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Report of the Bureau on the arrears of States Parties

Note by the Secretariat

Pursuant to operative paragraphs 40 and 48 of resolution ICC-ASP/4/Res.4, of 3 December 2005, the Bureau of the Assembly of States Parties hereby submits for consideration by the Assembly the report on the arrears of States Parties. The attached report reflects the outcome of the informal consultations held by the New York Working Group of the Bureau, as well as the recommendations on the issue contained in the report of the Committee on Budget and Finance on the work of its seventh session.

Report of the Bureau on the 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 Bureau") 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. The initial report of the Bureau on the issue of arrears (ICC-ASP/4/14) was adopted at the fourth session of the Assembly of State Parties ("the Assembly").

2. Resolution ICC-ASP/4/Res.4, adopted by the Assembly at its fourth session, invites the Bureau to report back to the fifth session of the Assembly of States Parties on the status of arrears, including on suggestions, if necessary, of measures to promote the timely, full and unconditional payment of assessed contributions and advances towards the costs of the Court (paragraph 40). It further requests the Bureau to adopt guidelines for the submission of documentation (with reference to requests for exemption under article 112, paragraph 8, of the Rome Statute) to the Assembly and to convey them to the Court (paragraph 48).

3. In April 2006, the Coordinator of the Working Group in New York, H.E. Ambassador Allioaiga Feturi Elisai (Samoa), appointed a facilitator, Mr. Marko Rakovec (Slovenia), for the issues attributed to the Working Group. This report reflects the outcome of the consultations conducted by the facilitator on the two above stated issues.

4. Between June and August 2006, the facilitator held numerous informal consultations with experts from the Registry of the Court, the Secretariat of the Assembly and the Committee on Budget and Finance ("the Committee") 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 International Criminal Court. Furthermore, he had the opportunity to talk to the Secretary of the United Nations Committee on Contributions and to discuss the experience of the United Nations with regard to arrears.

5. The facilitator held two meetings with interested States Parties in New York on 27 July 2006 and 3 August 2006. An updated draft report was then sent out to the Permanent Missions to the United Nations in New York of all States Parties with a request for comments by 9 August 2006.

I. Status of contributions as at 7 August 2006

6. By the time of drafting of this report, at the beginning of August 2006, the Court had completed three financial periods (2002/03, 2004 and 2005) and was halfway into its fourth financial period (2006). As at 7 August 2006, total outstanding contributions amounted to €24.871 million, which is 30 per cent of the €82.46 million budget approved for 2006. As at 31 July 2006, six States Parties had not yet made payments for the preceding two full years, which means that up to 6 per cent of the membership might be excluded from voting.¹ The

¹ 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 (*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.). According to regulation 5.6 of the Financial Regulations and Rules of the Court, assessed contributions and advances are due and payable in full within 30 days of receipt of the initial communication from the Court regarding the determination of the respective Government's assessed contribution (January of each year). As of 1

number of States ineligible to vote may be much higher at the beginning of 2007, since by then outstanding contributions for 2005 and 2006 will qualify as arrears. Distribution of the outstanding assessed contributions through the financial years was as follows²: for the 2002/03 financial period, outstanding contributions amounted to €11,066 (0.04 per cent of that year's budget); for the 2004 financial period €1.476 million (2.8 per cent of that year's budget); for the 2005 financial period €4.528 million (6.7 per cent of that year's budget); and for the 2006 financial period €18.417 million (22.5 per cent of that year's budget).³ The above financial situation of the Court (77.5 per cent of 2006 contributions had been received by the beginning of August 2006) represents a slight improvement over the financial situation in previous years.⁴ The report of the Committee on Budget and Finance on the work of its sixth session⁵ expressed greater concern, but the situation improved in the following three months as stated above. The biggest improvement in payments was seen at the end of 2005 and at the beginning of 2006 just before the election of new judges to the Court at the resumed fourth session of the Assembly, in January 2006 in New York.

7. During consultations, many delegations expressed serious concerns at the situation of unpaid assessed contributions to the Court. They highlighted the fact that, according to the Registry of the Court, the current outstanding contributions have so far not caused any constraints to the work of the Court (entailing a cash-flow crisis) only because of the previous underspending by the Court. But this situation was very likely to change as early as next year. Delegations therefore advised that additional measures should be taken to encourage States to pay their contributions on time.

8. Some delegations also reiterated that possibilities for so-called "cross-borrowing" (a common practice in the United Nations) between the appropriation sections of the Court's budget are very limited.⁶ 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 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, which could have serious long-term implications for the Court.

