



**BUDGET AND FINANCE TEAM**  
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)

**COMMENTS AND RECOMMENDATIONS<sup>1</sup>**  
**TO THE TENTH SESSION OF THE ASSEMBLY OF STATES PARTIES**  
12-21 December 2011, New York

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The Coalition for the ICC's Budget and Finance Team (Team) is seriously concerned about discussions that are taking place on the 2012 budget of the International Criminal Court (ICC) in the lead up to the tenth session of the Assembly of States Parties (Assembly). For the third time in the last four years, the integrity of the budget process is being undermined by a group of the highest contributing states who are demanding that the Assembly go beyond the recommendations of the Committee on Budget and Finance (CBF) in an effort to impose "zero-growth" on the ICC. In this paper, the Team calls upon states parties not to impose potentially damaging arbitrary cuts on the ICC's 2012 budget. Furthermore it proposes a number of longer-term initiatives that the Assembly should consider taking in order to stabilize the budget discussions in future years by changing the debate from arbitrarily imposing "zero growth" on the ICC to improving transparency of the ICC's budget allocation and cost-drivers, increasing understanding of the resource needs of the ICC as its activities increase and decrease and achieving greater efficiency as the ICC matures.

### **Summary of Recommendations**

#### *General*

- States parties must change the debate from the need for zero growth to the need for transparency and efficiency.

#### *Recommendations in relation to the proposed Budget for 2012*

- The Assembly must review the CBF recommendations on the 2012 budget taking into account the views of the ICC.
- The Assembly must consider the CBF recommendations as setting a floor for the 2012 budget.
- The Assembly must not cap legal aid for defence and victims
- The Assembly must ensure that resources are available for the Libya situation
- The Assembly must continue to fund outreach and public information as a core function.

#### *Recommendations to improve the budgetary process in future years*

- Current efforts to promote efficiency and improve the budget process should be continued.
- The Assembly should invite the ICC to provide a comprehensive report as soon as possible and

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<sup>1</sup> The Budget and Finance Team (Team) of the Coalition for the International Criminal Court (CICC) was established at the sixth session of the Preparatory Commission and its members have followed and contributed to the drafting of the Financial Regulations, Financial Rules, the Remuneration of Judges, the Budget for the First Financial Period and the Programme Budgets for 2004 to 2011. While the work of the CICC Budget and Finance Team reflects the positions of those Coalition members most active on particular issues, and while this paper has been prepared in consultation with other Coalition teams, this paper cannot be construed to represent the views of all organizations/members of the CICC. Since the Rome Diplomatic Conference, Coalition members have organized themselves into teams, one to follow each working group or theme of the intergovernmental process. Coalition teams now follow issues addressed by the Assembly of States Parties or its subsidiary mechanisms and by the International Criminal Court. Teams provide a forum within which interested members discuss issues, follow developments, elaborate relevant research and positions in response to developments, and elaborate and implement advocacy strategies in relation to those positions. All Coalition members are welcome to join any teams and all Coalition members are regularly apprised of the work of the teams.

within six months of the tenth session clarifying and fully justifying its current budget allocation and budget process

- The Assembly should invite the CBF to study the ICC's report in the context of its ongoing dialogue regarding efficiency measures; in connection with its request to the ICC to reconsider its budget preparation with a view to identifying where efficiencies can be found or should be explored; and to make recommendations to improve the preparation of the programme budget.
- The Assembly should review the CBF recommendations, taking into account the views of the ICC and recommend action in key areas to find efficiencies.
- The ICC should be requested to report to the Assembly regularly on efficiency measures it has taken as well as bringing policy or other developments which have cost implications to the attention of the Assembly.

#### **I. States parties must change the debate from the need for zero growth to the need for transparency and efficiency**

The Team considers that a "zero growth" approach to the ICC's annual budget is simply not realistic nor, if it is imposed, will it lead to efficiency. The ICC was created as a dynamic institution to respond to the world's worst crimes when required. Therefore, its resource needs will fluctuate depending on the number of situations it is investigating and its judicial activities (which will vary depending on when suspects are arrested and surrendered to the ICC).

Disturbingly, in the last decade there have been a large number of situations where crimes under the jurisdiction of the ICC have been committed. In many of these situations the ICC has launched preliminary examinations and investigations fulfilling the mandate assigned to it in the Rome Statute. It has also received two referrals from the United Nations Security Council. It should be expected then that activities of the ICC will remain high in the short and medium term.

