

Statement by the Women's Initiatives for Gender Justice

Launch of the Gender Report Card on the ICC, 2010

New York, 6 December 2010

Brigid Inder
Executive Director

I would like to welcome you all to the Launch of the Gender Report Card on the International Criminal Court (ICC) 2010.

My name is Brigid Inder, I am the Executive Director of the Women's Initiatives for Gender Justice. We are honoured by your attendance this evening and the collaboration with UNIFEM to host the launch of our sixth Gender Report Card. UNIFEM has a long policy and advocacy history for the prevention of violence against women, most notably their excellent work in the area of women, peace and security, a mandate we hope will be strongly supported within the new UN Women agency currently under development. In fact this evening, is the first or one of the first events, the new UN Women is associated with and it has been a pleasure working with Anne-Marie Goetz and her team for this launch.

The Women's Initiatives is an international women's human rights organisation that advocates for prosecution of gender based crimes by the ICC in situations where evidence of such crimes exist. We work with women most directly affected by the armed conflicts under investigation by the ICC and as such we have extensive -country based programmes in Uganda, the Democratic Republic of the Congo (DRC), Sudan and the Central African Republic. Next year we advance our work on Kenya and we are opening a documentation programme with women's rights groups in Kyrgyzstan following the violent events of last summer.

Since 2005, we have produced the Report Card which reviews all the major judicial decisions, developments in the legal proceedings, opening of investigations, announcements of charges, issuance of arrest warrants, emerging issue for victim participation, witness protection issues, the List of Legal Counsel, intermediaries, assistance to victims, and outreach activities. We also consider the development of internal policies, recruitment and personnel statistics, the institutional

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development and the work of the independent bodies such as the Trust Fund for Victims and the Office of the Public Counsel for Victims.

In other words we analyse and summarise all the major developments at the ICC both in its institutional progress and its substantive work.

Monitoring and critiquing the ICC is one of our strategies to advocate for gender-inclusive justice and to promote the inclusion and participation of women in shaping international criminal law as law-makers, practitioners, decision-makers, participants and beneficiaries of the justice process.

The Report Card provides a critique of the Court's work in the past 12 months in order to assess progress, analyse trends and focus the attention of the ICC and States Parties to areas where implementation of the Rome Statute is being diminished or under-utilised. This allows us to act as an alert system for the Court and States Parties so that actions can be taken to ensure the Statute is effectively implemented.

Context

The ICC which is operating in some of the most violent conflicts in the world. It is working in countries with limited functional state institutions and little public sector accountability.

The context of the Court's work is compounded by the realities of ongoing conflicts, by the limited role states are able or willing to play in securing the arrests of indictees and by an international system of justice which is fragmented and still in the process of developing as a cohesive, mutually reinforcing body of law.

The impact of the financial crisis upon states parties and their contributions to the Court has also been felt this year and will be the topic of debate during the budget discussions this week. It is interesting to note that of the new economic powers emerging over the past decade, the states known as the BRIC countries of Brazil, Russia, India, and China, only Brazil is a states party to the ICC. Individually the BRIC countries will have an increasingly stronger voice in global affairs and together as a political 'alliance', they will likely convert their economic power into greater geopolitical clout including in relation to the development of the international system of justice - it is significant in this regard that three of these emerging global powers and three fifths of the permanent members of the UN Security Council, still remain outside the jurisdiction of the ICC.

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2010: A year of 'firsts'

This year the history of the Court continued to be written and will be further inscribed this week during the annual meeting of the Assembly of States Parties. The ICC has been functioning for seven years and is still in the process of establishing its benchmarks and practices, its impact and record.

This was a year of many firsts.

