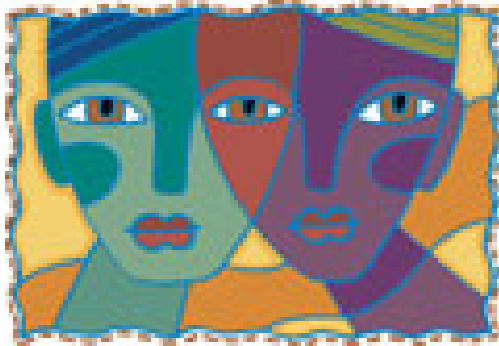


# Gender Report Card



## on the International Criminal Court 2006

Women's Initiatives for Gender Justice



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## Introduction

This is the second Gender Report Card produced by the Women’s Initiatives for Gender Justice. Its purpose is to assess the implementation of the Rome Statute of the International Criminal Court (“Rome Statute”), Rules of Procedure and Evidence (“RPE”) and Elements of Crimes (“EoC”) and in particular the gender mandates they embody, in the more than four years since the Rome Statute came into force.<sup>1</sup>

The Rome Statute is far-reaching and forward-looking in many aspects including in its gender integration in the following key areas:

- ◆ *Structures* - requirement for fair representation of female and male Judges and the International Criminal Court (“ICC”) staff as well as fair regional representation; requirement for legal expertise in sexual and gender violence; requirement for expertise in trauma related to gender based crimes; the unique establishment of the Trust Fund for Victims.
- ◆ *Substantive Jurisdiction* - crimes of sexual violence as well as definitions of crimes inclusive of gender and sexual violence, constituting genocide, crimes against humanity and/or war crimes; principle of non-discrimination in the application and interpretation of law, including on the basis of gender.
- ◆ *Procedures* - witness protection and support; rights of victims to participate; rights of victims to apply for reparation; special measures especially for victims/witnesses of crimes of sexual violence.

While implementing the Rome Statute is a task we all share, it is the particular responsibility of the Assembly of States Parties (“ASP”) and the ICC. This Gender Report Card is an assessment of the progress to date in implementing the Statute and its related instruments in concrete and pragmatic ways to establish a Court that truly embodies the Statute upon which it is founded and is a mechanism capable of providing gender-inclusive justice.

This Gender Report Card is divided into three sections: (1) Structures and Institutional Development; (2) Procedures and Substantive Jurisdiction; and (3) Substantive Work of the ICC and ASP. Recommendations are provided at the end of the sections on Structures and Institutional Development and Substantive Work of the ICC and ASP.

<sup>1</sup> The importance of these three instruments is evidenced by Article 21(1) of the Rome Statute, which states that “the Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.”

# Structures & Institutional Development

## Structures

### Judiciary, Office of the Prosecutor, Registry

#### Gender Equity

The Rome Statute requires that, in the selection of Judges, the need for a “fair representation of female and male judges” be taken into account. The same provision applies to the selection of staff in the Office of the Prosecutor (“OTP”) and in the Registry (Articles 36(8)(a)(iii) and 44(2)).

#### Geographical Equity

The Rome Statute requires that, in the selection of Judges, the need for “equitable geographical representation” be taken into account in the selection process. The same provision applies to the selection of staff in the OTP and in the Registry (Articles 36(8)(a)(ii) and 44(2)).

#### Gender Expertise

##### Expertise in Trauma

The Registrar is required to appoint staff to the Victims and Witnesses Unit (VWU) with expertise in trauma, including trauma related to crimes of sexual violence (Article 43(6)).

#### Legal Expertise in Violence Against Women

The Rome Statute requires that, in the selection of Judges and the recruitment of ICC staff, the need for legal expertise on violence against women or children must be taken into account (Articles 36(8)(b) and 44(2)).

Rule 90(4) of the RPE requires that, in the selection of common legal representatives for the List of Legal Counsel, the distinct interests of victims are represented. This includes the interests of victims of crimes involving sexual or gender violence and violence against children.

#### Legal Advisers on Sexual and Gender Violence

The Prosecutor is required to appoint advisers with legal expertise on specific issues, including sexual and gender violence (Article 42(9)).

#### Trust Fund for Victims

The Rome Statute requires the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and for their families (Article 79; see also Rule 98 RPE).

## Recruitment of ICC Staff<sup>2</sup>

		Men	Women
Overall staff <sup>3</sup> (professional, general and elected officials)		54%	46%
Overall professional posts <sup>4</sup> (including elected officials)		56%	44%
Judiciary	Judges	56%	44%
	Overall <sup>5</sup>	52%	48%
OTP <sup>6</sup>	Overall	61%	39%
Registry <sup>7</sup>	Overall	54%	46%

## Executive Committee and Senior Management

Judiciary - Presidency	67%	33%
OTP - Executive Committee	50%	50%
OTP - Heads of Division	33%	67%
OTP - Heads of Sections <sup>8</sup>	83%	17%
Registry - Heads of Division	100%	0%
Registry - Heads of Sections <sup>9</sup>	63%	37%

## Other ICC-Related Institutions

Trust Fund for Victims - Board of Directors	60%	40%
ASP Bureau - Executive	67%	33%

<sup>2</sup> These figures are as of 1 November 2006.

<sup>3</sup> This overall figure represents a 1% decline in female appointments from 2005.

<sup>4</sup> Although there has been a 2% improvement in female appointments to professional posts from 2005, there is still a 12% gap between male and female appointments to professional posts in 2006.

<sup>5</sup> This represents a 2% decline from 2005 of women in professional posts in the Judiciary. Moreover, although the overall figures show 52% male and 48% female appointments, there is an over-concentration of women in the lower professional posts (P1 - P3).

<sup>6</sup> While there appears to have been a considerable decline in female appointments to professional posts in the OTP since 2005, a more inclusive method of calculation in this year's Gender Report Card indicates a possible increase in the number of women appointed to professional posts. Nevertheless, there remains a 22% difference between male and female professional appointments, and as with the other two organs there is an over-concentration of women in P1 - P3 posts, and only two women at a P5 level.

