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Report on the anticipated financial impact of the new strategy of the Office of the Prosecutor*

Executive summary

This report responds to the request of the Committee on Budget and Finance (“the Committee”) for information on the anticipated financial impact of the next phases of the new Strategic Plan (2012-2015) of the Office of the Prosecutor (“the OTP” or “the Office”).¹

The Office of the Prosecutor developed its new Strategic Plan 2012-2015 through a process of consultation, involving external stakeholders and experts. The Prosecutor presented the Strategic Plan to the Committee and The Hague Working Group in September 2014. Price Waterhouse Coopers undertook an independent and comprehensive review of the functional structure of the OTP and made final recommendations that support the new strategy of the Office and its resource implications.

The OTP teams are being resourced in accordance with a model for creating effective team capacity, which maximises performance and results which was approved by States Parties. Notwithstanding the complexity of the situations and cases before the International Criminal Court (“the Court”), OTP team staffing levels are modest in comparison with those of the United Nations international criminal tribunals and special courts as well as national authorities which investigate serious crime.

The 2015 budget increase is in line with the OTP Strategic Plan, which was fully approved by States Parties. Without the requested budgetary resources, the OTP will be unable to discharge its responsibilities properly, jeopardising the credibility of the Court as a whole and undermining its capacity to deter the commission of mass atrocities. Insufficient capacity will also leave the OTP vulnerable to those seeking to subvert the course of justice or attack the Court and the principles and values for which it stands. The OTP must build enough capacity to respond to the increasing demand for intervention (e.g. in the Central African Republic, Afghanistan, Ukraine, Georgia and Nigeria). If properly staffed, the OTP can achieve the desired results, as recently shown by the confirmation of charges in the cases against Bosco Ntaganda and Laurent Gbagbo. Results, however, cannot be achieved without the provision of sufficient resources or the reallocation of existing resources at the expense of other cases.

* Previously issued as CBF/23/6.

¹Report of the Committee on Budget and Finance on the work of its twenty-second session, Advance version ICC-ASP/13/5, 11 June 2014, para. 47.

The OTP plans to build enough capacity to be able deal with seven (7) concurrent active investigations and five (5) trials *by the end* of 2017. This capacity will enable the OTP to effectively manage the same number of cases it was handling in 2013, but with the sufficient and improved staffing levels.

Using the staffing model of the Strategic Plan, the cost of one additional active OTP investigation can be calculated and amounts to €3.27 million. Additional marginal costs should be factored in to take into account of the necessary support for investigative and prosecutorial functions. However, any consideration of the strategic planning of OTP resources must take into account the impact on the Registry and Chambers, in order to inform States of the total cost of the options presented. The issue is under consideration within the OTP so that it can present its strategic plan for 2016-2018. It is expected that the plan will be ready when the 2016 budget will be submitted. Once the optimal staffing level is reached, and barring an unforeseen event such as the referral of a situation of an extraordinary scale, the arrival of new cases will be covered by the completion of old ones.

The OTP is fully aware of the budgetary constraints faced by many States and is committed to remaining accountable and responsible for the use of the resources allocated to it by the Assembly of States Parties. It is however the OTP's strong belief that investment in justice at this juncture is an investment in humanity's future and the best way to secure lasting peace. A properly funded Court is the best guarantee for a positive return on States Parties' investment in the fight against impunity, which is the *raison d'être* of the Court.

I. Introduction

1. At its twenty-second session in April 2014, the Committee on Budget and Finance ("the Committee") requested the Office of the Prosecutor ("the OTP" or "the Office") to provide an update on the implementation of the OTP's Strategic Plan for 2012-2015 and its impact on the anticipated financial support that the OTP will require over the coming years in order to complete its growth.²

II. Background

2. In September 2013, the Prosecutor presented the OTP's new Strategic Plan to the Committee.

3. The plan is the result of extensive and open consultations with the International Criminal Court's ("the Court") stakeholders, including civil society, NGO representatives and academics and experts from national and international judicial and law enforcement institutions, and of feedback gathered through a lessons learned exercise on the past performance of the OTP.

4. The widely shared conclusion of these consultations was that the OTP needs more resources to effectively discharge its mandate and foster the legitimacy and credibility of the Court.

5. The review³ of the OTP's operations and organization performed in 2013 by Price Waterhouse Coopers (PwC) in an independent and parallel exercise confirmed the need for the OTP to strengthen its staffing levels so as to properly discharge its workload and mandate.