- For the first time charges of genocide were included in an arrest warrant against an indictee and these included acts of rape and sexual violence;¹
- The ICC began its first trial in relation to crimes committed in the Central African Republic;²
- The Court heard its first witness to provide testimony in relation to charges of sexual violence;³
- This year the first expert witness to address gender based crimes appeared before the ICC. This expert was Radhika Coomaraswamy, the Special Advisor to the Secretary General on Children and Armed Conflict, who appeared in the Lubanga case and provided insight into the gender dimensions of the enlistment and conscription of child soldiers;⁴
- For the first time three participating victims were also enabled to testify;⁵

¹ In 2009, in the case of *The Prosecutor v. Omar Hassan Ahmad Al'Bashir*, Pre-Trial Chamber I declined to issue an Arrest Warrant for the crime of genocide, a decision which the Prosecution subsequently appealed. On 3 February 2010, the Appeals Chamber handed down a unanimous decision reversing Pre-Trial Chamber I's finding that it had been provided with insufficient evidence to issue a Warrant of Arrest for the crime of genocide (ICC-02/05-01/09-73). Accordingly, on 12 July 2010, Pre-Trial Chamber I issued a second Warrant of Arrest for President Al'Bashir for the crime of genocide (ICC-02/05-01/09-95). See also the *Gender Report Card 2010*, p 106-109.

² *The Prosecutor v. Jean-Pierre Bemba Gombo*. For further information on the Bemba case, see the *Gender Report Card 2010*, p 113-118.

³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. For a detailed summary of the witness testimony in relation to charges of sexual violence in this case, see the *Gender Report Card 2010*, p 165-176.

⁴ ICC-01/04-01/06-T-223-ENG. For a detailed summary of her testimony, see the *Gender Report Card 2010*, p 135-136.

⁵ Witness 270 (ICC-01/04-01/06-T-225-Red-ENG; ICC-01/04-01/06-T-226-Red-ENG), Witness 225 (ICC-01/04-01/06-T-227-Red-ENG; ICC-01/04-01/06-T-228-Red-ENG) and Witness 229 (ICC-01/04-01/06-T-230-Red-ENG; ICC-01/04-01/06-T-234-Red-ENG) testified as participating victims in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. For a detailed summary of their testimonies, see the *Gender Report Card 2010*, p 137-139.



- For the first time an all women bench is presiding a trial at the ICC, in fact this is a first in any of the international tribunals;⁶
- For the first time the Prosecutor exercised his proprio motu powers by opening an investigation in relation to the 2008 post-election violence in Kenya.⁷

For States Parties it was also a year of ‘firsts’ - with the adoption of the Crime of Aggression, clearly defining such acts as a crime and in time one for which individuals will be held accountable by the International Criminal Court.⁸ This year four more states became states parties bringing the total number of members to 114.

Progress has undoubtedly been made in the Court’s substantive work, in its institutional development and in the larger normative environment regarding expansion of the types of crimes and individuals who can be held accountable.

Recruitment

One of the first areas of work we prioritised in 2004 when we opened our office in the Hague, was to launch a campaign to address the recruitment of gender competent women and men to the Court and to advocate for more women to be appointed to the ICC given the striking gender inequalities in the staffing of the Court 6 years ago.

This year as we reviewed the figures we were heartened by the results. There are now 697 staff employed by the ICC, excluding the judges, and for the second year in a row professional posts are held evenly by women and men.⁹

The leader in this regard is the Registry which has maintained gender balanced figures for four years running. Although there has never been a woman appointed to a Head of Division within the

⁶ In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, the bench is composed of Presiding Judge Steiner and Judges Ozaki and Aluoch.

⁷ On 26 November 2009, the Prosecution submitted a request to Pre-Trial Chamber II for authorisation to initiate an investigation (ICC-01/09-3). On 18 February 2010, the Pre-Trial Chamber requested further clarification from the Prosecution (ICC-01/09-15), which was submitted on 3 March 2010 (ICC-01/09-16). On 31 March 2010, the Pre-Trial Chamber handed down a Decision, with Judge Kaul dissenting, authorising the Office of the Prosecutor to proceed with an investigation in Kenya (ICC-01/09-19). For a detailed discussion of the Kenya Situation, see the *Gender Report Card 2010*, p 118-127.