<sup>7</sup> As in 2005, there is an 8% difference in male and female appointments to professional posts in the Registry.

<sup>8</sup> Heads of Sections and equivalent posts, such as heads of investigation teams and prosecution teams.

<sup>9</sup> Heads of Section and equivalent posts, such as heads of the Offices of Public Counsel.

## Geographical Equity Among Professional Staff: The ‘Top 5’ in Each Region and the ‘Top 10’ Overall<sup>10</sup>

<p style="text-align: center;">WEOG<sup>11</sup> (59.0% overall) <i>‘Top 5’ range from 8 - 22 professionals</i></p>	<ol style="list-style-type: none"> <li>(1) UK</li> <li>(2) France</li> <li>(3) Germany</li> <li>(4) Italy</li> <li>(5) Canada and the Netherlands</li> </ol>
<p style="text-align: center;">Africa (17.6% overall) <i>‘Top 5’ range from 1 - 6 professionals</i></p>	<ol style="list-style-type: none"> <li>(1) South Africa</li> <li>(2) Nigeria</li> <li>(3) Sierra Leone</li> <li>(4) DRC,<sup>12</sup> Benin, Gambia and Senegal</li> <li>(5) The remaining countries each have one national appointed.</li> </ol>
<p style="text-align: center;">GRULAC<sup>13</sup> (11.7% overall) <i>‘Top 5’ range from 2 - 5 professionals</i></p>	<ol style="list-style-type: none"> <li>(1) Colombia</li> <li>(2) Trinidad and Tobago</li> <li>(3) Brazil</li> <li>(4) Argentina</li> <li>(5) Costa Rica and Ecuador</li> </ol>
<p style="text-align: center;">Eastern Europe (6.9% overall) <i>‘Top 5’ range from 1 - 4 professionals</i></p>	<ol style="list-style-type: none"> <li>(1) Romania</li> <li>(2) Croatia</li> <li>(3) Serbia and Montenegro<sup>14</sup></li> <li>(4) Belarus, Estonia, Georgia and Slovakia (one professional each)</li> <li>(5) No other countries from Eastern Europe have staff appointed to professional posts.</li> </ol>
<p style="text-align: center;">Asia (4.8% overall)</p>	<p style="text-align: center;">Only Jordan has more than one national appointed to a professional post.</p>
<p style="text-align: center;">Overall</p>	<ol style="list-style-type: none"> <li>(1) UK</li> <li>(2) France</li> <li>(3) Germany</li> <li>(4) Italy</li> <li>(5) Canada and the Netherlands</li> <li>(6) Australia</li> <li>(7) South Africa</li> <li>(8) Belgium, Colombia, Nigeria and Spain</li> <li>(9) Romania</li> <li>(10) Austria, Brazil, Croatia, Finland, Ireland, Jordan, New Zealand, Sierra Leone, Switzerland, Trinidad and Tobago, USA</li> </ol>

<sup>10</sup> The overall regional figures are as of 1 November 2006 and the country-specific figures are as of 1 August 2006. ICC personnel from non-States Parties (e.g. USA, Algeria, Iran) have been included in the calculation of geographic representation. These appointments do not represent a significant proportion (approximately 6.7%) of ICC personnel. For a clear picture with regard to gender and geographical representation, the ICC should assess gender breakdown by country and region and make this information publicly available.

<sup>11</sup> WEOG is an abbreviation for “Western European and Others Group”.

<sup>12</sup> Democratic Republic of The Congo

<sup>13</sup> GRULAC is an abbreviation for “Group of Latin American and Caribbean Countries”.

<sup>14</sup> ICC personnel from Serbia and Montenegro have been listed as such, and do not distinguish whether they are from Serbia or Montenegro. They have been accordingly grouped together.

## Appointments to the List of Legal Counsel<sup>15</sup>

	Men	Women
Overall (168 individuals on the List of Legal Counsel) <i>'Top 5': 1. USA, 2. France, 3. UK, 4. DRC, 5. Belgium</i>	84%	16%
WEOG <sup>16</sup> (70% of Counsel) <i>'Top 5': 1. USA, 2. France, 3. UK, 4. Belgium, 5. Canada and Spain</i>	85%	15%
Africa <sup>17</sup> (24% of Counsel) <i>'Top 5': 1. DRC, 2. Mali, 3. Cameroon, 4. Kenya, 5. Uganda and Senegal</i>	82.5%	17.5%
Eastern Europe (4.2% of Counsel) <i>'Top 5': 1. Serbia and Montenegro<sup>18</sup> and The Former Yugoslav Republic of Macedonia (2 appointees each) and 2. Croatia, Romania and Slovenia (1 appointee each)</i>	57%	43%
GRULAC (1.8% of Counsel) <i>Only 3 GRULAC appointments: Trinidad and Tobago, Argentina and Mexico (1 appointee each)</i>	100%	0%
Asia <sup>19</sup> (0.6% of Counsel) <i>Only 1 Asian appointment: Philippines</i>	100%	0%

<sup>15</sup> These figures are as of 9 October 2006.

<sup>16</sup> Appointments from the USA, which is not a States Party, have been included in the calculation for the WEOG region. Note the actual figure for WEOG is 69.6%.

<sup>17</sup> Appointments from Algeria, Cameroon, Mauritania and Morocco, which are not States Parties, have been included in the calculation for the Africa region. Note the actual figure for Africa is 23.8%.

<sup>18</sup> The two appointments from Serbia and Montenegro are listed as such, and do not distinguish whether they are from Serbia or Montenegro. They have been accordingly grouped together.

<sup>19</sup> The single appointment from the Philippines, which is not a States Party, is included in the calculation for the Asia region.



