet made any payment for any financial period is less than €60,000.

in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years." According to regulations 5.5 and 5.6 of the Financial Regulations and Rules of the Court, "contributions" include assessed contributions and advances to the Working Capital Fund. Advances to the Contingency Fund are likely to be added to this list once the changes to the Financial Regulations and Rules necessitated by the establishment of the Contingency Fund have been adopted.<sup>11</sup>

16. While States Parties expressed the hope that the loss of voting rights due to non-payment of contributions would be avoided, they also maintained that article 112, paragraph 8, of the Rome Statute must be strictly implemented. With regard to the possibility of exemption from loss of voting rights, it was requested that applications to that effect by States Parties in arrears should be substantiated and analysed in an objective way and that no new body should be created for the purpose of analysing such applications.

17. In its April 2005 report, the Committee on Budget and Finance noted that the Assembly had requested its Secretariat to write to States Parties that could lose their voting rights in accordance with article 112, paragraph 8, of the Rome Statute. The Committee recommended that the Assembly request the Secretariat to advise States Parties each year in January, and the Assembly at the opening of each session, of the States that were ineligible to vote. It further recommended that the Secretariat be requested to inform States Parties periodically of States that had recovered their voting rights following payment of their arrears.

18. With regard to the possible loss of voting rights, the relevant rules and regulations of the Court do not contain any guidelines beyond article 112, paragraph 8. This raises a number of questions with regard to its application in practice. As article 112, paragraph 8, of the Rome Statute was modelled on Article 19 of the Charter of the United Nations, the practice of the United Nations is of special relevance.

19. *Does the loss of voting rights occur ipso facto or does it require a constitutive decision by the Assembly of States Parties?*

The practice of the United Nations with regard to Article 19 of the Charter, while not entirely consistent, is apparently based on the premise that Article 19, clause 1, takes effect *ipso jure*.<sup>12</sup> The Committee on Budget and Finance seemed to agree that article 112, paragraph 8, of the Rome Statute should be applied in the same way when it recommended that States Parties be informed periodically of the States that were ineligible to vote and of States that had recovered their voting rights following payment of their arrears (see para. 17 above).

20. *What criteria should be applied with reference to a possible exemption from loss of voting rights?*

The General Assembly of the United Nations, in its resolution 54/237 C of 23 December 1999, urges all Member States in arrears requesting exemption under Article 19 of the Charter to provide the fullest possible supporting information, including information on economic aggregates, government revenues and expenditure, foreign exchange resources, indebtedness, difficulties in meeting domestic or international financial obligations and any other information that might support the claim that failure to make necessary payments had been attributable to conditions beyond the control of the Member States. The contributions of States Parties to the Court are considerably smaller than those of Member States to the United Nations. It may therefore seem impractical or harsh to request the same kind of supporting information for an exemption from loss of voting rights in the Assembly of States Parties to the Rome Statute. However, the threat of a possible loss of voting rights due to non-payment of contributions must not be compromised by providing an easy way out. It is therefore recommended that the same criteria be applied with regard to article 112, paragraph 8, of the Rome Statute as have been identified by the General Assembly for Article 19 of the Charter. Should the Assembly of States Parties follow this recommendation, it is important that States Parties have sufficient time to compile and submit the necessary reports and explanations.<sup>13</sup>

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<sup>11</sup> See resolution ICC-ASP/3/Res.4 B.

<sup>12</sup> Tomuschat, "Art. 19 N 15-25", in B Simma (ed), *The Charter of the United Nations* (2nd edition, 2002).

<sup>13</sup> This would require a special approach for the fourth session of the Assembly of States Parties in November 2005 and its resumed session in January 2006, as the criteria suggested in this report will not have been approved by the

As an alternative criterion it was suggested that exemption from loss of voting rights could be granted upon partial payment of arrears, which would demonstrate the State Party's good intentions. To prevent abuse of this option, exemption upon partial payment of arrears should not be granted more than once or twice to the same State Party over a period of several years.

With regard to the relatively small amounts of money involved, some participants in the consultations questioned whether exemptions from loss of voting rights could be justified at all.