Given this scenario, states parties are encouraged to focus on ensuring that the ICC establish effective systems and uses its resources efficiently to ensure that it can achieve as much as possible in addressing impunity. Imposing "zero growth" at a time when the ICC has not yet reached its full judicial workload capacity will result in the ICC not being able to conduct its work effectively during periods of high activity or having to reduce its activities when its work is most needed.

As evidenced in the 2012 and previous years' budget, the ICC still has to grow in order to reach that full capacity which means that future requests will be required for budget increases. If states parties cannot move their discussions beyond "zero growth" then the same problematic process will be repeated year after year and the unsatisfactory political compromises whereby some arbitrary cuts are agreed will rapidly degrade the institution.

Instead, the ICC's capacity needs to be defined and a budgeting system needs to be developed which allows for scalability of the ICC's resources in relation to its workload in a transparent manner which states parties understand and are satisfied is efficient.<sup>2</sup>

#### **II. Recommendations regarding the Assembly's consideration of the 2012 Budget**

The Team provided detailed comments on the proposed 2012 Budget to the CBF in advance of its seventeenth session in August 2011, including acknowledging the need for a significant increase in the 2012 budget in order to respond to the new situations in Libya and Cote d'Ivoire and to fund an

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<sup>2</sup> Valuable experiences may be gathered from other international organisations, such as UNHCR, which are by nature linked to difficult to predict increases/decreases of activities.

increase in projected judicial activities (including legal aid).<sup>3</sup> The Report of the CBF recommends a series of cuts to the proposed 2012 budget totalling approximately €5 million. Having reviewed the CBF recommendations, the Team makes the following recommendations to states parties.

**(i) The Assembly must review the CBF recommendations on the 2012 budget taking into account the views of the ICC**

In the context of the current discussions around “zero growth” and initiatives to find additional cuts to the proposed budget that go beyond the CBF recommendations, the Assembly must not lose sight of its role in conducting a detailed review the CBF Report. All of the recommendations should be thoroughly reviewed by the Assembly in accordance with its previous practice. The CBF recommended cuts must not be automatically accepted in an effort to reach a compromise for greater budgetary reductions. Many of the CBF recommendations relate to macro cuts to areas such as travel, training, consultants etc. It is therefore important that the Assembly consult with the ICC regarding any negative implications that these cuts would have on the effective implementation of its mandate if they were to be approved. Ultimately, the Assembly should provide the ICC with adequate resources to achieve its mandate.

**(ii) The Assembly must consider the CBF recommendations as setting a floor for the 2012 budget**

The CBF has conducted an expert analysis of the proposed Budget for 2012 and made its recommendations to the Assembly on the budgetary allocation for next year. The Team is concerned that some states parties are insisting that the Budget must be further reduced beyond the CBF recommendations and are therefore seeking to find additional cuts. There is a real danger that in trying to do so, the Assembly will cut blindly and damage the work of the institution in both the short and long term. The Assembly’s lack of standing expert bodies devoted to specific elements and issues within the ICC severely restricts its ability to conduct such initiatives effectively.

**(iii) The Assembly must not cap legal aid for defence and victims**

The Team is seriously concerned about the statements of the CBF in relation to legal aid for defence and victims and the proposals to cap legal aid for the defence at €500,000 per accused per year and victims at €223,000 per group of victims per year without a detailed examination of how this would impact the rights of the defence and the rights of victims.<sup>4</sup> The Team is particularly concerned that little recognition of the importance of legal aid for defence and victims is reflected in the CBF Report. The right to legal aid for indigent suspects is a vital component of the right to a fair trial which is enshrined in Articles 55 and 67 of the Rome Statute. In order to defend their clients in often complex cases, defence counsels require significant resources, including travel, investigation and administrative assistance in order to ensure they have equality of arms to match the Office of the Prosecutor. Similarly, legal aid for victims is essential to achieve the rights of victims to participate in proceedings and seek reparation as set out in Article 68 and 75 of the Rome Statute. Victims’ representatives have to coordinate and communicate with often large numbers of victims.

If the Assembly rushes to stem increases in legal aid costs arising from the increases required this year to respond to new judicial activities, it will erode the fundamental principles of fair trials and victims’ rights set out in the Rome Statute.<sup>5</sup> Instead, a detailed review of the legal aid system should

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<sup>3</sup> ‘Comments on the Proposed Programme Budget for 2012 of the International Criminal Court and Other Matters’ – CICC Budget and Finance Team Submission to the CBF at its 17<sup>th</sup> Session on 22 – 30 August 2011 [17 August 2011.

