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**Proposal by the Court of a supplementary item to the agenda:
tax reimbursement of staff and officials of the International Criminal Court**

Note by the Secretariat

The Secretariat of the Assembly of States Parties has received a communication from the Registry which, after consultation with the Presidency of the International Criminal Court requests, pursuant to rule 12 of the Rules of Procedure of the Assembly, the inclusion as a supplementary item to the agenda of the third session of the Assembly a proposal on tax reimbursement of staff and officials of the International Criminal Court.

Tax reimbursement of staff and officials of the International Criminal Court

A. INTRODUCTION

1. This background paper examines the issue of reimbursement of taxes paid by officials and staff of the Court to their respective Governments on salaries, emoluments and allowances received from the Court.

2. In addressing this question, consideration has been given to: the practice of other international organizations, the deliberations of the Preparatory Commission for the International Criminal Court (“**Preparatory Commission**”), the Rome Statute, the Agreement on Privileges and Immunities of the Court (“**APIC**”), the position of the Assembly of States Parties (“**the Assembly**”) (through its adoption of the Staff Regulations of the Court)* and the jurisprudence of the International Labour Organization Administrative Tribunal (“**ILOAT**”).

B. ANALYSIS

The practice of other international organizations

3. The general practice of international organizations with respect to the taxation of staff members is to rely on tax exemption agreements with the host State, whereby no tax is paid by employees resident in that State. However, certain States’ national taxation regimes claim jurisdiction over all untaxed income of citizens of that State, regardless of where that income is earned and where that citizen is resident. Other international organizations resolve this issue in two ways:

- (i) By establishing a staff assessment and tax equalization fund; or
- (ii) Through agreements between the international organization (as employer) and the taxing States, whereby the State will refund to the organization all income taxes deducted from its employees in respect of the salaries, emoluments and allowances paid by the organization.

Consideration given to tax reimbursement by the PrepCom

4. The PrepCom did not adopt a system of staff assessment and tax equalization for the Court. In its deliberations on this matter, it was argued that the complex staff assessment procedure with gross and net salaries and a tax equalization fund had been established by the United Nations in the 1950s in order to deal with the specific concerns of the United States which, for constitutional reasons, could not accept the principle of tax exemption for staff members of the UN who were United States nationals. The situation of the Court was considered to be different from that of the UN in the 1950s and the establishment of staff assessments and a tax equalization fund was therefore considered to be unnecessary. In adopting this approach, the PrepCom proceeded on the assumption that most staff members of the Court would be nationals of States Parties or of States that would sign and ratify the APIC.

* Resolution ICC-ASP/2/Res 2, annex

The Rome Statute

5. Pursuant to article 48, paragraphs 1 and 3, of the Rome Statute, the Court and its officials and staff enjoy the privileges and immunities necessary for the performance of their duties. As indicated below, ILOAT has held that tax-exempt status is essential in order to maintain the independence of the international civil service, and accordingly it is submitted that such exemption is reflected within this provision of the Statute.

The Agreement on Privileges and Immunities

6. The APIC, which entered into force in July 2004, exempts officials and staff of the Court from taxation on the salaries, emoluments and allowances paid to them by the Court.

Staff Regulations

7. Staff regulation 3.5 states that the Registrar may, in consultation with the Prosecutor, conclude bilateral tax reimbursement agreements with States, where it is appropriate and in the operational interests of the Court to do so. Thus, the Regulations do not establish an automatic right to tax reimbursement for staff members.