⁸ At the 10-year Review Conference of the Rome Statute and the ICC from 31 May – 11 June in Kampala, Uganda, States Parties amended the Rome Statute, pursuant to Article 5, to include a definition and elements of the crime of aggression as well as conditions under which the ICC would be able to exercise jurisdiction for this crime. RC/Res.6 ‘The Crime of Aggression’, 11 June 2010. See also the *Gender Report Card 2010*, p 79-81.

⁹ See the *Gender Report Card 2010*, p 12.



Registry, the Registrar herself is a woman and 47% of the Heads of Sections are women. As such, women feature in leadership and decision-making positions across the Registry and within most divisions. There are no women yet appointed at the D1 level, however the number of women appointed to P5 posts within the Registry more than doubled this year.

Within the judiciary, 58% of the professional posts are held by women who have consistently dominated this workforce although given this figure there is a disproportionate number of men holding the senior level professional posts.

Within the Office of the Prosecutor (OTP), progress has been made in the last two years towards more women appointed to professional posts and this year's figure is its best performance to date with 51% male and 49% female appointees. While these figures are positive, the male/female differential is more accurately assessed when each professional level is considered. Predictably women continue to be over-represented in the lower professional levels. In fact since the beginning of the OTP's recruitment programme, there has never been less than a 45% gender gap between the number of women and men appointed to P5 positions and not less than a 20% gender gap at the P4 level.

Across the Court there are 30 appointees at the P5 level of which 13 are women. Of these, 60% of women appointed at this level are located within the Registry or the independent bodies such as the Office for the Public Counsel for Victims (OPCV), the Trust Fund for Victims (TFV) and the Independent Oversight Mechanism (IOM).

This year we found some surprises in the geographical representation. Although the Western European Group continues to dominate with again 61% of professional posts, within this group we discovered that the overwhelmingly dominant national group to emerge was France with an 83% increase in professional appointees since 2008.¹⁰

¹⁰ For a detailed overview of the geographical and gender equity among Professional Staff, see the *Gender Report Card 2010*, p 18-20.



Unexpected Developments

While 2010 was a year of firsts in many positive aspects as I described earlier, it was also a year of firsts which we didn't expect and hoped we wouldn't see.

- For the first time before the ICC, a Pre-Trial Chamber declined to confirm any of the charges brought in a case such that the case, the first held in relation to Darfur, was dismissed in its entirety;¹¹
- For the first time before the ICC, a Trial Chamber imposed a second stay of proceedings;¹²
- For the first time a senior officer of the Office of the Prosecutor was censured by Judges for remarks to the media regarding issues under judicial consideration;¹³
- And for the first time in an international tribunal, the Chief Prosecutor of the ICC was issued a formal warning of sanctions due to his failure to comply with judicial orders. A warning, it should be noted, upheld by the Appeals Chamber who stated that sanctions should have been pursued, rather than merely warned, instead of the more 'drastic measure' taken by the Trial Chamber in the Lubanga case to stay proceedings.¹⁴

Areas of Concern

1. Effective Prosecutions

In some respects the area of most concern, and one which relates to important decisions this week for States Parties, are the persistent challenges around sustaining charges in a number of cases, including charges for gender-based crimes.

¹¹ In the case of *The Prosecutor v Bahar Idriss Abu Garda*, on 8 February 2010, Pre-Trial Chamber I declined to confirm the charges sought by the Prosecution (ICC-02/05-02/09-243-Red). For further background on the Abu Garda case, see the *Gender Report Card 2010*, p 109-111 and the *Gender Report Card 2009*, p 61-62.

¹² In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, on 8 July 2010 Trial Chamber I issued a decision staying the proceedings for abuse of process (ICC-01/04-01/06-2517-Red). For a detailed discussion of the Stay of Proceedings, see the *Gender Report Card 2010*, p 147-150.

¹³ In March 2010, Beatrice Le Fraper du Hellen, at the time Head of Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor, gave an interview to the *lubangatrial.org* website, which included a number of statements vigorously defending the use of intermediaries by the Prosecution. On 12 May 2010, Trial Chamber I issued a decision censuring this interview. ICC-01/04-01/06-2433. For a summary of this decision, see the *Gender Report Card 2010*, p 151-152.

