

**The Gender Justice Team of the
Coalition for the International Criminal Court (CICC)**

**Recommendations to the Fifth Session of the Assembly of States Parties
from 23 to 25 November and 27 November to 1 December 2006**

[26 November 2006]



The Gender Justice Team Paper is endorsed by:

ALDHU (Latin America Region), ASADHO/KATANGA (DRC), CAFRA (Caribbean), Helsinki Committee for Human Rights of the Republic of Macedonia, Humanas (Chile), Humanas (Ecuador), ICCPG, La Cuerda (Guatemala), Philippine Coalition for the ICC, Sisters Arab Forum for Human Rights (Yemen), SOFEPADI (DRC), Women's Initiatives for Gender Justice (Hague) and WILPF

PREFACE

While the work of the Gender Justice Team reflects the positions of those Coalition members most active on particular issues and 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.

Key Gender Issues- ASP 2006

Recruitment

The **Gender Legal Adviser** post, obligated under Article 42(9) of the Rome Statute, has not been established. Given the **absence of charges for gender based crimes in the DRC and the under-investigation of these crimes** in the DRC to date, it is vital that a Gender Legal Adviser is appointed¹.

- **Appoint a Gender Legal Adviser as a matter of urgency** and aim to have the candidate in place by March 2007.
- **Place greater emphasis on recruiting expertise (both legal and trauma) in relation to sexual and gender violence across all three organs of the Court.** Seek candidates for recruitment with a background in dealing with or representing victims of gender-based violence by indicating this preference on the website and on the application form.

Outreach² and Participation

- **Given the low numbers of women³ amongst those applying to the ICC to be recognized as victims, outreach to women must be a high priority** for the Court during 2007. The absence of strategies to date specifically targeting women victims/survivors in the situations before the Court has prevented women from having the information and support necessary to apply to participate in the Court proceedings.
 - **Currently no women have been recognized as direct victims participating in the case**
 - **No victims of gender based crimes have been recognized by the Court;**
 - **No girl soldiers have been recognized by the ICC with the right to participate in the case;**
 - **Only 4 applicants have been recognized as victims in the current proceedings and therefore able to participate in the Confirmation of Charges Hearing.**
- **Across all situation countries, the ICC should hold consultations with women leaders** and develop partnerships with local, national and international women's organisations and groups working with victims of gender based crimes, to determine the most appropriate and effective means to carry out outreach for women.

Trust Fund for Victims

- In light of the 'gender equity' requirement⁴ for the Board of the Trust Fund, the Asian States seat, which is still vacant, **must be filled by a woman. The nomination period should remain open until the resumed session of the ASP in January 2007, or until this requirement is achieved. Competence in gender issues should be a high priority in potential nominees.**
- In 2007 the Board of the Trust Fund and the Director should **establish effective fundraising strategies for the Trust Fund as a matter of urgency.** The amount of contributions received

¹ The ICTY is responsible for 70% of the total convictions for gender based crimes in international criminal law (22 convictions). While there are likely several reasons for this record, one crucial factor is that the ICTY is the only Tribunal or Special Court with a designated Gender Legal Adviser at a senior level within the Office of the Prosecutor.

² For a discussion on a broad range of outreach issues, see the Communications Team Paper, 22 November 2006.

³ This assessment is up until 9 November 2006 and is based on publicly available information from Court documents about applicants.

⁴ ICC-ASP/1/Res.6, para. 3 (9 September 2002).

to date (around €1.6 million) is inadequate to cover the needs for assistance to victims and at a later stage, for reparation.⁵

- During 2007, a **functioning Secretariat for the Trust Fund for Victims should be established as a matter of urgency**. The Board should immediately **establish guidelines, inclusive of gender specific considerations, in order to fairly and effectively identify and implement projects and activities of assistance to victims**, including in a proactive manner (thus without awaiting assistance requests).

Structures and Institutional Development

- **Pass a resolution at the ASP 2006** for the Bureau to undertake the **study and development of a model for a Gender Committee** of the Assembly and establish at the ASP 2007, a Gender Committee of States Parties to monitor implementation of the gender mandates in the Rome Statute and assist the Court in ensuring gender-inclusive justice.
- **Develop an oversight mechanism and staff rules on sexual violence/abuse** (i.e. defining “serious misconduct” to expressly include sexual violence/abuse) ensuring strict disciplinary accountability for staff who violate these rules.

Legal Representation

Overall there are 168 lawyers on the List of Legal Counsel. Of these, 27 are women, 141 are men. As in 2005, there are over 5 times more men than women on the List of Counsel, with 70% of the List from WEOG (68% in 2005).