21. *What body should evaluate applications from States Parties for exemption from loss of voting rights?*

Among the bodies that might be considered – the Registry of the Court, the Assembly of States Parties, the Bureau of the Assembly, the Secretariat of the Assembly, the Committee on Budget and Finance – only the latter seems to be sufficiently qualified and independent to be entrusted with this delicate task. In addition, rule 9 of the Rules of Procedure of the Committee on Budget and Finance<sup>14</sup> stipulates that the Committee shall be responsible for the technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature as may be entrusted to it by the Assembly of States Parties. Accordingly, it is suggested that the Committee on Budget and Finance be requested to advise the Assembly of States Parties on the action to be taken with regard to the application of article 112, paragraph 8 (2), of the Rome Statute.<sup>15</sup> The Assembly of States Parties decides on granting an exemption from loss of voting rights by a simple majority<sup>16</sup> on the basis of the recommendation by the Committee on Budget and Finance.

22. Based on the above, the application of article 112, paragraph 8, of the Rome Statute according to the established practice of the United Nations with regard to Article 19 of the Charter has been discussed and generally agreed by interested States Parties.

#### **Recommendation 5**

- **With regard to the loss of voting rights, article 112, paragraph 8 (1), of the Rome Statute should be applied based on the premise that it takes effect *ipso jure*.**

#### **Recommendation 6**

- **With regard to possible exemption from loss of voting rights according to article 112, paragraph 8 (2), of the Rome Statute, the same criteria should be applied as were identified by the General Assembly of the United Nations for Article 19 of the United Nations Charter.**

#### **Recommendation 7**

- **The Committee on Budget and Finance should be requested to evaluate the applications of States Parties for exemption from loss of voting rights and to advise the Assembly of States Parties on the action to be taken with regard to the application of article 112, paragraph 8 (2), of the Rome Statute.**

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Assembly in time for States Parties to prepare their applications accordingly. Under the circumstances, it might be appropriate for the Assembly to approve any request for exemption from the loss of voting rights.

<sup>14</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Second session*, New York, 8-12 September 2003 (United Nations publication, Sales No. E.03.V.13), Annex III (ICC-ASP/2/10).

<sup>15</sup> See also rule 160 of the Rules of Procedure of the General Assembly of the United Nations (UN doc. A/520/Rev.15).

<sup>16</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session*, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), ICC-ASP/1/3, part. IIC, rule 64 of the Rules of Procedure of the Assembly of States Parties.

**Recommendation 8**

- **In order to clarify the future application of article 112, paragraph 8 (2), of the Rome Statute, the Assembly of States Parties, at its next session, should adopt a resolution which could include the following paragraphs:**

*Emphasizes* the importance of endowing the Court with the necessary financial resources;

*Urges* all States Parties to the Rome Statute to transfer as soon as possible and in full their assessed contributions in accordance with relevant decisions taken by the Assembly of States Parties;

*Recalls* that, pursuant to article 112, paragraph 8, of the Rome Statute, a State Party which is in arrears in the payment of its financial contributions towards the costs of the Court may lose its vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years (ICC-ASP/3/Res.3, para 12);

*Decides* that the Committee on Budget and Finance shall advise the Assembly of States Parties on the action to be taken with regard to the application of article 112, paragraph 8, of the Rome Statute;

*Requests* the Secretariat to advise the States Parties, based on the recommendations of the Committee on Budget and Finance, each year in January, and the President at the opening of each session, of the States that are ineligible to vote and of States that have requested an exemption from the loss of voting rights;

*Further requests* the Secretariat to inform States Parties periodically of States that have recovered their voting rights following payment of their arrears.

*Urges* all States Parties in arrears requesting exemption under article 112, paragraph 8, of the Rome Statute to provide the fullest possible supporting information, including information on economic aggregates, government revenues and expenditure, foreign exchange resources, indebtedness, difficulties in meeting domestic or international financial obligations and any other information that might support the claim that failure to make necessary payments had been attributable to conditions beyond the control of the States Parties;

*Decides* that requests for exemption under article 112, paragraph 8, of the Rome Statute shall be submitted by States Parties to the Secretariat of the Assembly at least two weeks before the session of the Committee on Budget and Finance, so as to ensure a complete review of the requests.