6. The PwC report, presented to the Committee in September 2013, supported the functional reorganization of the OTP⁴ and its shift towards the use of various forms of evidence other than witness statements through enhanced capabilities.⁵

² Report of the Committee on Budget and Finance on the work of its twenty-second session, Advance version, ICC-ASP/13/5, 11 June 2014, para. 47.

³ International Criminal Court - Consultancy on ICC Organizational Structure; Report on the intra-Organ review of the Office of the Prosecutor, Price Waterhouse Coopers, 1.0, 2013-1081/OV/Im/sb, 30 July 2013.

7. The main benefits of the new strategy are:
- (a) Greater effectiveness and enhanced impact of preliminary examinations;
 - (b) Improved and more varied investigative methods with the adoption of both an open-ended, as opposed to a narrow-focused, approach and the use of modern techniques and technologies;
 - (c) Improved collection of evidence and preparation of filings to enable the OTP to be trial-ready at an earlier stage in the proceedings;
 - (d) Lower costs for the Court resulting from shorter proceedings (e.g. reduced legal aid, witness protection and detention costs);
 - (e) Lower costs to the judiciary and benefits to the accused in terms of expeditiousness of proceedings;
 - (f) Faster access for victims to the reparations phase once a conviction is handed down; and
 - (g) Enhancement of the reputation and legitimacy of the Court.
8. The strengthening of the OTP through the implementation of its new strategy also has considerable potential for increasing the deterrent effect of the Court. It will also increase the effectiveness of preliminary examinations in fostering positive complementarity, obviating the need for the Court's intervention in some situations.
9. Mindful of the financial implications of the new strategy, PwC also raised the critical question as to whether the Court should be resource or demand driven.
10. The reality is that, by law and out of necessity, the Court – and the OTP in particular due to its specific mandate – are demand driven, given that in most cases of commission of crimes within the Court's jurisdiction, it is States Parties that seek the Court's intervention. A case in point is the recent self-referral by the Central African Republic seeking the assistance of the Court to address the mass crimes that have allegedly taken place in the country since August 2012 in the context of violent sectarian clashes. States Parties ratified the Court's founding treaty, the Rome Statute, with the precise expectation that in the event of atrocities, they would receive the protection and justice which it affords. The Court must respond responsibly, within the parameters set by the Rome Statute and in an independent, impartial and systematic manner to address these real needs.
11. The OTP has started linking the implementation of its new Strategic Plan to the formulation of the 2014 Programme Budget. The proposed budget foresees the acquisition of resources (staff and non-staff) to enable the OTP to handle five active investigations by the end of 2014. Recruitment of the necessary staff has been phased throughout the year, but concentrated in the second half of 2014 to allow for delays in the hiring process.
12. The resources requested to undertake five active investigations with the appropriate level of staffing amounts to €7.5 million. Following the Committee's recommendations, in November 2013 the Assembly of States Parties ("the Assembly") approved only €4.96 million of the requested resources. This decision affected all the operations of the Office. In effect, the budgetary cut did not allow the OTP to staff its teams to the level considered sufficient by States Parties to conduct investigations and prosecutions. The increase was thus not commensurate with the staffing level that would enable the OTP to carry out its envisaged activities.
13. It should be recalled that the OTP also presented a four-year plan for 2014-2017⁶ that highlighted the possible change in requests for financial support based on the assumption that, *by the end* of 2017, the OTP would have enough resources to properly and concurrently manage seven active investigations, five trials and eight preliminary examinations.⁷

⁴ For example, through better leadership of the joint teams, the reassessment of the strategic role of the Office's Executive Committee and the division of responsibilities at senior management level.

⁵ For example, by greater use of forensic evidence, the development of state-of-the-art analytical products, the gathering of information and evidence through the acquisition and analysis of electronic data, and better use of open source information and information available in social media.

⁶ For the details on developments, see the response of 13 September 2013 to the Committee's Third set of in-session queries to the Court.

⁷ This figure corresponds to the number of cases that the Office was handling in 2013, stretching its resources to the very limit. The number of trials (5) was a target, rather than a reality in 2013. In fact, the new budget

14. The staffing capacity required for efficient and effective investigations and prosecutions was calculated on the basis of the activities that must be performed in each phase of a case.

15. The OTP's activities are broadly carried out in the following phases: preliminary examination,⁸ investigation, arrest, confirmation of charges proceedings, trial and appeal. The resource requirements for the different divisions, sections and units of the OTP at each phase depend on the nature of the phase itself. Management, support and coordination are also to be considered throughout all phases.