¹⁴ In an oral hearing on 8 July 2010, Trial Chamber I issued a warning of sanctions (ICC-01/04-01/06-T-313-ENG). This was upheld by the Appeals Chamber on 8 October 2010 (ICC-01/04-01/06-2582). For a detailed summary of these decisions, see the *Gender Report Card 2010*, p 149-150, 158-159.



Several judicial decisions have questioned the quality of filings, the sufficiency of evidence, and the linkage between the charges and the elements based on the evidence presented.¹⁵ In some instances the failure to make this linkage led to the dismissal of charges, at both the arrest warrant phase and the confirmation of charges proceedings.

To date, the ICC has included charges for gender-based crimes in all four situations where indictments have been issued, and in six out of ten individual cases brought by the Office of the Prosecutor. However, 40% of the charges for gender-based crimes have been dismissed from the cases for which confirmation hearings have been held, with most judicial decisions citing insufficient evidence. There is no other category of charges which consistently faces these challenges.

In the case against Jean-Pierre Bemba, more than half of the charges for gender based crimes were dismissed before it got to trial. However, in this instance the loss of charges does not appear to be due to insufficient evidence necessarily, but rather to an interpretation by the judges which departed from 10 years of practice and jurisprudence at international tribunals and national courts, regarding cumulative charging for crimes of sexual violence, thus leading to the dismissal of charges for rape as torture and outrages upon personal dignity.

This year in the Lubanga Trial, prosecution witnesses have offered testimony in relation to sexual violence, legal counsel for victims have raised this issue, even a witness for the defence referenced sexual violence committed against girls, and yet no such charges were ever brought forward by the OTP in this case, because these crimes were not sufficiently prioritised in the original investigations.

Against this backdrop, the Prosecutor is proposing in the budget to reduce mission days for investigations by 50% in 2011. In our view this defies both the performance and efficacy of the investigation strategies to date, as determined by the Executive Committee, as well as their stated

¹⁵ For example: In the case of *The Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I declined to confirm any of the charges sought by the Prosecution. The Chamber found that the Prosecution did not provide sufficient evidence regarding Abu Garda's alleged participation in the meeting, noting that the evidence is 'weak and unreliable due to the many inconsistencies' (ICC-02/05-02/09-243-Red, para 173). For a detailed discussion of this Decision, see the *Gender Report Card 2010*, p 109-110. In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Pre-Trial Chamber declined to confirm charges of other gender-based crimes, including rape as torture, other alleged acts of torture as a crime against humanity (including the act of forcing victims to watch the rape of family members), and rape and other acts as outrages upon personal dignity (ICC-01/05-01/08-424). For a detailed discussion of this Decision, see the *Gender Report Card 2009*, p 63-67. In the case of *The Prosecutor v. Omar Hassan Ahmad Al'Bashir*, the majority of the Pre-Trial Chamber (Judge Ušacka dissenting) declined to charge Al'Bashir with genocide because it was not satisfied that the evidence submitted by the Prosecutor was sufficient to allow it to find reasonable grounds to believe that the Government of Sudan acted with a specific genocidal intent (ICC-02/05-01/09-3). Note, though, that this decision was later overturned by the Appeals Chamber (ICC-02/05-01/09-73).



workload next year of five active investigations, maintenance of seven residual investigations and supporting three trials.

We are concerned that a reduction in investigation days could signal the OTP intends to or may lapse into an over-reliance on media sources and other secondary material - meaning, that the OTP could rely too heavily on information from UN reports, NGO reports or information provided by governments, press clippings or newspaper articles - to substantiate the charges, rather than a solid reliance on witness testimonies and other primary evidence.

An initial review conducted by the Women's Initiatives of the publicly available arrest warrant applications shows a liberal use of open source material in cases for which charges have been dismissed.

As States Parties are considering budget issues this week, we urge that steps are taken to achieve the overall budgetary goals for the OTP without reducing the means to be able to perform its core functions. We urge States to locate other areas within the OTP budget, or to request the Prosecutor to do so, where reductions can be made which will not have such a profound effect on the primary mandate of the Office which is to investigate, charge and prosecute those who have committed crimes within the jurisdiction of the ICC. It is not efficient simply to be cheaper while still under-fulfilling one's mandate.