<sup>4</sup> Report of the Committee on Budget and Finance on the work of its seventeenth session (CBF Report), ICC-ASP/10/15, 18 November 2011, para. 15 and Annex III.

<sup>5</sup> The practice of the ICC to date indicate that legal aid provision may not be sufficient to fulfil orders by the Chambers’ without having to move resources between sections. In the *Lubanga case* where Trial Chamber 1 reversed a Registrar’s decision on legal aid for the accused, see: Decision reviewing the Registry’s decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800, 30 August 2011. In its attempt to have the decision overturned by the Appeals Chamber, the Registrar highlighted that the decision implied costs

be conducted on the completion of the full first judicial process to determine whether efficiencies can be found, without compromising the rights set out in the Rome Statute. Since those rights are at the heart of the meaning and purpose of the ICC and are important indicators for persons, groups and States not yet convinced of the value and viability of the ICC, maintaining them is vital for the ICC's credibility and future.

**(iv) The Assembly must ensure that resources are available for the Libya situation**

The Team notes that, in its Report, the CBF recommends that the Prosecutor should “assess events on the ground and re-evaluate the needs of the Office of the Prosecutor... prior to the tenth session of the Assembly to determine if the requested resources are still required at the same level or whether further reductions on the 2012 proposed budget for the Libya situation can be made.”<sup>6</sup> The Team notes that, since the CBF Report, the Prosecutor has publicly indicated that the Libyan authorities may hold national proceedings against Saif al-Islam Gaddafi following his capture. However, it should also be noted that the ICC has clarified that “any decision on the admissibility of a case is under the sole competence of the Judges of the ICC.” Therefore, the Assembly should seek the input of all organs of the ICC in determining whether reductions can be made in the proposed Libya budget. In particular, if judicial proceedings on the admissibility of any cases are pending or anticipated at the time of the tenth session, the Assembly should, at a minimum, recognize the ability of the ICC to access the contingency fund if the ICC proceeds to prosecute the cases. The contingency fund should be replenished to ensure that sufficient resources would be available to meet any such costs.

**(v) The Assembly must continue to fund outreach and public information as a core function**

The Team is concerned that, despite recognizing the importance of outreach to “help build and maintain support for the Court internationally and to ensure broad diffusion of information on the investigation and trials within the Court”, the CBF has suggested that outreach activities could be funded by a mixture of assessed and voluntary contributions.<sup>7</sup> The Team regrets that, once again, outreach is being targeted in the budget process to the potential detriment of victims and affected communities, ignoring the fact that it is part of the mandate of the ICC, the importance of which has been repeatedly recognised by the Assembly and with a view to intensifying the ICC's outreach efforts.<sup>8</sup> It is important to emphasize that the ICC's investigations, prosecutions, and trials depend on outreach and a number of other court activities, including external relations to secure cooperation in arrest, public information, effective victim participation, support to defence teams, and witness protection. Many of these activities are carried out most efficiently and effectively through the ICC's field presence. Resorting to voluntary contributions to fund part of the ICC's core work would undermine the ICC's ability to do this work if contributions – especially in the current financial climate- could not be found. There is currently nothing to prevent donors that wish to contribute to the ICC's outreach activities from making voluntary contributions in accordance with Article 116 of the Rome Statute which would offset the assessed budget. While such contributions may be sought – the Assembly has the primary responsibility to ensure that outreach is adequately funded through the budget of the ICC.

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for legal aid going beyond what the budget allowed and that internal flexibility in that regards has reached its limits, see: Registrar's Submissions under Regulation 24bis of the Regulations of the Court In relation to Trial Chamber I's Decision ICC-01/04-01/06-2800, 5 October 2011, ICC-01/04-01/06-2812.

<sup>6</sup> CBF Report, paras. 84-86.

<sup>7</sup> CBF Report, paras. 24-25.

<sup>8</sup> See *inter alia*, Rule 15, 50, 92 and 96 of the Rules of Procedure and Evidence; Regulations 6 and 103 of the Regulations of the Registry; and Resolution ICC-ASP/9/Res.3, paras. 38-39; Resolution ICC-ASP/8/Res.3, paras. 33-34; Resolution ICC-ASP/7/Res.3, para. 25; Resolution ICC-ASP/6/Res.2, para 20; Resolution ICC-ASP/5/Res.3, para. 20; Resolution ICC-ASP/4/Res.4, para 22.