16. An OTP Joint Team involved in an active investigation (as opposed to a case in "hibernation")⁹ must have the equivalent of 26.5 staff in order to operate effectively (17 from the Investigations Division, 7.5 from the Prosecution Division, and one International Cooperation Adviser per accused). A prosecution team involved in an active trial must be composed of a minimum of 14 staff (2 investigators per accused, which will increase the size of the team in accordance with the number of accused; 11 Prosecution Division staff; and one International Cooperation Adviser). Compared to team staffing levels at the United Nations *ad hoc* tribunals and special courts or to the resources deployed by national authorities in the investigation and prosecution of serious crimes, these staffing levels are extremely modest.

III. Expected growth of the Office of the Prosecutor

17. Over the course of 2014, the OTP has committed the budgeted funds to deploying the staff necessary to the successful performance of its core activities. However, the Office had to contend with unexpected events and developments, such as unforeseen activities undertaken in connection with offences against the administration of justice (prosecuted under article 70 of the Rome Statute) and aimed at protecting the integrity of Court proceedings, as well as the unexpected surrender of Mr. Charles Blé Goudé. These unforeseen events forced the Office to reallocate staff to cases. Pending approval of Contingency Fund requests, the OTP inevitably had to temporarily suspend and/or delay its activities in some on-going cases.¹⁰

18. For the OTP to be able to carry out the same level of activities in 2015, it is critical for it to keep all the staff who were hired in 2014 from budgetary funds or the Contingency Fund. The OTP has already invested a great deal of time and effort into recruiting, training and integrating all these staff into the teams and the organization. Not to retain such staff would constitute a negative return on that investment, disrupt the work of the Office and adversely affect the climate in the workplace.

19. For the 2015 Proposed Programme Budget, the OTP has essentially used the same basic staffing model for Joint Teams for investigation and prosecution as it did for the 2014 budget proposal. This model was approved by Committee and the Assembly. This basic model recognized the need to increase teams in order to achieve sufficient capacity to properly implement the new prosecutorial strategy. However, as explained above, it was impossible to achieve this capacity for the entire year with the limited funds approved for

assumptions foresee at least five trials in 2015. Furthermore, ten preliminary examinations are anticipated for 2015, already exceeding the number foreseen for the end of the growth plan. The phasing in of resources, based on the Office's forecast, was projected to cover the period 2014 through 2017 – by then the critical mass of resources essential to the OTP's capacity to work effectively was to level out, barring an unforeseen event such as referral of a situation of an extraordinary scale.

⁸ Preliminary examinations allow the Office to evaluate the need for direct intervention by the Court in response to allegations of crimes falling under the Rome Statute. The evaluation is based on several factors, such as the jurisdiction of the Court, the gravity of the crimes, and the possibility of applying positive complementarity. This last factor is very important, as it implies support and monitoring by the Court of the progress made by domestic authorities to develop adequate judicial institutions to fight impunity and prosecute perpetrators of crime at national level. In addition to fostering the achievement of a main goal set by the founders of the Court, preliminary examinations are also cost effective in as much they may avoid a more comprehensive and structured intervention by the Court in the form of an active investigation and possible trial proceedings.

⁹ "Hibernation", broadly refers to the downgrading of activities in any given case to the minimal requirements needed to maintain it updated and alive, while also sustaining the necessary level of contacts with victims and witnesses. The hibernation of cases may be initiated for a variety of reasons.

¹⁰ The Office has demonstrated what it can achieve with properly resourced teams in the Ntaganda and Gbagbo cases in which the Pre-Trial Chambers confirmed charges this year. However, the teams working on those cases were fully resourced at the expense of other situations and cases, since it was only possible for the OTP to bring new staff on board over the course of 2014.

the 2014 budget. This capacity must, however, be achieved for 2015 in order to accord with the assumptions underlying the 2015 budget proposal.

20. The OTP also envisages an increase in operational costs relating to preliminary examinations, investigations, trial support, and trial preparation in 2015. In order to improve the quality of its work, the OTP must invest in its staff's skills and in the acquisition of new technologies.

21. In 2015, the OTP plans to conduct ten (10) preliminary examinations; four (4) active investigations; two (2) investigations into offences against the administration of justice (pursuant to article 70 of the Rome Statute); at least five (5) trials, including trial support investigations; and one appeal. The OTP will also maintain nine (9) cases in "hibernation".¹¹

22. In sum, the OTP's budget proposal for 2015 represents the basic resources required for it to continue all the work started in 2014 and to the requisite standard of quality required by the new Strategic Plan, as endorsed by the Assembly.