9. 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.⁷

(a) The non-payment was of a technical nature, primarily the consequence of poor internal coordination among the various national institutions responsible for communications with the Court;

(b) 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 contributions owed to international organizations;

January of the following calendar year, the unpaid balance of such contributions and advances is considered to be one year in arrears.

² The Court's budget for 2002-2003 was €30,893,500; for 2004, it was €53,071,846; for 2005, it was €66,784,200; and for 2006, it was €82,464,400.

³ Assessed contributions only; advances to the Working Capital Fund not included.

⁴ "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", Report of the Bureau on the arrears of States Parties (ICC-ASP/4/14), paragraph 5.

⁵ ICC-ASP/5/1, para. 12.

⁶ *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), part. II.D, Financial Regulations and Rules, regulation 4.8.

⁷ The reasons given differed somewhat from the reasons that had been given to the previous Coordinator (ICC-ASP/4/14, para. 6).

(c) Failure to make payments on time was due to poor budgetary planning on the part of some States. The funds are reserved at the end of each year instead of at the beginning.

10. However, the States Parties participating in these consultations expressed their strong support for the Court and several of those with outstanding contributions made commitments to remit their arrears at the earliest possible time.

II. Recommendations

Promotion of the timely, full and unconditional payment of contributions

11. In paragraph 40 of resolution ICC-ASP/4/Res.4, the Assembly invited the Bureau to suggest measures to promote timely payments. In addition, in the course of the consultations held by the facilitator, representatives of States Parties stressed that every effort should be made to encourage timely, full and unconditional payment of contributions. Many delegations were of the opinion that the Court should take additional measures that would encourage States to pay their contributions on time.

12. The Rome Statute of the International Criminal Court already provides an incentive for timely payments, namely that a State Party in arrears might lose its voting rights (article 112, paragraph 8.). Moreover, with respect to the distribution of surpluses to States Parties, 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 that have not paid their contributions will not participate in the distribution of any cash payments, with their balances of (outstanding) assessed contributions being credited instead. However, due to their non-payment, the actual surplus will be smaller than the calculated difference between budget and performance (amount originally budgeted minus amount effectively spent by the end of the financial period).⁸ Hence, in the event of a cash surplus, States Parties that have paid their contributions will receive less than their due.⁹

13. In the organizations of the United Nations system and other multilateral and regional organizations, several other measures to encourage the payment of arrears have been considered repeatedly.¹⁰ Meanwhile, delayed payment or non-payment of contributions of various kinds remains a significant challenge to many international and regional organizations. It is necessary to stress that for the large majority of States Parties to the Rome Statute, contributions to the Court involve relatively low figures.¹¹

⁸ Ibid., regulation 4.6.

⁹ For 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, according to the scale of assessments, amounts 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.

¹⁰ See, for example, the report of the United Nations Committee on Contributions for 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 (United Nations document A/56/11/Add.1), or the recent report of the Committee on Contributions on measures to encourage the payment of arrears (United Nations document A/59/11).

¹¹ A number of States Parties owe less than €10,000, which should not constitute a substantial burden for those States to remit.

14. The Coalition for the International Criminal Court has prepared a draft research paper on the incentives provided by other international organizations for timely payments. Participants were also debriefed on the practice of the United Nations by the Secretary of the Committee on Contributions, Mr. Mark Gilpin.

15. The Working Group discussed the numerous incentives mentioned which might promote timely payments to the Court's budget. The views of participants differed, however, with regard to which of these measures could be adopted by the Court. Some were of the opinion that the Court should seriously consider adopting some of these additional incentives (for example, publication online of the status of arrears, charging interest on arrears, offering rebates on early payments, presenting payment plans), while others expressed concerns over such measures and questioned their practical value. They were of the view that such incentives would entail additional burden and cost for the Registry and/or the Secretariat but would have very limited effect on the timeliness of payments. These delegations preferred action in this regard to be limited to the Registrar and/or the Secretariat taking up the issue on a bilateral basis with the States in arrears to ensure payment.

16. The Working Group discussed in particular and at some length, the question of whether information on arrears should also be made publicly available, for example by publishing a list of States Parties' arrears on the Court's web site. Some delegations objected to such publication, questioning its practical value as it might unduly politicize the already sensitive issue of arrears. Others supported the idea, seeing no reason why such factual information on the financial situation of the Court should not be disclosed to the general public. They considered the public availability of such information to be important, as it might actually support efforts to guarantee timely payment. The idea of online information is in line with the general efforts to promote transparency in all matters concerning the Court. It was also pointed out that the regular publication of information on the financial situation of the Court, including the status of payments received from States Parties, is standard practice in many international organizations, not least the United Nations. Finally, they recalled that the information would in any case be publicly available in the form of an official document at the time of the annual session of the Assembly. A delegation suggested that political acceptance of the publication of arrears on the Court's web site might be made easier if it were of a more informal character, such as an information note, and was limited to indicating the amount due and the payments actually received, instead of the amounts outstanding.