- **Initiate specific strategies to promote the List of Counsel and the List of Assistants to Counsel** amongst women’s organizations and networks, women lawyers associations and other judicial associations such as national bar associations, the IBA, ICB and IAP, particularly in countries with situations before the ICC and countries under-represented at the ICC.
- Be proactive in its strategies to **promote the List of Professional Investigators for Counsel** and ensure appointment of investigators **experienced in conducting investigations into gender based crimes** and interviewing/working with victims of rape and other forms of sexual violence.
- Ensure that protection and support measures **are sensitive to the particular circumstances of women in conflict situations and ensure women and girls** who are recognized as ‘victims’ by the Court benefit from protection procedures, and provide **appropriate protection for intermediaries and Counsel** whose safety may also be at risk.

⁵ By contrast, the UN Peacebuilding Fund which opened in October 2006, already has US \$ 140 million in pledges.

Gender Issues: Recruitment at the ICC⁶

- There is a **12% gap** between men (56%) and women (44%) in the appointment to professional posts across the Court.
- The largest difference is in the appointment of men and women in senior professional (P.4 – P.5) posts, with **women clustered into the lower professional levels (P.1 - P.3)**.
- Because most of the women appointed are concentrated in the P.1 – P.3 posts, they have far less access to and participation in the fora and structures where **crucial decisions are made on a day-to-day basis** regarding the substantive work of the Court. This has not changed from 2005, and the continuous under-representation of women in decision-making roles will further reinforce gender marginalization in other areas.
- Women occupy only 2 of 12 Head of Section positions (or their equivalents) in the OTP. This is a **67% difference in the numbers of men and women in management positions**
- Women occupy only 7 of 19 Head of Section positions (or their equivalents) in the Registry. This is a **26% difference in the numbers of men and women in management positions**
- The 'Executive Committee' structure of the Presidency is 67% men- 33% women; for the OTP it is comprised of 50% women; for the Registry it is 100% men.
- The **Gender Legal Adviser** post, obligated under Article 42(9) of the Rome Statute, has not been established. Four years after the ICC has been established no one has been appointed to this important position. The position was advertised in December 2005, applications closed January 22, 2006, and despite the application of qualified candidates, no one has been interviewed nor appointed for the position.
- Given the **absence of charges for gender based crimes in the DRC and the under-investigation of these crimes** in the DRC to date, it is vital that a Gender Legal Adviser is appointed. To date, the ICTY is responsible for 70% of the total convictions for gender based crimes in international criminal law (22 convictions). While there are likely several reasons for this record, one crucial factor is that the ICTY is the only Tribunal or Special Court with a designated Gender Legal Adviser at a senior level within the Office of the Prosecutor.
- Despite explicit mandates within the Rome Statute for legal expertise in relation to sexual and gender violence, and expertise in trauma also related to sexual and gender violence, **not a single position** has been recruited by the Court with this expertise as the **primary** criteria.

Recommendations:

- **Appoint a Gender Legal Adviser as a matter of urgency** and aim to have the candidate in place by March 2007.

⁶ These figures are as of 1 November 2006.

- **Implement affirmative action strategies for recruitment** including active promotion of positions through women's NGOs, regional and international networks, professional associations such as the IBA, IBC and IAP, particularly in countries with situations before the ICC and countries under-represented at the ICC.
- **Develop strategies to address the significant under-representation of women in senior professional posts** (P.4 – P.5).
- Apply 'best practice' in recruitment programmes emphasizing the importance of those involved in recruitment undergoing **training on gender equality and potential discrimination** which may be taking place (i.e. in relation to establishing criteria, advertising positions, reviewing CVs, recognizing diverse expertise and interviewing).
- Place greater emphasis on **recruiting expertise (both legal and trauma) in relation to sexual and gender violence across all three organs of the Court**. Seek candidates for recruitment with a background in dealing with or representing victims of gender-based violence by indicating this preference on the website and on the application form.