2. Victims Participation

The second area of concern we would like to mention is the need for an institutional audit of the Victims Participation and Reparations Section (VPRS). We include a recommendation within the GRC to address this - including conducting capacity analysis; a review of roles and performance; introducing a stronger data collection function and creating a more effective response strategy to address the large backlog of over 900 unprocessed victim applications. For several years there have been significant challenges for the section in managing the application process, as well as its methodology for consulting victims and the strategies to inform victims of their rights.

Now we see the effect of this work over time, with a significant under-representation of women applying to be recognised as victims by the ICC. More men than women have been recognised as victims by the Court in every situation and in each case. No women having been recognised in relation to two of the three Sudan cases for which victims applications have been received, and on

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average twice as many men than women have been recognised in the DRC and Ugandan cases. The gender breakdown of victims is out of kilter with the crime-base of the conflicts as documented by a variety of sources and is also out of kilter with the charges in the ICC cases. Women have less access to a range of mainstream media and information sources and fora upon which the VPRS maybe relying to reach affected communities. This is an issue requiring urgent attention to rectify the disconnect between victims in reality and victims accessing ICC justice.

Highlights

Now let me turn to some of the highlights and strongest performing areas of the ICC in 2010. These are the independent bodies - the Trust Fund for Victims (TFV); the Office of the Public Counsel for Victims (OPCV); and this year the new Independent Oversight Mechanism (IOM). In addition to these entities, the strengths of the Court in 2010 has included the work of the Registry in strengthening the field offices and progress in its outreach activities, the new strategies adopted by the OTP at the opening of trials, and the performance of the Trial Chambers in managing the court room process.

I would like to touch on each of these highlights briefly.

The TFV continues to provide assistance to over 70,000 victims through community-based projects in Northern Uganda and the DRC. In many ways the Trust Fund is the most tangible experience of the ICC as it is through the Fund that 'victims' are directly assisted. Some are benefiting from surgery for fistula repair, and others from reconstructive surgery to repair lips, ears and noses cut off for example by the Lord's Resistance Army (LRA). Through the peace caravans supported by the Trust Fund communities are beginning to develop a narrative of peace with the aim of building a culture of peace and reconciliation even in the midst of ongoing conflict such as in eastern DRC. In addition, the Trust Fund has initiated significant research with over 2,600 responses from 'victims' regarding their perceptions of rehabilitation, justice and reparations.

In the five years of its work, the OPCV has assisted approximately 2000 individuals, supported 30 external legal representatives and presented 300 submissions before the Court and all this with a staff of only 10. In the GRC this year we added a separate section on the OPCV and the

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representation of victims with a gender breakdown for each situation and case as well as a breakdown by type of crime reported by those victims who are represented by the OPCV.¹⁶

At the time of publishing the Report Card, the OPCV represented 1,252 victims in all five conflict situations with the majority being from the Central African Republic. Around 90% of victims represented by the OPCV are victims of sexual violence crimes.

The Independent Oversight Mechanism (IOM) is a new body established this year, with striking and credible progress made by the Officer in conjunction with The Hague Working Group of States Parties, who together have prepared and recommend for adoption this week, a mandate to operationalise the Oversight mechanism for the Court.¹⁷ The impetus for the ICC to develop an IOM was the crisis for the UN in 2005 when allegations of sexual violence surfaced against UN peace keepers stationed in the DRC. The Presidency of the ASP at the time initiated the idea of an oversight mechanism for the Court to prevent or address serious allegations of misconduct, fraud, corruption etc against its staff and officials. The IOM is not about reform or performance management, its mandate is about conduct.

An IOM, independent and able to function without veto powers exercised by a head of organ; an IOM which conducts preliminary fact-finding into allegations of serious misconduct against staff, contractors and officials of the ICC; an IOM which produces reports on such allegations and provides these to the relevant head of organ; and an IOM which thus relies on the head of organ to determine the appropriate disciplinary response - does not sound to us in its intent, structure or mandate, to be an intrusion on independence nor a form of micro management by States Parties.