17. At this stage, therefore, the facilitator concentrated the debate on only some of the incentives, namely those that were largely acceptable to all delegations. However, depending on the evolution of the total amount of arrears and the financial situation of the Court, States Parties may wish to reflect before proposing additional measures in the future.

18. The Working Group agreed that the following proposals could be considered for adoption in the omnibus resolution at the fifth session of the Assembly:

Recommendation 1

- **The Registry of the Court (“the Registry”)** should provide States Parties, on a quarterly basis, with an updated information note on the contributions received from States Parties since the Rome Statute entered into force for each State Party, as applicable, in order to add transparency to the Court's management and to give States Parties up-to-date information on the financial situation of the Court. 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 Bureau as well as individual States Parties should continue to take up the subject of the financial situation of the Court in their bilateral contacts with other States Parties, as appropriate, and underline the importance of timely payment of contributions for the effective functioning of the Court.** It is important to make representatives of States Parties in arrears aware of the facts and of the possible implications for the Court of the non-payment or delayed payment of contributions and to encourage them to intervene with the relevant authorities of their own Governments.

Recommendation 3

- In order to facilitate better communication between the Court and States Parties on matters of contributions, States Parties should **provide the Registry, on a yearly basis and upon the Court's request, with information (name and contact details) of the individual responsible for the actual payments to the Court.** This information could be accompanied, on a voluntary basis, by information on when that State Party expects to remit its financial contribution to the Court.

Recommendation 4

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

Recommendation 5

- The Bureau of the Assembly of States Parties should review the status of payments received on a regular basis throughout the financial year of the Court and consider additional measures to promote payments by States Parties, as appropriate.

Requests for exemption from loss of voting rights

19. Article 112, paragraph 8, of the Rome Statute provides that a State Party which is in arrears in the payment of its financial contributions could lose its voting rights if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years.¹² According to regulations 5.5 and 5.6 of the Financial Regulations and Rules

¹² 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."

of the Court, as revised by resolution ICC-ASP/4/Res.10, "contributions" include assessed contributions and advances to the Working Capital Fund or the Contingency Fund.

20. In paragraph 19 of the report ICC-ASP/4/14, it was noticed that the loss of voting rights takes effect *ipso jure*.¹³ 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 should 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.

21. As regards the exemption request, article 112, paragraph 8, of the Rome Statute and operative paragraph 42 of resolution ICC-ASP/4/Res.4, urge all States Parties in arrears requesting exemption 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.¹⁴

22. Operative paragraph 43 of resolution ICC-ASP/4/Res.4 further states that the above information should be submitted to the Secretariat of the Assembly at least one month before the session of the Committee on Budget and Finance. The Committee on Budget and Finance then advises the Assembly of States Parties before the latter decides on any requests for exemption from loss of voting rights (para. 44). This procedure applies from the fifth session of the Assembly of States Parties (para. 45).

23. In paragraph 16 of the report on the work of its sixth session (ICC-ASP/5/1), the Committee on Budget and Finance developed its procedures for the consideration of exemption requests. The Committee agreed that the Chair should ask three members of the Committee to meet for one or two days immediately in advance of its seventh session to consider applications for exemption in accordance with the Assembly's decision. The three Committee members would meet informally and present their conclusions to the Committee as a whole. In turn, the Committee would adopt recommendations to the Assembly. This arrangement would be applied initially in 2006 and then be reviewed by the Committee. In paragraph 17, the report of the Committee further states that the above three members identified to examine requests for exemption should also consider this question in advance of the seventh session of the Committee.¹⁵

24. In operative paragraph 48 of its resolution ICC-ASP/4/Res.4, the Assembly requests the Bureau to adopt guidelines for submission of documentation to the Assembly.¹⁶ The Working Group therefore discussed what additional guidelines could be developed with reference to a possible exemption from loss of voting rights.

¹³ Tomuschat "Art. 19 N 15-25", in B. Simma (ed.), *The Charter of the United Nations* (2nd edition, 2002).

¹⁴ These are the same guidelines as the ones adopted by the United Nations General Assembly in its resolution 54/237 C of 23 December 1999.