Gender Issues: Outreach⁷ and Participation

- While the Court acknowledges in its Strategic Plan for Outreach the need to develop “targeted strategies” for reaching women and ensuring they have access to Court proceedings, **further and more focused planning is critical to ensure outreach will be successful in reaching women victims/survivors and those most affected by conflict.**
- **Given the low numbers of women⁸ amongst those applying to the ICC to be recognized as victims, outreach to women must be a high priority** for the Court during 2007. The absence of strategies to date specifically targeting women victims/survivors in the situations before the Court has prevented women from having the information and support necessary to apply to participate in the Court proceedings.
 - **Currently no women have been recognized as direct victims participating in the case;**
 - **No victims of gender based crimes have been recognized by the Court;**
 - **No girl soldiers have been recognized by the ICC with the right to participate in the case;**
 - **Only 4 applicants have been recognized as victims in the current proceedings and therefore able to participate in the Confirmation of Charges Hearing.**
- Investigation strategies and outreach activities are independent and inter-related. **Effective outreach strategies should be cognizant of and complementary to the work of the OTP in the situations under investigation.** Amongst other strategies this requires that communities and populations overlooked by the OTP in their community relations work, should be addressed by the Registry in its outreach work, to redress the current bias towards consultations and relationships with male traditional, cultural, civic and community leaders. This bias is reflected in the Court’s work in Uganda and the DRC, where to date there have been no gender specific outreach activities to reach women victims/survivors of these conflicts.
- **Across all situation countries, the ICC should hold consultations with women leaders** and develop partnerships with local, national and international women’s organisations and groups working with victims of gender based crimes, to determine the most appropriate and effective means to carry out outreach for women.
- In recruiting staff for the new Outreach Unit, **experience and expertise in community development and mobilization and working with**

⁷ For a discussion on a broad range of outreach issues, see the Communications Team Paper, 22 November 2006.

⁸ This assessment is up until 9 November 2006 and is based on publicly available information from Court documents about applicants.

victims/survivors of gender based crimes should be primary criteria to ensure the outreach programmes are effective.

- The most important means of ensuring justice for victims through the ICC is for the Court to conduct effective investigations and bring charges against those most responsible for the gravest crimes – such investigations and charges must reflect the range of crimes committed during the conflict for the interests of justice and victims to be served. **Outreach activities should run parallel with but be independent of the investigatory work of the Court and ensure that victims/survivors** and their communities are aware of the functions of the Court, the opportunities for victims to participate, the right to have a legal representative to serve their distinct interests, and the opportunity to apply for reparations.
- Justice and victims participation are inter-related elements requiring **gender competence** amongst ICC staff to carry out effective investigations, prosecutions, protection and outreach activities.
- The Judges should continue to develop the **modalities for victims participation to ensure they are meaningful**, and reflects the crimes committed while balancing and ensuring the rights of the accused.

Gender Issues: Trust Fund for Victims

- In light of the ‘gender equity’ requirement⁹ the Asian States seat, which is still vacant, **must be filled by a woman. The nomination should remain open until the resumed session of the ASP in January 2007 or until this requirement has been achieved. Competence in gender issues should be a high priority in potential nominees.**
- In 2007 The Board of the Trust Fund and the Director should **establish effective fundraising strategies for the Trust Fund as a matter of urgency.** The amount of contributions received to date (around €1.6 million) is inadequate to cover the needs for assistance to victims and at a later stage, for reparation¹⁰. There are still a relatively small number of contributors.
- In light of the complexity of its tasks, the Board of Directors should meet more often, at a **minimum twice a year.**
- The Board and Secretariat will need to **consult victims and their families, as well as their legal representatives, and any competent expert or expert organization on the situation** of the potential beneficiaries and the ways to assist them (Regulation 49 of the Regulations of the Trust Fund for Victims). Such ‘experts’ should include those with expertise in **working with women victims/survivors of gender based crimes.**
- During 2007, a **functioning Secretariat for the Trust Fund for Victims should be established as a matter of urgency.** The Board and the Secretariat should immediately **establish guidelines, inclusive of gender-specific considerations, in order to fairly and effectively identify and implement projects and activities of assistance to victims**, including in a proactive manner (thus without awaiting assistance requests).
- The Board and Secretariat of the Trust Fund should **develop a strategic plan and identify the budget necessary** to be able to implement the mandate of the Fund.
- The Board and Secretariat will need to **consult international and national women’s organizations which can help them to implement assistance projects**, such as sexual and reproductive health clinics for treating victims of sexualized violence, hospitals, schools, and community-wide anti-violence programmes.

⁹ ICC-ASP/1/Res.6, para. 3 (9 September 2002): “The Assembly shall elect the members of the Board, all of whom shall be of a different nationality, on the basis of equitable geographical distribution and taking into account the need to ensure equitable gender distribution and equitable representation of the principal legal systems of the world. The members of the Board shall be of high moral character, impartiality, integrity and shall have competence in the assistance to victims of serious crimes.” See also ICC-ASP/1/Res.7, para. 8 (9 September 2002).

¹⁰ By contrast, the UN Peacebuilding Fund which opened in October 2006, already has US \$ 140 million in pledges.