## Structures: Overview of Trends



Overall professional staff of the ICC are from 59 nationalities: WEOG 59.0%, Africa 17.6%, GRULAC 11.7%, Eastern Europe 6.9% and Asia 4.8%.<sup>20</sup> Among the 'Top 5' countries with professional staff at the Court, all are from WEOG.



There is a 12% gap between the appointment of men and women to professional posts across the Court. This is particularly true for appointments in the senior level posts (P4 - P5).



Women occupy only 2 of 12 Head of Section positions (or their equivalents) in the OTP, a 67% gap between men and women appointed.



Women occupy only 7 of 19 Head of Section positions (or their equivalents) in the Registry, a 26% gap between men and women appointed.



70% of the List of Legal Counsel are from WEOG.



On the List of Legal Counsel there are over five times more men than women recognized as counsel. Although the Rome Statute and the RPE require that there should be legal representatives on the List of Legal Counsel with expertise on sexual and gender violence, this criteria is not taken into account by the Court when assessing the eligibility of applicants to the List, nor is information sought from applicants with regard to their experience in this area.



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. Appointing ICC staff with legal expertise on violence against women or children recognizes the significance of crimes against women, and the need for expertise at every level to ensure these crimes are prosecuted.



The position of Gender Legal Adviser, obligated under Article 42(9) of the Rome Statute, has not been appointed. This position is important to ensure that gender crimes are both effectively investigated and prosecuted. The position was advertised in December 2005 and despite the urgent need for the appointment of a Gender Legal Adviser, no one has been interviewed nor appointed for the position.



The Regulations for the Trust Fund for Victims were adopted at the Fourth Session of the ASP in 2005. The Secretariat for the Trust Fund is still to be established, and this is expected in 2007. To date no assistance to victims has been provided through the Fund. As of 29 August 2006, the total amount received by the Trust Fund was €1.6 million.<sup>21</sup>

<sup>20</sup> These figures exclude elected officials and language staff

<sup>21</sup> The contributions deposited in euros with the Trust Fund for Victims from 16 August 2005 to 30 June 2006 was € 803,122.32 (€19,460.69 individual contributions; €783,661.63 States' contributions).

## **Institutional Development: Gender Training**

### **Registry**

There has been no gender training in 2006.

Two sections within the Registry have prioritized gender training during 2007: The VWU has identified gender training for their field staff and the Office of Public Counsel for Victims has requested funds for training in specific techniques for interviewing children and vulnerable groups, including victims of sexual crimes.

### **Office of the Prosecutor**

On 24 May 2006, the OTP hosted an expert meeting regarding the investigation of sexual and gender violence crimes in Darfur, Sudan. This meeting was for senior level personnel within the OTP and experts on sexual and gender violence, including from the ad hoc tribunals.

No gender training has been identified within the OTP during 2007. The Planning and Operations Section has requested funds in their budget proposal for an expert meeting on sexual crimes in 2007.

### **Judiciary**

The Judges held a substantive one-day gender seminar in February 2006. This was conducted by the Women's Initiatives for Gender Justice.

A one-day Gender Training Seminar was also conducted for Associate Legal Officers in February 2006 by the Women's Initiatives for Gender Justice.

No gender training has been identified for 2007.

## Institutional Development: Policies

### Sexual Harassment Policy<sup>22</sup>

Policy ✓	Sexual harassment is defined as “any unwelcome sexual advance, request for sexual favour or other verbal, non-verbal or physical conduct of a sexual nature, which interferes with work, alters or is made a condition of employment, or creates an intimidating, degrading, humiliating, hostile or offensive work environment.”
Procedure ✓	Procedures are not featured in the policy itself but are outlined in Chapter X of the Staff Rules. Formal complaints are forwarded to the Disciplinary Advisory Board <sup>23</sup> which hears the case with brief statements and rebuttals by the staff member who has allegedly violated the Policy, and if the staff member wishes, by a representative (who must be a staff member or a former staff member of his or her choosing). There is no indication in the Staff Rules of a right for complainants to participate in the proceedings nor their access to a representative. The Board must make a decision within 30 days and the staff member may appeal the decision to the Administrative Tribunal of the International Labour Organization.
Training ✗	There has been no training undertaken on the Sexual Harassment Policy for the designated focal points.
Focal Point ✓	Registrar or Prosecutor in the first instance, or a third party if the staff member feels uncomfortable approaching the Registrar or Prosecutor directly (i.e. manager, staff counselor, fellow staff member, representative of the Human Resources Section, Court Medical Officer or member of the Staff Representative Body).

### Equal Opportunity Policy<sup>24</sup>

Policy ✓	The Court “recruits, hires, promotes, transfers, trains and compensates its staff members on the basis of merit and without regard for race, colour, ethnicity, religion, sexual orientation, marital status, or disability.” Gender discrimination is not mentioned in this overarching provision, but it is enumerated in the Policy’s provision on non-discrimination in relation to opportunities for employment, transfer and training. Discrimination is described as both direct and indirect.
Procedure ✓	Grievance procedures are described in Section 6 of the Policy and are identical to the procedures for the Sexual Harassment Policy.
Training ✗	There has been no training undertaken on the Equal Opportunity Policy for the designated focal points.

<sup>22</sup> “Sexual and Other Forms of Harassment”, Administrative Instruction ICC.

<sup>23</sup> The Disciplinary Advisory Board is comprised of one member and two alternate members appointed by the Registrar (in consultation with the Presidency); one member and two alternate members appointed by the Prosecutor; and one member and two alternate members elected by the staff representative body, at least one of whom shall be a staff member of the OTP.

<sup>24</sup> “Equal Employment Opportunity and Treatment”, Administrative Instruction ICC.

