



GENDER JUSTICE TEAM
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)
COMMENTS AND RECOMMENDATIONS¹
TO THE 11th SESSION OF THE ASSEMBLY OF STATES PARTIES

14-22 NOVEMBER 2012, THE HAGUE

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The Gender Justice Team (Team) of the Coalition for the International Criminal Court (CICC) was established to monitor the work of the Assembly of States Parties (ASP) and the International Criminal Court (Court) regarding gender related issues and to ensure that the Rome Statute system of justice is gender-inclusive.

In this regard the Team wishes to offer comments and recommendations to the ASP and the Court concerning a) outreach and public information; b) elections; c) governance and recruitment of court personnel and compliance; d) the Trust Fund for Victims (TFV); e) protection issues; f) victims' participation; g) the Independent Oversight Mechanism (IOM); h) complementarity; and j) the Office of The Prosecutor (OTP) gender policy. This broad approach takes into account the cross-cutting nature of gender and reflects the need for an integral dimension of gender perspectives in the work of the ASP and the Court.

A. Outreach and public information

The team is convinced that outreach efforts are crucial to promote understanding of the Court's mandate among victims and affected communities, to manage expectations and to enable those most concerned to follow and understand the international criminal justice process. Outreach is also an essential tool for informing victims, in particular those most vulnerable, of their right to participate in proceedings. According to the Victim Participation and Reparation Section (VPRS), for almost 30% of the 12,641 applications received by the Court, the gender of the applicant was registered as 'unknown' either because the data has not yet been entered into the database or because the applicant did not specify her/his gender.² Identifying trends in the number of victims applying to participate in court proceedings is critical in order to understand any barriers faced by certain groups of victims, and to ensure resources and activities are targeted efficiently and as needed towards underrepresented groups.

Of the 8,899 applicants whose gender is registered, 4,470 (or 53.2%) are male applicants and 4,159 (or 46.7%) are female applicants. In some cases, including the proceedings against President Al-Bashir and

¹ 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.

² Based on information provided by the VPRS by emails dated 3 September and 20 September 2012. The information indicates that a total of 12,641 were registered by the VPRS as of 31 August 2012. The gender of 3,705 applicants (or 29.3%) is registered as 'unknown'.

Harun and Kushayb, all of the victims authorised to participate are male, while in the Lubanga and Katanga & Ngudjolo cases approximately 70% of the victims authorised to participate are male. No victims have yet been authorised to participate in the Libya situation or in the case against Gaddafi and Al-Senussi. With the exception of the Mbarushimana case in the Democratic Republic of Congo (DRC) Situation, the Muthaura & Kenyatta case in the Kenya situation and the Gbagbo case in the Côte d'Ivoire situation, a significant majority of victim participants are male victims. Outreach activities designed to reach potential female applicants are important for ensuring both women and men have equal opportunities to be heard by the Court and to obtain reparations for the crimes committed against them.

Recommendations to the Assembly of States Parties

- The ASP should grant the Court the financial means requested for outreach and public information activities for 2013 through the regular budget of the Court, to ensure both women and men have equal opportunities to be heard by the Court and to obtain reparations.
- The ASP should ensure the continued inclusion of references to the importance of, as well as the need to improve, court outreach and public information activities in the 'Omnibus Resolution'.
- States parties should inform the ASP of any plans to raise awareness of the Rome Statute's provisions on sexual violence on the International Day for the Elimination of Violence against Women on 25 November.

Recommendations to the Court

- The Court should develop clear communications plans taking into account gender specific issues that are tailored to each stage of the proceedings and implement them as early as possible, to allow all victims, in particular women and girls, to receive information appropriate to their needs in a timely fashion. This should include implementation at the earliest stage possible and working with local NGO's, victims' and women's organizations to ensure reaching women and girls who may not have easy access to outreach programs.
- The Court should develop comprehensive plans for maintaining a presence and legacy on the fight against sexual and gender-based violence (SGBV) in situations where downsizing or exit strategies might be considered.