It has always been our view since we began work on the IOM in 2006, that such a mechanism was necessary for States Parties to protect the credibility and good standing of the ICC. It is also in the best interests of each organ of the Court - it safeguards court staff and officers and ensures that the system of the ICC is larger than any individual whose actions may bring themselves rather than the court into disrepute.

In the Report Card you will also read about the Registry's work to improve the effectiveness of the ICC field offices which are the local face of the court to victims' communities. We find great value in

¹⁶ See the *Gender Report Card 2010*, p 49, 188-193.

¹⁷ Annex (to the Draft Resolution) containing the IOM Operational Mandate, 4 November 2010. See also the *Gender Report Card 2010*, p 71-72, 215-216.

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the concrete proposals by the Registrar to establish managerial positions within the Field Offices to enhance their efficiency, coordination and efficacy.¹⁸ We also note the solid progress made this year by the Registry in its outreach activities; and although advances have been noticeable, women are still only 25% of the total number of participants in their activities.¹⁹ We hope the momentum established this year will continue in 2011 with perhaps more activities directed towards women, women's groups, organisations, women leaders, those who are trusted by and can reach women and other groups whose access needs differ from male victims/survivors. In addition we also note this year the initiation of planning for greater streamlining of victims issues within the Registry.

Another highlight of 2010 was the start of the Jean Pierre Bemba Trial. We have noticed a change in strategy by the OTP with a more detailed approach taken to the start of this trial compared to a more rhetorical practice in the past. The commanding performance by the Deputy Prosecutor in opening the case, the strong presentation of the facts of the prosecutions dossier, and the effective strategy of providing details of the crimes and an overview of the conflict by the Senior Trial Attorney, was compelling.²⁰

The last area to highlight for its positive performance this year is the work of the two Trial Chambers. Both Chambers utilised the provisions under the Rome Statute for special measures to assist the testimony of vulnerable witnesses and in both cases these were women victims of sexual violence whose testimonies were particularly difficult for the individuals.²¹ The positive leadership of the presiding judges - Judges Fulford (Trial Chamber I), Judge Cotte (Trial Chamber II) and most recently Judge Steiner (Trial Chamber III), in controlling and managing the court room dynamics has provided a sense of clarity and confidence in the legal process even when events have at times appeared catastrophic, such as the circumstances leading up to the second stay of proceedings in the Lubanga case.

Spotlight

In closing, the Women's Initiatives has a habit of focusing the spotlight where it is least wanted and we are often considered the critical voice amongst NGOs in relation to the ICC. But our dissent is because we, like others, are amongst its most intense supporters. We question not to undermine

¹⁸ *Report of the Court on the enhancement of the Registry's field operations for 2010*, ICC-ASP/8/CBF.2/10, 30 July 2009

¹⁹ *Gender Report Card 2010*, p 29.

²⁰ For a detailed discussion of the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, see the *Gender Report Card 2010*, p 114-118.

²¹ For a discussion of in-court protective measures see the *Gender Report Card 2010*, p 162-163.



but to strengthen, we demand and applaud, we criticise and encourage the Court to not settle for being adequate when it has the ability to be better, nor to settle for being mediocre when the realities require it to be great.

Women around the world are supporting and urging the Court to prosecute gender based crimes with vision and direction, with determination and purpose, with clarity about its intention to contribute to justice for women.

The Gender Report Card for 2010 is dedicated to two of our friends and colleagues, Rhonda Copelon and Paula Escarameia who both passed away during the year. They were great advocates for gender justice and we honour their intellects and contributions to this field.

I would also like to thank and acknowledge the amazing staff of the Women's Initiatives and my co-authors of this Report - Kate Orlovsky, Vanina Serra, Lori Mann and Niamh Hayes. Thank you also to other staff of the Women's Initiatives especially Amira Khair and Jane Adong Anywar and to all our interns for their important contributions to our work and this publication.

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