Focal Point ✓	Registrar or Prosecutor in the first instance, or a third party if the staff member feels uncomfortable approaching the Registrar or Prosecutor directly.
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### Parental Leave within the Staff Rules

Policy ✓	ICC staff are entitled to a continuous period of 16 weeks' maternity leave with full pay; a continuous period of eight weeks' adoption leave with full pay; and four weeks of "other parent leave" with full pay in connection with the birth or adoption of that staff member's child.
Procedure ✓	A staff member seeking maternity leave must present a medical certificate stating the probable date of delivery of her child; maternity leave may commence between six and three weeks prior to the probable date of delivery. A staff member seeking adoption leave shall inform the Registrar or the Prosecutor at least one month prior to the anticipated commencement of the adoption leave and submit the documentary proof available at that time. A staff member seeking "other parent leave" must submit proof of the birth or adoption of the child within three months of the other parent leave ending.
Training ✗	It is unclear whether new staff are given an orientation on staff rules and conditions including the parental leave provisions.
Focal Point ✓	Direct managers for maternity leave and other parent leave; Registrar or Prosecutor for adoption leave.

### Compensation of Judges<sup>25</sup>

Policy ✓	As adopted by the ASP 2004, "spouse" is defined as a partner by marriage recognized as valid under the law of the country of nationality of a Judge or by a legally recognized domestic partnership contracted by a Judge under the law of the country of his or her nationality.
Procedure ✓	See Recommendations.
Training ✗	See Recommendations.
Focal Point ✓	Assembly of States Parties.

<sup>25</sup> "Draft Conditions of Service and Compensation of Judges of the International Criminal Court", ICC-ASP/3/12, 10 August 2004, as adopted by the ASP in 2004 in Resolution ICC-ASP/3/Res.3.

## Structures and Institutional Development: Recommendations

### Structures



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 with a background in working with gender based crimes by including this as criteria in new positions and indicating this preference on the website.



Develop strategies to address the significant under-representation of women in senior professional posts (P4 - P5).



Implement affirmative action strategies for recruitment including active promotion of positions through women's NGOs and networks particularly in countries with situations before the ICC and countries under-represented at the ICC.



Initiate specific strategies to promote the List of Legal Counsel amongst women's lawyers associations, women's judges associations, and women's networks within other judicial associations such as the IBA, ICB and IAP, particularly in countries with situations before the ICC and countries under-represented at the Court.



Seek information about candidates' experience representing victims of gender based crimes on the application form for List of Legal Counsel. Explicitly encourage applications from lawyers with this experience on the ICC website and develop a "Frequently Asked Questions" page on the ICC website to promote a better understanding of the application process.



Set time-specific targets to increase the number of women on the List of Legal 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%.



Establish the List of Assistants to Legal Counsel<sup>26</sup> and actively promote the List to women's lawyers associations (as above) and within countries with situations before the ICC.



Apply 'best practice' in recruitment programmes which emphasize the importance of those involved in recruitment undergoing training on potential discrimination which may be taking place (i.e. in relation to establishing criteria, advertising positions, reviewing CVs, recognizing diverse expertise and interviewing).



Amend the Rules of Procedure of the ASP, so that gender competence within the ASP Bureau is mandated, in addition to equitable geographical distribution and adequate representation of the principal legal systems of the world.

<sup>26</sup> Pursuant to Regulations 124 and 125 of the Regulations of the Registry.



Establish an effective Secretariat for the Trust Fund for Victims as a matter of urgency. The Board of Directors and the Secretariat should immediately establish guidelines in order to fairly and effectively identify and implement projects and activities of assistance to victims without delay. While the Board of Directors endeavour to assess as soon as possible its first requests for assistance received in October 2006, it should also respond proactively to situations where assistance to victims is required.



In light of the complexity of its task, the Board of the Trust Fund for Victims should meet at minimum twice a year.



The Board and Secretariat of the Trust Fund for Victims should embark on a vigorous fundraising campaign. Currently there is only €1.6 million in the Fund. More pledges need to be encouraged from States and individual donors should be sought to contribute to the scheme.

## Institutional Development: Gender Training



Prioritize the need for ongoing gender training for staff of all organs of the Court and make attendance mandatory at gender training seminars. The President, Registrar and Prosecutor should ensure staff attendance for each organ of the Court.



Prioritize the need for training individuals on the List of Legal Counsel on interviewing/working with victims of rape and other forms of sexual violence and the gender provisions within the Rome Statute.



Collaborate with local, national and international women's organizations to develop and organize gender training.



Develop training on issues of trauma and sexual violence.<sup>27</sup>



Appoint advisers with legal expertise on sexual and gender violence<sup>28</sup> to enable focal points within each organ of the Court to organize and develop gender training.

<sup>27</sup> Rule 17(2)(iv) RPE requires the VWU to make this available to the Court.

<sup>28</sup> Pursuant to Articles 42(9), 44(2) in combination with 36(8)(b), and 43(6) of the Rome Statute.

## Institutional Development: Policies



Amend the Staff Rules so complainants in relation to the Sexual Harassment Policy and Equal Opportunity Policy are provided the opportunity to participate in the disciplinary hearing and have access to a representative regarding their case before the Disciplinary Advisory Board.



Implement training for ICC staff on the grievance procedures for the Sexual Harassment and Equal Opportunity Policies. Section 4.5 of the Sexual Harassment Policy requires managers and supervisors to “ensure that all staff, including existing and new employees” have knowledge of the policy, their rights and how to use the grievance procedure. Section 4.6 of the Policy further requires all staff to be trained on issues related to harassment and for training programs to be held *on an ongoing basis*.



Develop a flexible working conditions policy for ICC staff. This facilitates the recruitment of, and enables the ongoing employment of, staff members (primarily women) with family and other commitments.



Develop staff rules on sexual violence/abuse in the field (i.e. defining “serious misconduct” to expressly include sexual violence/abuse) ensuring strict disciplinary accountability for staff who violate these rules (including termination of employment).



Develop and implement training for ICC staff on the Court’s rules on sexual violence/abuse.



Review and amend the current definition of “spouse” in the Conditions of Service and Compensation of Judges of the ICC to include all domestic partnerships including same-sex partners, whether legally recognized or not under the law of the country of a Judge’s nationality.