Gender Issues: Structures and Institutional Development

There are currently no institutional mechanisms to: (1) assist States in their collective oversight of the implementation of gender mandates within the Rome Statute or to (2) independently oversee cases of sexual violence/abuse by ICC staff.

Gender Committee

There is currently **no institutional mechanism to assist States in their collective oversight of the implementation of gender mandates within the Rome Statute**. Currently this oversight is provided by individual states on an *ad hoc* basis. A more systemic mechanism is needed to assist States in fulfilling their responsibility to ensure the **effective implementation of the Rome Statute** including the gender provisions, an area currently falling behind in the ICC Strategic Plan, Budget and substantive work.

While the ASP made progress by appointing a Facilitator to monitor equitable geographical and gender representation amongst staff of the ICC, a Gender Sub-Committee is needed to support the Facilitator's work and enable oversight of the substantive gender provisions within the Rome Statute.

Recommendation:

- Pass a resolution at the ASP 2006 for the Bureau to undertake the study and development of a model for a Gender Committee of the Assembly.
- Establish at the ASP 2007, a Gender Committee of States Parties to monitor implementation of the gender mandates in the Rome Statute and assist the Court in ensuring gender-inclusive justice.

Oversight Mechanism

At the ASP's Fourth Session, the Assembly invited the Court, **"to submit proposals about an independent oversight mechanism"**¹¹, pursuant to Article 112(4) of the Rome Statute which enables the Assembly to establish "such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court." The Assembly appointed Prince Zeid Ra'ad Zeid Al-Hussein, who served as Special Advisor to the UN Secretary-General on sexual exploitation and abuse in UN peacekeeping operations, as the Facilitator on this issue.

Prince Zeid's 2005 report¹² (the "Zeid Report") on sexual exploitation and abuse in UN peacekeeping operations stemmed from a series of highly publicized incidents in 2004, evidencing instances of peacekeeping personnel engaging in sexual exploitation and abuse, such as demands for sexual favours in return for food or employment, sexual assault, rape and the presence of children fathered and abandoned by peacekeeping personnel. **Sexual violence/abuse by ICC staff is a realistic possibility for ICC field staff, especially if staff rules expressly prohibiting such conduct, and training on these rules, has not been implemented.** An oversight mechanism would enable an independent body to act as the focal

¹¹ ICC-ASP/4/Res.4, para. 24.

¹² "A comprehensive strategy to eliminate future sexual exploitation and abuse in UN peacekeeping operations", UN Doc. A/59/710, 24 March 2005.

point for reporting, investigation and resolution of alleged cases of sexual violence/abuse, so the experiences of victims/survivors are redressed and criminal behaviour by ICC staff does not go unpunished.

The Court is developing a report on oversight to be submitted to the ASP 2007.

Recommendations:

- Develop staff rules on sexual violence/abuse (i.e. defining “serious misconduct” to expressly include sexual violence/abuse and sexual harassment) including the waiving of immunity, and strict disciplinary accountability for staff who violate these rules (including termination of employment).
- Develop and implement training for ICC staff on these rules.
- Develop and implement effective programmes of outreach to local communities to explain the ICC’s policy against sexual violence/abuse and provide effective mechanisms to enable individuals to make complaints in a confidential setting.
- To facilitate *criminal accountability* for ICC staff alleged to have committed sexual violence/abuse, the Court should, at a minimum:
 - (1) Ensure that an independent oversight and investigatory mechanism collects evidence with a view to not only supporting disciplinary action but also criminal proceedings so it can take into consideration the elements of the crime which need to be established.
 - (2) Assist, if necessary, ‘situation’ States (with territorial jurisdiction over the alleged crimes committed by ICC staff) with their investigations and criminal proceedings.
 - (3) Should ‘situation’ States not proceed with prosecutions, the ICC should forward evidence and information related to the crime to the State of the alleged perpetrator. This will necessitate signing Memorandums of Understanding with States Parties to ensure that they forward cases of sexual violence/abuse by their nationals to the competent authorities to be considered for prosecution and report the results to the Court and the ASP.
 - (4) Develop a graduated system of accountability for ICC managers, peers or subordinates so that those who are negligent in preventing sexual violence/abuse are professionally disciplined and those who engage in conduct that may amount to a crime that is ancillary to the primary offence are held criminally accountable.

Gender Issues: Legal Representation

1. List of Legal Counsel - Overview

Overall there are 168 lawyers on the List of Legal Counsel. Of these, 27 are women, 141 are men. As in 2005, there are over 5 times more men than women on the List of Counsel, with 70% of the List are from WEOG (68% 2005).