23. Without the requested budgetary resources for 2015, the OTP will simply be unable to discharge properly its responsibilities under the Rome Statute. The OTP will barely be able to continue the activities that are being performed in 2014, jeopardizing the credibility of the Court as a whole and undermining its capacity to deter the commission of mass atrocities. Insufficient capacity will also leave the OTP vulnerable to those seeking to subvert the course of justice or attack the Court and the principles and values for which it stands.

24. As regards further stages in the OTP's growth, any changes will depend on how expeditiously the demands for the Court's intervention can be met. The original phasing can be changed and the final "optimal" level achieved at a later stage than the initially planned date (i.e. end of 2017). The present Strategic Plan for 2012-2015 foresees that the OTP's capacity would revert from four (4) to seven (7) active investigations, corresponding to the 2013 level, but entailing overstretched capacity. The OTP is in the process of undertaking a strategic revision to gauge the appropriate size of the Office in light of the increasing demand placed on it. This exercise will be complete in time to drive forward the OTP Strategic Plan for 2016-2018 and prepare the 2016 budget proposal. It will also require consultation with the other organs of the Court to identify the full cost implications for States. Based on current salary scales and travel and support cost estimates, the financial impact of one active investigation is calculated as follows:

Team: 17 FTE Investigation Division, 7.5 FTE Prosecution Division, 1 FTE Jurisdiction, Complementarity and Cooperation Division, amounting to €2.72 million

Travel: €0.4 million

Support: €0.15 million

Total: €3.27 million

25. It is important to underline that the growth of the OTP will be constantly assessed against the resources required to respond to the evolving workload (demand) and always with a view to ensuring efficiencies. The prime goal of the OTP is to complete old cases and allocate the freed resources to new cases. This reallocation of resources will have a positive impact on the funds required, as well as on the quality of the operations, as experienced and trained staff will be redeployed to the new cases.

26. Once the Office reaches optimal capacity level, and barring an unforeseen event, such as the referral of a situation of an extraordinary scale, the arrival of new cases will be covered by the completion of old ones. Of course, this *virtuous cycle* depends also on the capacity of other organs to contend with the Court's workload. The OTP has already started internal discussions to assess how such a process can be effectively implemented.

27. A key factor is, of course, the development of an *exit strategy* for each situation. After one or more cases are completed (i.e. the case has undergone all the phases, from preliminary

¹¹ Hibernated cases always involve a variable amount of residual work, for both Investigation Division (regular contact with witnesses, protection issues and gap analysis, etc) and Prosecution Division (residual litigation, reports to the Court and gap analysis).

examination to appeal), the Court should assess the need for further involvement in a situation. Such a decision would imply affording due consideration to the legal boundaries prescribed by the Rome Statute, but also the weighing up of all the consequences that could arise from the end of the Court's active involvement in a situation. Firstly, the moral and practical responsibilities entailed in the protection of those involved in the activities of the Court in situation countries or elsewhere must not be neglected. Secondly, any exit strategy developed by the Court must take account of the possible impunity gap that may ensue if exit from a given situation is not accompanied by compensatory measures, in particular the strengthening of mechanisms for accountability at national level.

28. As can be appreciated, the interplay of various interrelated factors, some of which lie outside the control of the Court, will affect the determination of the appropriate size of the Court. For instance, important factors include the achievement of an optimal capacity; the increased effectiveness of the Court's activities, which to a great extent will also positively affect the duration of proceedings; the reallocation of resources from old to new cases; the decision on whether to conduct simultaneous or consecutive investigations into the different sides of a conflict; and the extent of calls by States Parties for the exercise of the Court's jurisdiction, which is the biggest cost driver for the Court.

29. The OTP will include these factors in its 2016-2018 Strategic Plan.

30. A decision on the size of the OTP and the Court as a whole is one to be taken by the Assembly based on the importance it attaches to international criminal justice and a recognition that mass crimes "threaten the peace, security and well-being of the world" whilst remaining mindful of each State's priorities and resource constraints. It is the responsibility of the OTP and the Court as a whole to provide the relevant data, which will inform the Assembly's decision.

31. Any discussion on the strategic planning of OTP resources needs to consider its impact on the Registry and Chambers so as to inform States of the total cost of the options presented.

IV. Conclusion

32. The OTP is fully aware of the budgetary constraints faced by many States and is committed to remaining accountable and responsible for the use of the resources allocated to it by the Assembly. It is, however, OTP's strong belief that an investment in justice at this juncture is an investment in humanity's future and the best way to secure lasting peace. A properly funded Court is the best guarantee for a positive return on States Parties' investment in the fight against impunity, which is the *raison d'être* of the Court.