Develop and implement sexuality based anti-discrimination training for the Judges and Bureau of the ASP.

# Substantive Jurisdiction & Procedures



## Substantive Jurisdiction

### War Crimes and Crimes Against Humanity: Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization and other Sexual Violence

The Rome Statute explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence as war crimes in international and non-international armed conflict as well as crimes against humanity (Articles 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g); see also corresponding Articles in the EoC<sup>29</sup>).

### Crimes Against Humanity: Persecution and Trafficking

In addition to the crimes of sexual and gender violence discussed above, persecution is included in the Rome Statute as a crime against humanity and specifically includes for the first time the recognition of gender as a basis for persecution (Articles 7(1)(h), 7(2)(g) and 7(3); see also Article 7(1)(h) EoC).

The Rome Statute also includes trafficking in persons, in particular women and children, as a crime against humanity within the definition of the crime of enslavement (Articles 7(1)(c) and 7(2)(c); see also Article 7(1)(c) EoC).

### Genocide: Rape and Sexual Violence

The Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention (Article 6). The EoC specify that genocide (by causing serious bodily or mental harm) includes rape and sexual violence (Article 6(b) EoC).

### Non-discrimination

The Rome Statute specifically states that the application and interpretation of law must be without adverse distinction on the basis of enumerated grounds, including gender (Article 21(3)).

<sup>29</sup> The EoC (ICC-ASP/1/3) define the elements of each crime under the jurisdiction of the Court. Pursuant to Article 9(1) of the Rome Statute, the “Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8 [on genocide, crimes against humanity and war crimes]” and is therefore a non-binding, but guiding document for the Court.

## Procedures

### Measures during Investigation and Prosecution

The Prosecutor shall “take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children” (Article 54(1)(b)).

### Witness Protection

The Court has an overarching responsibility to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, taking into account all relevant factors including age, gender, health and the nature of the crime, in particular sexual or gender based crimes. The Prosecutor is required to take these concerns into account in both the investigative and the trial stage. The Court may take appropriate protective measures in the course of a trial, including *in camera* proceedings, allowing the presentation of evidence by electronic means and controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation. The latter measures shall, in particular, be implemented in the case of a victim of sexual violence or a child (Article 68; see also Rules 87 and 88 RPE).

The Rome Statute provides for the creation of a Victims and Witnesses Unit (VWU) within the Court’s Registry. The VWU will provide protective measures, security arrangements, counseling and other appropriate assistance for victims and witnesses who appear before the Court, and others at risk on account of their testimony (Articles 43(6) and 68(4)).

### Evidence

The RPE provide special evidentiary rules with regard to crimes of sexual violence. Rules 70 (“Principles of Evidence in Cases of Sexual Violence”), 71 (“Evidence of Other Sexual Conduct”) and 72 (“In Camera Procedure to Consider Relevance or Admissibility of Evidence”) stipulate that questioning with regard to the victim’s prior or subsequent sexual conduct or the victim’s consent is restricted. In addition, Rule 63(4) states that corroboration is not a legal requirement to prove any crime falling within the jurisdiction of the Court and in particular crimes of sexual violence.

## Procedures

### Participation

The Rome Statute explicitly recognizes the right of victims to participate in the justice process, directly or through legal representatives, by presenting their views and concerns at all stages which affect their personal interests (Article 68(3); see also Rules 89 - 93 RPE).

Rule 90(4) of the RPE requires that there be legal representatives on the List of Legal Counsel with expertise on sexual and gender violence.

Rule 16(1)(d) of the RPE states that the Registrar shall take “gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.”

### Reparation

The Rome Statute includes a provision enabling the Court to establish principles and, in certain cases, to award reparation to, or in respect of, victims, including restitution, compensation and rehabilitation (Article 75; see also Rules 94 - 97 RPE). The Statute also requires the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and for their families (Article 79; see also Rule 98 RPE).

# Substantive Work of the ICC and ASP

## Substantive Work of the ICC and ASP<sup>30</sup>

### States Parties / ASP

Budget for the ICC	In its annual review of the budget, the ASP should ensure the Court is sufficiently funded to carry out its mandate and exercises the most efficient use of resources to maximize its impact. Under-resourcing in previous years has hindered the operational work in significant areas (i.e. investigation teams, outreach, field offices).
Work of States Parties	<p>The ASP is meeting for 11 days (including the resumed session) in December and January. This increases the working days from the last two years and provides States with more time for decision making.</p> <p>On 14 February 2006, the Bureau reconstituted its two Working Groups and adopted their terms of reference. There continues to be concerns about the level of co-ordination provided by the Bureau and the level of communication between the Bureau and States Parties in The Hague, New York and capitals.</p>
Oversight of implementation of gender mandates	The ASP Bureau made progress by appointing a Facilitator to monitor equitable geographical and gender representation amongst staff of the ICC. However, there is no institutional mechanism to support the Facilitator's work nor to assist States in their collective oversight of the implementation of other gender mandates within the Rome Statute.
Implementing Legislation	As of 1 January 2006, approximately 35% of States Parties had implemented legislation incorporating provisions of the Rome Statute into their domestic legislation. There are a wide range of practices with regard to implementation, with some States adopting substantially the same definitions of crimes provided in the Rome Statute, others selectively adopting definitions from the Rome Statute and/or omitting parts of the definitions of crimes and some States not amending any domestic legislation, since they consider their domestic legislation to be already consistent with the Statute. There are also a wide range of practices amongst States in how they implement the gender mandates of the Rome Statute, with some States adopting most of the gender provisions in the Statute in their domestic legislation while other States have diminished or excluded the gender specific definitions of the crimes.

<sup>30</sup>This assessment reflects the work of the ICC and ASP during 2006, up to and including the commencement of the Confirmation of Charges Hearing, 9 November 2006.