B. Elections

The Team views the 11th session of the ASP as an important opportunity to emphasize the necessity of transparent and merit-based elections of all International Criminal Court, ASP and Trust Fund for Victims officials, and stresses the need for the ASP to promote the fair representation of women and men in all electoral processes. The Team is convinced that more must be done to ensure that the Assembly develops best-practice election processes capable of producing the nomination and election of the highest qualified officials, where a fair representation of women and men is achieved in the nomination process.

The Team is dismayed that for the current elections:

- Only 28 of the 120 applicants for the position of Deputy Prosecutor were women.³
- Only 21 of the 67 applications for the Registrar were women and only three women were among the 11 candidates shortlisted.⁴

³ Election of the Deputy Prosecutor of the International Criminal Court, ICC-ASP/11/17, 12 September 2012, Appendix 1.

⁴ Appendix to the Letter from the President of the Court to the President of the Assembly on the shortlist of candidates for election to the post of Registrar with the statistical overview of the gender and geographic representation of the candidates, 1 October 2012.

- Only two women have been nominated for the 11 positions on the Advisory Committee on Nominations, despite a requirement in its Terms of Reference that it be composed of a “fair representation of both genders.”
- Although two women were nominated for the five members of the Board of Directors of the TFV, only five candidates were nominated in total for the five seats. As seen in other bodies, in particular the Committee on Budget and Finance, clean slate elections in practice undermine gender balance.

Recommendations to the Assembly of States Parties

- The ASP should ensure that legal and gender expertise on violence against women and children are taken into account in the election of the Deputy Prosecutor, the Advisory Committee on Nominations, and the Board of the TFV.
- The ASP should elect a new Deputy Prosecutor at its 11th session, taking into account the requirement that the Deputy Prosecutor ‘shall be [a person] of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases [and] have excellent knowledge of and be fluent in at least one of the working languages of the Court’ as provided for in article 42(3) of the Rome Statute.
- The Draft Resolution for consideration by the 11th Session of the ASP containing recommendations to the plenary of judges on the election of the Registrar should stress the experience and criteria desired for this important post, taking into account the requirements provided for in article 43(3) of the Rome Statute. The general recommendation should include reference to competencies and experience reflective of the substantive role of the Registrar including experience in senior leadership and management positions; a track record in leading large institutions reflecting the size and scale of the registry staff of the ICC⁵; sound administrative, policy and human resource experience; a significant record in the development and management of complex annual budgets; and experience regarding the integration of gender issues and expertise as these relate to the profile of Registry staff as well as to its substantive work.
- The Team strongly encourages states parties to be attentive to the gender balance and profile in its nominations of candidates for future elections.
- The ASP should encourage that in future elections, regional blocs identify more than one candidate per region in order to avoid clean slate elections. To that effect, the ASP should consider adopting some mechanisms employed in the election of judges such as minimum voting [and nomination] requirements which ensure a greater choice of candidates for election, to the benefit of an equitable gender balance in the elections and gender expertise of the candidates.

C. Governance and Recruitment of Court personnel and compliance

Current Status of recruitment⁶

In 2012, the overall number of staff employed by the Court including professional, general and elected officials, but excluding judges, is 699, one more than in 2011. Of these, 53% are men and 47% are women. This figure represents only a small variation in the gender breakdown when compared to 2011 when 54% of the total staff were male employees and 46% female employees.

This year, the number of occupied professional posts including elected officials but excluding judges is 362. Female professionals occupy 49% of the total number of professional posts, which represents a slight increase from 2011 when 48% of the professional staff were female employees. The gender breakdown in the Judiciary (excluding judges) and the Registry remained substantially the same as in the

⁵ The Registry currently has over 400 staff members.

⁶ Information provided by the Human Resources Section of the ICC and current as of 31 July 2012.

last five years. In the OTP, female employees are 46% (65) of the total office staff (141). Women continue to be over-represented in lower-level professional positions across the Court (P1-P2). As in past years, the female/male differential at the OTP remains high in senior positions with both D1 posts occupied by men, almost three times the number of male appointees than female at the P5 level, and twice as many men as women in P4 level positions.