16% of those on the List of Counsel are women; and 84% are men. This is the same as the figure for 2005. There has not been any progress by the Court in the number of women admitted to the List. During 2006, 59 people have been admitted to the List of whom 10 are women. This is at a rate of 16.9% (an increase of less than 1% for the rate of admission which makes no difference in the overall proportion of women/men on the List).

- There has been no improvement in the number of women, nor the regional diversity of those appointed to the List of Counsel.
- The WEOG figure has increased.
- The figures for Africa have increased by 2%, but decreased by 11% in the proportion of African women recognized on the List.
- The ICC has not instigated any specific strategies to address this imbalance.
- The ICC is obligated under Rule 90(4) to “take all reasonable steps to ensure that in the selection of common legal representatives, **the distinct interests of victims, particularly as provided in article 68(1)**¹³, are represented and that any conflict of interest is avoided”.

Therefore the *composition of the List is crucial to ensure it includes Counsel with the necessary experience, expertise and skills to effectively represent the range of victims of crimes* within the jurisdiction of the Court.

At this time, the **distinct interests of victims of gender based crimes are not reflected in the List of Counsel**. There are very few on the List of Counsel with experience and expertise in representing victims of sexualized violence and the ICC has not made sufficient effort to encourage applications from counsel with this expertise.

Recently, the Registry initiated a process of **reviewing the Regulations in order to identify alternative avenues of experience** that would meet the criteria for inclusion on the List of Counsel.

Recommendations:

- **Initiate specific strategies to promote the List of Counsel** amongst women’s organization and networks, women lawyers associations and other judicial

¹³ Article 68 (1) obligates the Court to take “appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. ...the Court shall have regard to all relevant factors including age, **gender**...and the nature of the crimes, in particular but not limited to, **where the crime involves sexual or gender violence or violence against children**’. Emphasis added.

associations such as national bar associations, the IBA, ICB and IAP, particularly in countries with situations before the ICC and countries under-represented at the ICC.

- **Set time-specific targets to increase the number of women** on the List of Counsel. Currently there are 27 women on the List (16%). By July 2007, the ICC should aim to have women comprising 32% of the List; by November 2007 aim to have 50%.
- **Actively promote the List of Assistants to Counsel**¹⁴ to women lawyers associations (as above) and within countries with situations before the ICC.
- **Chambers should exercise oversight of the Registry to monitor their progress** and strategies to ensure there is sufficient expertise on the List and sufficient numbers of Counsel with this expertise to represent the distinct interests of victims of gender based crimes.
- Be proactive in its strategies to **promote the List of Professional Investigators for Counsel** to and ensure appointment of investigators **experienced and skilled in conducting investigations into gender based crimes** and interviewing/working with victims of rape and other forms of sexual violence.

2. Indigence Form

The Form to determine indigence has not yet been approved and victims continue to have to use the indigence form designed for the Accused. Many victims find this offensive as the context and issues regarding indigence for victims is very different from issues of indigence for an accused whose position and authority may make it likely that he/she holds assets which could disqualify him/her from legal aid and could be frozen, seized and transferred in respect of reparations.

Most victims applying to be recognized by the ICC have been displaced are often living in camps for Internally Displaced People with few or no assets, income or significant material property.

Recommendations:

- The Victims Form for Indigence should be **finalized and approved by the Judges** as a matter of urgency – this form is the basis for assessing whether an individual qualifies for the Legal Aid Programme which will enable them to engage Counsel to represent their interests. For many victims without the Legal Aid Programme they will not be able to have representation before the ICC.
- Given the prevailing systemic marginalization of particular populations and communities and the circumstances constructed by armed conflict which further underscores pre-existing discrimination, there should be **a presumption of indigence** for many communities of victims including women, indigenous communities, those under 18 years of age and those living in IDP camps.
- The indigence form must be accessible for victims and intermediaries to understand and must be handled with complete confidentiality to ensure the safety of both parties.

¹⁴ Pursuant to Regulations 124 and 125 of the Regulations of the Registry

3. Protection

The Court's current position on protection extends only to the protection of prosecution and defence witnesses. There have not been sufficient affirmative policies nor strategies for the protection of victims, intermediaries and Counsel.

It would appear that the threshold for determining a 'specific threat to life' against a victim or intermediary may be so high and narrow that it would almost never require the Court to act to ensure protection for those at serious risk as a result of their engagement with the ICC.

Recommendation:

- Ensure that protection and support measures **are sensitive to the particular circumstances of women in conflict situations and ensure women and girls** who are recognized as 'victims' by the Court, benefit from protection procedures, and provide **appropriate measures for intermediaries and Counsel** whose safety may also be at risk.