## Registry

### Rights of victims to participate

Rule 16(1)(d) of the RPE obligates the Registrar to take “gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.”

Standard application forms to facilitate victims’ applications for participation and reparation have been developed. A booklet explaining the functions of the Court, victims’ rights and how to complete the participation and reparation forms has also been developed. The forms and booklet are available in English and French. The ICC has confirmed that there is no formal obligation to use the forms as long as all the relevant information is provided by the applicant.

Uganda

No decisions from the Pre-Trial Chamber in relation to victims’ applications. As such, no victims have been recognized in relation to the Uganda cases. There is no information available on the gender breakdown of victim applicants from Uganda.

DRC  
(*The Prosecutor v. Thomas Lubanga Dyilo*<sup>31</sup>)

Approximately 80 - 100 individuals have applied for victim status in order to participate in proceedings in the DRC situation, including 17 victims of gender based crimes allegedly committed by the UPC, one of whom is a Prosecution witness.

Four applicants and their children, who were boy soldiers, have been recognized as victims of *The Prosecutor v. Thomas Lubanga Dyilo*, (hereafter the “Lubanga case”), and are therefore able to participate in the Confirmation of Charges Hearing. To date, no victims of gender based crimes have been recognized by the Court and no girl soldiers have been recognized as victims of the Lubanga case.

On 6 September 2006, the observations from the Prosecutor summarized six victim applications (applicants are also Prosecution witnesses) and noted that amongst the six applicants, one was raped by a UPC commander, one was ordered to mutilate the sexual organs of Lendu villagers and one witnessed UPC troops rape young girls before killing them. To date there are no charges for gender based crimes in the case for the DRC. See Charges Section. See also the Key Decisions Section, Decision of 20 October 2006.

Darfur, Sudan

No decisions from the Pre-Trial Chamber in relation to victims’ applications. As such, no victims have been recognized in relation to the Darfur situation. There is no information available on the gender breakdown of victim applicants from Darfur.

<sup>31</sup> Thomas Lubanga Dyilo does hold, or has held, positions of Founder and President of the Union des Patriotes Congolais (UPC) and Commander in Chief of its military wing (FPLC) and is charged by the ICC with the enlistment and conscription of child soldiers and using them to participate actively in hostilities (hereafter “enlistment and conscription of child soldiers”).

## Legal Representation for Victims

Victims can apply for legal representation through the Court's Legal Aid Programme. The form to determine indigence in order to qualify for legal aid has not been approved and victims continue to have to use the indigence form designed for suspects. If victims can afford it, they can also obtain legal representation before they have been granted victim status.

Although Rule 90(4) requires that there should be legal representatives on the List of Legal Counsel with expertise on sexual and gender violence, this criteria is not taken into account by the Court when assessing the eligibility of applicants to the List, nor is information sought from applicants with regard to their experience in this area.

Uganda	It is unknown whether any of the applicants have legal representation. To date, no legal representatives have been assigned by the Judges to applicants from Uganda.
DRC	The four victims who have been granted the right to participate in the Lubanga case have legal representation.
Darfur, Sudan	It is unknown whether any of the applicants have legal representation. To date, no legal representatives have been assigned by the Judges to applicants from Darfur.

## Outreach

Overall, there have been limited outreach activities undertaken by the Court in Uganda, DRC and Darfur, Sudan. A greater emphasis on outreach is expected in 2007.

Uganda	The ICC has held seven workshops and two meetings in northern Uganda predominantly with traditional leaders. To date there have been no specific meetings nor workshops with women victims/survivors of the conflict. The ICC has overlooked co-operation with women's groups in providing outreach.
DRC	In general there have been insufficient outreach activities in the DRC and to date there have been no specific strategies to reach women victims/survivors of the conflict.
Darfur, Sudan	In general there have been insufficient outreach activities in relation to Darfur and to date there have been no specific strategies to reach women victims/survivors of the conflict.

## Office of the Prosecutor

### Investigation and Prosecution Strategy

Uganda	Gender based crimes were investigated in relation to the six incidents selected for prosecution. See Charges Section.
DRC	<p>Despite widespread documentation of gender based crimes<sup>32</sup> these crimes were not effectively investigated in the Lubanga case. On 28 June 2006, the Prosecutor announced the temporary suspension of further investigations in relation to other potential charges against Lubanga and indicated that the current charges would not be amended. As outlined by the Prosecutor, the investigations which had been underway included allegations of murder, pillaging, displacement of civilians and did not include investigations of gender based crimes.</p> <p>On 7 September 2006, the Women’s Initiatives for Gender Justice requested leave to participate as <i>amicus curiae</i> to ensure other crimes, including sexual violence crimes, are not overlooked in the Lubanga case. On 25 September 2006, the Prosecution submitted observations and asked the Pre-Trial Chamber to deny leave to the Women’s Initiatives to file an amicus brief. On 26 September 2006, Pre-Trial Chamber 1 invited the Women’s Initiatives to re-file its Request for leave to submit observations in the DRC <i>situation</i> rather than the <i>case</i> against Lubanga. On 10 November 2006 the Women’s Initiatives re-filed its Request to prepare an amicus brief on the DRC situation.</p> <p>On 22 August 2006 and 19 October 2006, the OTP submitted that 16 victims of gender based crimes allegedly committed by the UPC who had applied for participation did not meet the criteria for victim status because the crimes committed against them were outside the charges against the suspect. The charges relate strictly to the enlistment and conscription of child soldiers.</p>
Darfur, Sudan	The OTP has registered hundreds of alleged cases of rape and has stated that there are indications of significant under-reporting of this crime. The Court has commissioned expert studies on rape and sexual violence in Darfur.
Central African Republic	Despite evidence of widespread and systematic sexual violence, no investigation has been formally announced by the ICC in response to the 7 January 2005 referral by the Government of the Central African Republic.