### III. Recommendations to improve the budgetary process in future years

In addition to the specific recommendations above in relation to the 2012 budget, the Team also calls on the Assembly to take action to improve and to stabilise the volatile budget process in future years. Specifically, the Assembly should seek to:

- improve transparency of the ICC's budget allocation and cost-drivers;
- increase understanding of the resource needs of the ICC as its activities increase and decrease; and
- achieve greater efficiency as the ICC matures.

In pursuing these efforts it is hoped that, in the next years, the ICC will submit clearer budget requests that will enjoy the support of states. Another possible outcome of these efforts might be for the ICC to lay the ground work for the ICC move to a multi-year budget process.

#### **(i) Current efforts to promote efficiency and improve the budget process should be continued.**

Before looking at new initiatives, it should be recognized that a number of efforts are already being conducted or considered within the Assembly and by the ICC to identify efficiencies and improve effectiveness - both with regard to administrative processes and judicial proceedings—and to evaluate the budget process. These include:

- A review of the ICC's Strategic Plan, including improving the link between the plan and setting the programme budget;
- Ongoing dialogue between the ICC and the CBF to identify efficiency savings and improve the budget document. The ICC has provided the CBF with six reports regarding the status of its efforts to identify efficiency measures. In its most recent report, the CBF observed that "the Court had made considerable progress in its efforts to find and quantify possible efficiency savings" and recommended the ICC continue its efforts.<sup>9</sup>
- A request from the CBF for the ICC to examine its process for preparing the proposed program budget and report to the CBF in this regard at its eighteenth session (tentatively scheduled for 23-27 April 2012);
- Ongoing discussions in the Study Group on Governance on expediting the criminal process, and a proposed new cluster on budget process.
- An ongoing review of the Court-wide strategy in relation to victims looking at how the ICC's engagement with victims can be strengthened and in consultation with state and non-state actors in areas that will likely have a budgetary consequence, such as protection; outreach to victims and affected communities; victim participation and reparations.

The relationship of these efforts should be considered with a view to encouraging cohesion and avoiding duplication and ensuring that they can inform one another. Review of judicial processes should aim foremost at improving the ICC's effectiveness, rather than in identifying cost savings. These reviews can nevertheless contribute to increased transparency and identification of best practices, which, in turn, can contribute to stronger dialogue between states parties, the CBF, and the ICC regarding setting the programme budget.

#### **(ii) The Assembly should invite the ICC to provide a comprehensive report as soon as possible and within six months of the tenth session clarifying and fully justifying its current budget allocation and budget process**

The ICC has enjoyed significant budgetary flexibility in the last ten years both in the establishment

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<sup>9</sup> Report of the Committee on Budget and Finance on the work of its seventeenth session, ICC-ASP/10/15.

phase and more recently as it has started fulfilling its judicial mandate. Such flexibility, including the high use of general temporary assistance to employ staff on contracts and the ability to transfer money within the major organs, was essential to get the ICC up and running. However, it has also generated confusion about how exactly resources are currently allocated within the ICC, especially when the ICC has on more than one occasion announced that it is able to absorb new costs within its existing budget without indicating where such resources are drawn from. The current style of the budget document – which primarily provides details on the needs for new resources - unfortunately does not address this issue.

As a first step towards addressing concerns about the ICC's budget it must first be understood. The ICC should therefore be required to provide a comprehensive explanation of its current budget allocation and how it relates to the organization's strategic plan and current policies. The Assembly should invite the ICC to provide:

- A clear explanation for the current staff structure of each unit (including their responsibilities) and fully justify each posts in the context of the strategies for each unit and to identify GTA posts which should be transferred to permanent posts.
- A fully justified explanation of the non-staff resources allocated to each unit.
- A clear analysis of the main cost drivers of the ICC and the core capacity of the Rome Statute system.<sup>10</sup> For example, if the number of trials is a major cost driver, then the ICC should indicate what are the maximum number of trials it could conduct at any one time in accordance with the limitations of the Rome Statute (e.g. number of judges) or other factors (e.g. number of court rooms).
- A projection of how costs will be scaled up and down for each of the cost drivers. For example, the ICC should be able to provide an accurate estimate of the costs associated with an investigation. Such estimate should include the costs associated with the OTP's investigation strategies, including the size of investigation team, frequency and cost of travel, the languages involved, projected witness protection budget. The projection should also indicate the costs of activities indispensable to the creation of an environment conducive to investigations and secure cooperation as well as to implement the provisions of the Rome Statute on victims' participation. This would include the costs of victims and witness protection, outreach, public information, external relations. It should also provide accurate information on the costs associated with the field presence the ICC intends to establish in the situation country to carry out its mandate. Similarly, the ICC should be able to provide a general estimate of costs of trials and the adjustments necessary (e.g. the projected duration of the trial, the number of defendants, defence counsel and number of victims' representatives etc.). Similarly, the estimate should indicate the costs of activities necessary to the conduct of trials and implementation of the victims' rights under the Rome Statute, including victims and witness protection, outreach, public information, external relation and victims' participation and reparation and the necessary fluctuations in their level depending on judicial developments and phases. It should provide an indication of the costs of the ICC's field presence. Where possible, information should be provided of factors which may require additional resources (e.g. travel to remote areas with poor infrastructure etc.).
- A review of the budget process, as requested by the CBF, identifying where improvements are necessary to strengthen the link with the strategic plan and realistic assumption setting based on the above examination of cost drivers and their scalability including the opening of new investigations and trial activities.

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<sup>10</sup> The Team does not rule out the possibility that at some point in the future states parties may consider expanding upon the ICC system – for example by altering the number of judges, but for the purposes of this process – when the ICC has yet to reach full judicial capacity it should focus on the system set out in the Rome Statute. In presenting the cost-drivers, the ICC should take into account the cost drivers identified in the CBF Report, paras. 11-26.

**(iii) The Assembly should invite the CBF to study the ICC's report:**

- **in the context of its ongoing dialogue regarding efficiency measures;**
- **in connection with its request to the ICC to reconsider its budget preparation with a view to identifying where efficiencies can be found or should be explored; and**
- **to make recommendations to improve the preparation of the programme budget.**

Based on the information provided by the ICC, the CBF will be well placed to conduct a thorough review of the information and to make additional recommendations as to where efficiencies can be found and to identify areas where further research is required to explore whether more efficiency is possible. This should include whether a number of UN systems applied to many aspects of the ICC are appropriate for the institution. In doing so, the CBF should ensure that any such search for efficiencies are in line with the provisions contained in the Rome Statute (including the independence of the Prosecutor and the Judges), the Rules on Procedure and Evidence and relevant principles of international law. The CBF could focus on applying its financial expertise to identifying administrative, managerial and operational processes where efficiencies could be gained and avoid overlap with ongoing reviews of ICC policies (e.g., implementation of the strategy on victims) and Study Group on Governance discussions on expediting the criminal process.

If necessary, the CBF should hold a special or extended session to review the information and discuss their recommendations. They should consult with the ICC, legal representatives, states parties and civil society during the process.

**(iv) The Assembly should review the CBF recommendations, taking into account the views of the ICC and recommend action in key areas to find efficiencies**

The CBF recommendations should be reviewed by the Assembly in consultation with ICC officials in order to identify what additional measures are needed to achieve efficiencies and a better budgeting system incorporating these efficiencies. This could be done through the Study Group on Governance's proposed cluster on budget process, or through another forum with adequate participation of ICC officials, legal representatives, states parties, and civil society. These recommendations to the ICC could be adopted at the Assembly's 11<sup>th</sup> session in 2012, and implemented on an agreed timetable.

The ICC should be requested to report intersessionally to the CBF and states parties regularly on its progress, with a view to achieving significant progress in implementing the recommendations by the Assembly's 12<sup>th</sup> session in 2013.

**(v) The ICC should be requested to report to the Assembly regularly on efficiency measures it has taken as well as bringing policy or other developments which have cost implications to the attention of the Assembly**

Achieving efficiency must be an on-going process. Similarly, efficiency should not always be viewed as a means of reducing costs. Indeed, in some situations, an increase in resources may enable the ICC to conduct its work better and with more impact. In other situations, an increase in resources in the early stages of the ICC's work might represent cost savings later on, as more initial resources can help prevent situations where additional resources are required to reach the same results at the end of the process. For example, investing more resources in outreach at the very outset of a situation prevents the formation of misconceptions that need considerably more resources to be overcome later. The ICC should keep the Assembly informed of its efforts to achieve efficiency and maintain an on-going dialogue on cost implications.