¹⁵ In paragraph 15 of the report on the work of its sixth session (ICC-ASP/5/1), the Committee emphasized that it would not be possible for it to adequately perform the task entrusted to it by the Assembly within the five-day session that the Committee held in October each year. The Committee was concerned that the workload of considering the budget, premises, financial accounts and an array of other budgetary and administrative issues were already becoming too great for the Committee to be able to provide the Assembly with good quality advice in accordance with its terms of reference. However, the Committee wished to avoid, if possible, an extension of its October session.

¹⁶ See also para. 17 of the report of the Committee on Budget and Finance on the work of its sixth session (ICC-ASP/5/1).

25. The issue was already discussed in 2005 (see report in document ICC-ASP/4/14). It was noted that 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.

26. It was pointed out that a loss of voting rights could be interpreted in different ways. While on the one hand it may indeed be an incentive to the States Parties concerned to remit their contributions in due time, on the other hand, the exclusion of States Parties from voting, including in elections, at the Assembly might be misunderstood as signifying a lack of political commitment by the State in question to the work of the Court, when in reality the reasons for non-payment were more of a fiscal nature.

27. Some delegations, however, warned strongly against weakening the only remedy against non-payment provided in the Rome Statute by allowing a too easy way out of the contractual obligations into which each State Party knowingly enters when acceding to the Statute.

28. It was further stressed that States Parties should provide comprehensive arguments to support their claim that failure to make the necessary payments had been attributable to conditions beyond their control.

29. As putting together the necessary evidence to support an application for exemption may be difficult, the Secretariat should notify States Parties facing loss of their voting rights at a session of the Assembly well in advance (i.e. mid-January and mid-June) so that States have enough time to prepare. States should be required to submit the exemption requests one month before the session of the Committee on Budget and Finance. The Committee meets twice a year, in April and in October. States Parties will therefore need to submit exemption requests by the beginning of March or at the beginning of September of each year at the latest in order to allow for proper examination and to guarantee a timely decision by the Assembly.

30. However, the question of how to proceed with the case of States that are in arrears as of 1 January and are subject to the loss of voting rights as of that month remains an open one, since it would appear that such States may not have the means to request an exemption from the Committee (which only meets in April and October). This issue would be particularly important if there is to be an election or any kind of voting during a resumed session in the period from January to April (as was the case in January 2006 when the second election of judges took place). Apparently, in this situation the States Parties will have to submit requests for exemption from the loss of voting rights one month before the October session of the Committee in the preceding year. The Secretariat should draw this to the attention of States Parties which might be in arrears as of 1 January of the following year in its mid-June communication.¹⁷

31. The Working Group agreed that the following guidelines for exemption requests could be considered for adoption by the Assembly in the omnibus resolution at its fifth session:

Recommendation 6

- **A State Party requesting exemption from the loss of voting rights under article 112, paragraph 8, of the Rome Statute shall submit information and/or documentation (according to operative para. 42 of resolution**

¹⁷ See also paras. 16 to 19 of the report of the Committee on Budget and Finance on the work of its seventh session (ICC-ASP/5/23 and Add.1).

ICC/4/Res.4) that would substantiate and comprehensively support the claim that failure to make necessary payments had been attributable to conditions beyond the control of the State Party concerned.

Recommendation 7

- The State Party may **submit documentation that has earlier been submitted elsewhere** for comparable purposes. A **decision by another organization** concerning the loss of voting rights due to non-payment of contributions shall be **taken into due account by the Assembly**, but shall not prejudice its own decision.

Recommendation 8

- **If possible, requests should be accompanied by a payment plan or other form of political commitment by the requesting State to address the issue as a matter of urgency and to take concrete steps towards payment as soon as possible.** While it is up to each country to decide whether to engage in a concrete payment scheme, the provision of a payment plan to remit the arrears would substantially increase the possibility that permission to vote would be granted.

Recommendation 9

- **The Secretariat should notify States Parties which may face loss of their voting rights twice a year (in mid-January and in mid-June)** so that States Parties have enough time to prepare the exemption requests for one of the two sessions of the Committee on Budget and Finance, which take place in April and October.

Recommendation 10

- As regards a State Party that became ineligible to vote on 1 January of a given year, the **Assembly could consider applications for exemption that arise in this situation without the advice of the Committee on Budget and Finance when there would be resumed sessions of the Assembly at which major elections are to be held.** Accordingly, States Parties would not have the opportunity to submit applications for other sessions of the Assembly or meetings of the Bureau that fall between 1 January and the first session of the Committee on Budget and Finance each year.