<sup>32</sup> See, for instance, United Nations Security Council, Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council, a “Special report on the events in Ituri, January 2002 - December 2003”, UN Doc. S/2004/573, 16 July 2004, p. 80; United Nations General Assembly, Report of the International Criminal Court, UN Doc. A/60/177, 1 August 2005, para. 37; Assembly of States Parties, Fourth Session, 28 November to 3 December 2005, Report on the activities of the Court, ICC-ASP/4/16, 16 September 2005, para. 53; Amnesty International, “Democratic Republic of Congo - Mass Rape: Time for Remedies”, AI Index: AFR 62/018/2004, 26 October 2004; Human Rights Watch, “Seeking Justice: The Prosecution of Sexual Violence in the Congo War”, March 2005, pp. 19 - 20; Women’s Initiatives for Gender Justice confidential report on “Rape and Sexual Violence in Ituri”, August 2006.



## Charges

Uganda	Two of five LRA commanders (Joseph Kony and Vincent Otti) have been charged with rape and sexual enslavement as crimes against humanity and/or war crimes.
DRC	Gender based crimes have not been included in the charges against Lubanga. The suspect faces charges of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities.
Darfur, Sudan	There are no charges to assess at this time.

## Judiciary

### Key Decisions

Uganda	There have been no relevant decisions to assess.
DRC	<p>On 17 January 2006, Pre-Trial Chamber 1 allowed six victims to participate in the investigation stage of the DRC situation by: (1) presenting their views and concerns, (2) filing documents and (3) requesting the Chamber to order specific measures. The Judges based this on their conclusion that the applicants' interests were affected in the investigation stage, and that this stage amounts to "proceedings" in which victims have the right to participate.<sup>33</sup> In the Pre-Trial Chamber's view, "the close link between the personal interests of the victims and the investigation is even more important in the regime established by the Rome Statute, given the effect that such an investigation can have on future orders for reparations pursuant to article 75 of the Statute."</p> <p>On 29 June 2006, Pre-Trial Chamber 1 rejected these six victims as "victims of the case" against Lubanga, as the crimes allegedly committed against them were outside the charges brought against the suspect of enlistment and conscription of child soldiers. There was no causal link between the harm the victims suffered and the charges against the suspect.</p> <p>On 24 February 2006, Pre-Trial Chamber 1 held that "the reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature ... the success of the Court is, to some extent, linked to the success of its reparation regime." In view of this, the Judges determined that protective measures to secure the freezing and seizing of assets for future reparation awards should be transmitted simultaneously with cooperation requests to States for arrest and surrender of suspects.</p>

<sup>33</sup> Article 68(3) of the Rome Statute.

On 24 July 2006, Pre-Trial Chamber 1 invited victims to make submissions on Lubanga's application for release. On 9 October 2006, the victims filed observations that release would be dangerous as he could continue to direct the UPC which still exists on the ground, notably in Bunia District, where victims are located. On 18 October 2006 the Pre-Trial Chamber refused Lubanga's interim release.

On 28 July 2006, Pre-Trial Chamber 1 granted victim status to three applicants in view of the link between the harm they suffered and the charges against Lubanga. All three applicants are parents who have or had male children who were enlisted by the UPC militia.

On 19 September 2006, Pre-Trial Chamber 1 provided a general framework concerning protective measures for Prosecution and Defence witnesses. Among its orders were requiring the Prosecution and Defence to consult with, and be trained by, the Victims and Witnesses Unit on matters relating to guidelines for investigators to minimize exposure to risk and measures available to ensure confidentiality, secure handling of documents and secure communication, and requiring the Registrar to negotiate cooperation agreements and *ad hoc* arrangements on matters related to the protection of witnesses.

On 22 September 2006, Pre-Trial Chamber 1 defined the mechanisms for victim participation in the Lubanga case.<sup>34</sup> The Chamber admitted that for now, non-communication of the victims' identities to the Defence was the only protective measure available to protect victims, but also warned against anonymous accusations. As such victims could participate anonymously, but without introducing new facts or evidence or questioning witnesses.

On 7 September 2006, the Women's Initiatives for Gender Justice requested leave to participate as *amicus curiae* stressing the importance of judicial oversight of the Prosecutor's exercise of his discretion, specifically in relation to the selection of charges. The narrow charges against the suspect, the absence of charges for gender based crimes despite the availability of documentation including a confidential report furnished by the Women's Initiatives to the OTP, and victims' requests for participation, warranted the Judges' consideration and review of the charges at the time of the Confirmation of Charges Hearing.

On 26 September 2006, the Pre-Trial Chamber decided that the Women's Initiatives' Request to review the Prosecutor's exercise of his discretion in the selection of charges and whether broader charges could be considered, had no link with the case brought against Lubanga by the Prosecutor.

<sup>34</sup> Anonymous participation at this stage of the proceedings is limited to: (1) accessing public documents of the case, (2) attending only the public portion of hearings, (3) making opening and closing statements at the confirmation hearing and (4) requesting leave to intervene during the public sessions of the confirmation hearing. On 9 November 2006, the victims' legal representatives stressed that the participatory mechanisms for victims were overly restrictive.