Governance

The ASP has a crucial statutory function in its management oversight of the Court.⁷ This function is fundamental to the success of the Court and the Rome Statute system of justice, including in ensuring the gender inclusiveness in all Court related processes. At its ninth session in 2010, the ASP established a Study Group on Governance (SGG) to facilitate a structured dialogue between the Court and states parties to strengthen the institutional framework of the Rome Statute system. The mandate of the SGG, initially for one year, was extended in 2011. In 2012, the SGG focused its discussions on two clusters: (i) expediting the criminal process; and (ii) enhancing the transparency and predictability of the budget process.

Recommendations to the Assembly of States Parties

- The ASP should fully support the Court to conduct an effective and thorough structural review in 2013 in order to address issues of: institutional efficiency; potential under-utilisation, duplication or under-performance of sections or posts; under-resourcing of critical areas supporting the mandate and efficacy of the Court; human resource allocation; and financial support to ensure a sustainable and effective Court.
- The ASP should encourage the Court to consistently comply with the Staff Rules and Regulations regarding recruitment processes for posts (GTA and established posts). Within some organs of the Court, there is a widespread practice of considering policies and regulations as guidelines rather than instructions which must be consistently applied. The Committee on Budget and Finance (CBF) has noted on several occasions the lack of transparency and other concerns in the Court's recruitment processes.
- The ASP should ensure that the bodies within the Court responsible for financial and human resource compliance operate effectively and with sufficient funds with the expectation that quality management procedures are fully established by the 12th session of the ASP. The ASP, as part of its governance duties, should actively review reports of the respective compliance bodies, while leaving actual management to the appropriate organ and staff structure.
- The ASP should ensure sufficient resources for the Human Resources Section of the Registry to enable it to carry out its many functions, including that of ensuring the compliance with recruitment processes and ensuring gender and geographical representation in all staff grades.

Recommendations to the Court

- The Court should fully participate in an effective and thorough structural review in 2013 in order to address issues of: institutional efficiency; potential under-utilisation, duplication or under-performance of sections or posts; under-resourcing of critical areas supporting the mandate and efficacy of the Court; human resource allocation; and financial support to ensure a sustainable and effective Court.
- The Court should give priority to strengthening its quality management procedures to ensure each unit, team, entity, division and organ is operating at a high level of performance and is able to meet their specific responsibilities in a consistent, effective and impactful manner.

⁷ Article 112 of the Rome Statute.

- The Court should form an inter-organ committee to develop a three-year plan towards addressing imbalances in gender and geographical representation in the Court through active recruitment and the promotion of strategies across each organ. The three-year plan should contain specific strategies to redress the under-representation of women in P3 to D1 posts across most organs and related bodies.
- The Court should accurately and with specificity present its budget proposals to the CBF, and continue to prioritise improvements in its budget process. In its report, the CBF had noted several improvements in the 2013 proposed budget, including 'better justifications and more refined assumptions'.⁸ The CBF also 'accepted in many instances the Court's analysis of the negative impact of other [budgetary] cuts identified in the paper'.⁹ The CBF noted as well that the 2013 proposed budget did not account for a number of costs, which could have significant impacts on the Court's finances.¹⁰

D. The Trust Fund for Victims

Out of 40 Trust Fund for Victims (TFV) projects approved by chambers, 18 are in northern Uganda, 16 in eastern DRC and 6 in the Central African Republic (CAR). Since 2007-2008, the total funds obligated in the DRC and northern Uganda amount to €7,779,458. In addition, €600,000 has been allocated for projects in the CAR and €1.2 million has been set aside as reserves to supplement court-ordered reparations from Chambers. As of 30 June 2012, the funds available to the TFV amounted to €3,480,545. During the first six months of 2012, the TFV raised €252,252 and received a donation from the UK of €640,000, bringing the income for 2012 to €942,800, the lowest level since it became operational in 2008.

There are currently 28 active TFV projects. Of the 16 projects approved for Uganda, three exclusively support women and girls victims/survivors. Of these, one uses earmarked funds from the Sexual Violence Fund and two receive un-earmarked funds. Of the 12 projects approved in the DRC, eight (67%) use earmarked funds for SGBV and work directly with women and girls victims/survivors. In both northern Uganda and eastern DRC, the remaining projects provide psychological and physical rehabilitation and material support to adults and children, including women and girls, as part of the integrated approach.