ILOAT jurisprudence

8. ILOAT has clearly stated the principle that “exemption from national taxes is an essential condition of employment in the international civil service and is an important guarantee of independence and objectivity.”[†] and has held that this principle is “fundamental to the law of the international civil service”.[‡]

9. This principle has been held to be independent of any arrangement between the employer organization and the national taxing government.[§] ILOAT has stated that where a member State does not enter into an arrangement with the international organization to refund to it the taxes deducted, the organization has a duty to reimburse deducted taxes to its taxed employee and that the burden of financing that extra payment should fall on members States collectively (through their assessed contributions to the organization’s budget).^{**}

10. The cases adjudicated by ILOAT in this area have all been in the context of employees taxed by States that are signatories to the constitutive documents of the organizations concerned. While no case is directly comparable to the obligations of the Court towards an employee from a State that is not a party to the Rome Statute, it is likely that ILOAT would not derogate from the general principle of assuring tax-exempt status for international civil servants in such a case. This general principle and the fundamental principle of “equal pay for equal work”^{††} support the view that all employees of the Court should receive remuneration on a tax-free basis, regardless of the position of their own (State Party or non-State party) Government.

[†] *In re Krutzsch*, ILOAT Judgment No. 2032

[‡] *In re Rose*, ILOAT Judgment No. 2256

[§] ILOAT Judgment No. 2032

^{**} ILOAT Judgment No. 2256

^{††} *In re Mirmand*, ILOAT Judgment No. 1182 and as enshrined in the International Covenant on Economic, Social and Cultural Rights.

C. APPLICATION OF ANALYSIS TO THE COURT

11. It is submitted in light of the foregoing that, with regard to States Parties, all employees of the Court from such States should receive their salaries, emoluments and allowances on a tax-free basis regardless of whether the State has signed the APIC or any host State or other bilateral agreement. Moreover, where employees are taxed by such States on income earned while working at the Court, the Court will have to refund the amount of such taxes to the employee. To this end, it is submitted that the ASP request States Parties to sign and ratify the APIC and to take any other necessary action to exempt their nationals from taxation on their Court salaries, emoluments and allowances. A draft resolution along such lines is submitted with this report. In all cases where States Parties continue to impose income tax on employees of the Court, the Court will have no alternative but to reimburse the employee concerned and seek reimbursement in turn, in the first instance from the taxing State through separate bilateral agreements and, failing that, from States Parties collectively as part of the annual contributions process.

12. It can be argued that it is unreasonable to expect States Parties to refund to employees of the Court from States not party to the Rome Statute the taxes paid by such employees to their governments. However, this proposition finds no support in the ILOAT jurisprudence being developed in the context of Member States of the United Nations (the equivalent of the Court's States Parties) and may be rejected if considered directly by ILOAT. Accordingly, the Court should proceed on the basis that any employee – regardless of nationality – who is forced to pay income tax on his/her Court salary, emoluments and allowances shall have such tax reimbursed by the Court. Alongside this, the Court should proceed with the adoption of the steps outlined in the annexed draft resolution and also explore the possibility of entering into tax exemption agreements with States not party to the Statute that seek to tax its employees.

13. The alternative approach of establishing a staff assessment system together with a tax equalization fund has clearly previously been discounted by the PrepCom and ASP in their deliberations and it is submitted that that decision should not be revisited at this time.

Annex

Draft resolution

“The Assembly of States Parties,

Recalling that the Agreement on the Privileges and Immunities of the International Criminal Court, which entered into force on 22 July 2004, exempts salaries, emoluments and allowances paid by the Court to its officials and staff from national taxation,

Desiring to achieve both equity among the States Parties to the Rome Statute and equality among the officials and staff of the Court,

Noting that certain States Parties have not yet taken action to that end,

1. *Requests* States Parties to take the necessary legislative or other action to exempt their nationals employed by the Court from national income taxation with respect to salaries, emoluments and allowances paid to them by the Court, or to grant relief in any other manner from income taxation in respect of such payments to their nationals;
2. *Also requests* the Registrar, in consultation with Prosecutor, to take steps to conclude bilateral tax reimbursement agreements with States, where it is appropriate and in the operational interests of the Court.^{‡‡}

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^{‡‡} Staff regulation 3.5 (ICC-ASP/2/10, p. 211).