DRC	<p>The Chamber invited the Women’s Initiatives to re-file its Request to submit observations in the DRC <i>situation</i> rather than the <i>case</i> against Lubanga.</p> <p>On 20 October 2006, one applicant was granted victim status in the case against the suspect, and was accorded the same modalities of participation applicable to the other three recognized victims. Despite demonstrating sufficient links to the Lubanga case, seven applicants (among whom were witnesses/victims of sexual violence) were not granted victim status at this phase of the Court proceedings, as they are Prosecution witnesses. These applicants were granted protective measures. Eight applicants were not granted victim status because they did not demonstrate a causal link between the harms they suffered (victims of gender based crimes) and the charges against the suspect (enlistment and conscription of child soldiers). However, the Chamber held that they would be considered at a later date with regard to their victim status in relation to the situation.</p> <p>One of the applicants was not recognized by the Judges as a victim of the case. However, the Judges requested verification of the applicant’s date of birth.</p> <p>On 2 November 2006, clarification of the applicant’s date of birth was provided to Chambers. No decision was taken regarding the applicant’s victim status before the Confirmation of Charges Hearing began and as such the applicant could not participate in the Hearing.</p>
Darfur, Sudan	<p>On 24 July 2006, Pre-Trial Chamber 1 invited Louise Arbour, High Commissioner of the Office of the United Nations for Human Rights, and Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan, to submit observations concerning the protection of victims and the preservation of evidence in Darfur. On 25 August 2006, Cassese submitted an <i>amicus curiae</i> in which he noted that the best way to prevent further rape is to hold those with command responsibility accountable. Cassese also suggested that to protect rape victims from re-traumatization, testimonies obtained during the investigation stage could be preserved for trial so victims need not appear in Court at a later stage. On 10 October 2006, Louise Arbour submitted an <i>amicus curiae</i> describing the experiences of her Office in on-the-ground monitoring and investigation of serious human rights violations in Darfur and called for an increased visible presence of the ICC in Sudan as she believes this could have a deterrent effect in relation to the ongoing violence.</p>

## Substantive Work of the ICC and ASP: Recommendations

### States Parties / ASP



Increase the budget for the ICC so it is able to implement its mandate more fully. A mechanism to deal with non-paying States Parties should be developed. The ICC should be a mandate-driven, not resource-deprived justice mechanism.



Pass a resolution at the ASP 2006, that during 2007 the Bureau will undertake to study and develop a model for a Gender Sub-Committee of the ASP.



Establish by the ASP 2007, a Gender Sub-Committee of States Parties to monitor implementation of the gender mandates in the Rome Statute.



Increase the yearly ASP meeting from 11 days (including the resumed session) to 12 days with the possibility of a resumed session of no more than five days. Enhance the efficiency of the work of the Bureau of the ASP including a more effective communication strategy between the Bureau and States Parties in the Hague, New York and capitals.



Prioritize the completion of an “oversight mechanism” for the ICC for the prevention and redress of sexual violence/abuse and exploitation committed by ICC staff whilst carrying out their duties.



Undertake full and expansive implementation of the Rome Statute into domestic legislation ensuring the gender provisions are enacted and advanced in relevant legislation and judicial procedures.



Elect the new Board of Directors of the Trust Fund for Victims at the Fifth Session of the ASP taking into account equitable geographical and gender distribution required by the 2002 ASP Resolution.<sup>35</sup>



Encourage the Board of Directors of the Trust Fund for Victims to urgently establish guidelines to fairly and effectively identify and implement projects and activities of assistance to victims without delay. Encourage the Board of Directors to also respond proactively to situations where assistance to victims is required.



Urge the Board of the Trust Fund for Victims to meet at minimum twice a year, in light of the complexity of its task.



Urge the Board and Secretariat of the Trust Fund for Victims to embark on a vigorous fundraising campaign.

<sup>35</sup> Paragraph 3 of the Annex to Resolution ICC-ASP/1/Res.6 (“Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims”).

## Registry



Prioritize outreach to women in 2007, given the low numbers of women amongst those applying to the ICC to be recognized as victims.



Develop a focused outreach strategy to target women and seek advice from and establish partnerships with local, national and international women's organizations to advise the Court's work in each of the three situations. While a Strategic Plan for Outreach has been developed and additional resources have been proposed for the establishment of an Outreach Unit within the Public Information and Documentation Section, there are insufficient plans, strategies and indicators to reach women most affected by conflict.



Enhance the work of the Field Offices in each situation to effectively support victims' participation and communication with local NGOs including women's groups and victims/survivors organizations.



Make the participation and reparation forms as well as the booklet available in languages other than English and French, particularly in languages of the situations before the Court.



Allow victims greater flexibility by promoting applications for participation and reparation without having to use the standard form.



Recruit staff for the new Outreach Unit, with experience and expertise in community development and mobilization and working with victims/survivors of gender based crimes to ensure that effective programmes are developed to reach women and diverse sectors of communities in conflict situations.

## Office of the Prosecutor



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



Consistently display a commitment to investigate, charge and prosecute gender based crimes in every situation where there is evidence such crimes have occurred. Review the strategy of narrow charging in light of experiences in the DRC case which has negatively impacted on justice for victims and communities and reduced the ability of victims to participate in the judicial process.

In light of the fact that all five suspects in Uganda held senior command positions, all five could have been charged with crimes of sexual violence and further charges of sexual violence could be added to the charges against Joseph Kony and Vincent Otti.

In the face of documentation indicating the commission of widespread and systematic crimes of sexual violence by the UPC in the DRC, charges of sexual violence should be brought against Lubanga. Charges of sexual violence should also be included in all future cases of the DRC situation, where there is evidence such crimes have occurred.



With the first trial beginning in 2007, the Prosecution and the Defence must be mindful of the manner of questioning of a witness or victim so as to avoid any harassment or intimidation with particular attention to attacks on victims of sexual violence.

## Judiciary



Supervise prosecutorial discretion, especially in cases where the Prosecutor decides not to include certain crimes in the charges brought against an individual, when there is evidence to the contrary. Narrow charges have a detrimental effect on victims' participation and outcomes for justice. Chambers have an important role in overseeing victims' interests.



Immediately approve the Indigence Form for victims and ensure it is sensitive to the issues and the context regarding the circumstances of victims before the ICC.



Continue to develop the modalities for victims' participation which allows for meaningful participation while balancing the rights of the accused.



Utilize the special measures allowed for in the Rome Statute and the RPE to facilitate the testimony of a victim of sexual violence.



With the first trial beginning in 2007, the Trial Chamber should be mindful in controlling the manner of questioning of a witness or victim so as to avoid any harassment or intimidation with particular attention to attacks on victims of sexual violence.



November 2006