Recommendations to the Assembly of States Parties

- The ASP should approve the request by the TFV Board of Directors for a collective contribution of €1 million to complement the TFV's reserves for the implementation of court-ordered reparations.
- The ASP must provide sufficient core funds for the operational budget of the TFV, including rejecting the recommendation of the CBF to reduce its budget request for 2013.
- The ASP should not require the TFV to utilize voluntary contributions to cover institutional overhead and administrative costs, which detracts much needed resources to the development of projects. In this regard, the ASP should approve the redeployment of the Field Programme Assistant for Kenya to The Hague (G5).
- The ASP should encourage states parties to increase their financial contributions to the Fund and to make regular annual contributions.
- The Team also calls, in particular, for a renewal of the Sexual Violence Appeal and for States to contribute to its target of €10 million.

⁸ ICC-ASP/11/15, Advance version, para 2.

⁹ ICC-ASP/11/15, Advance version, Annex V, para 1.

¹⁰ ICC-ASP/11/15, Advance version, paras 116-117.

Recommendations to the Trust Fund for Victims

- The TFV should urgently develop a fundraising strategy and embark on a vigorous campaign to mobilize resources. Such a campaign should consider: retaining current donors; attracting new donors amongst states parties; reaching out to non-states parties who may wish to engage with the Court through the TFV; encouraging both cash and in-kind donations; developing a specific strategy with the private sector; implementing a scheme for individual donors; and launching more targeted donor appeals.
- The Board and Secretariat of the TFV must ensure that implementation of court orders for reparations through the TFV integrate gender strategies, include women and girls victims/survivors as recipients and participants, and address often invisible issues of gender bias amongst potential implementing partners.
- The TFV should urgently communicate to states, donors and civil society the process for developing its Strategic Plan which expires in 2012 and ensure continuity of objectives, programme strategies, and direction for this new phase of its work including the initiation of reparations. Like the TFV's strategic management process in 2008, the development of the new plan should ensure the involvement of key stakeholders including civil society and grassroots women's organisations as a way to promote transparency regarding the TFV's future intentions and priorities. Such a process would assist with promoting the TFV and generating greater visibility, in support of its fundraising initiatives.
- The TFV should ensure that intermediaries with whom it partners have sound gender policies and strategies for addressing gender issues within their projects.
- The Secretariat of the TFV should urgently prioritise the establishment of the ad hoc expert Advisory Committee on Reparations approved by the Board of the TFV at their Annual Meeting held in March 2011. The establishment of the expert Advisory Committee would assist the TFV's work in designing the framework and operational parameters for the reparations programme.
- The TFV should re-launch the Sexual Violence Appeal.

E. Victim and Witness Protection

The Team aligns itself with the Victims' Rights Working Group¹¹ in noting that without a robust system in place to ensure the protection of victims and witnesses, few would agree to engage with the Court, either as witnesses, participants or in any other category. While the continued existence of conflicts in many situation countries complicates the process of putting in place protection measures, this, however, does not lessen the legal or moral obligation to ensure adequate and effective protection.

Recommendations to the Assembly of States Parties

- The ASP should significantly increase the resources available to both the Victims and Witnesses Unit (VWU) and the VPRS of the Registry to allow them to efficiently carry out their tasks and duties towards victims, particularly towards victims of gender-based crimes.
- The ASP should also enable the VPRS to collect disaggregated data on applicants seeking to be formally recognized as victims by the Court. Currently, there are significant gaps in the data and profile of applicants seeking to be recognised formally as victims. The percentage of applicants whose gender is registered as 'unknown' (29.3%) continues to be high. Identifying trends in the number of victims applying to participate in court proceedings is critical to understand any

¹¹ Issues and Concerns Presented by the Victims' Rights Working Group on the occasion of the 10th Session of the Assembly of States Parties 12 - 21 December 2011, December 2011. The Victims' Rights Working Group is an informal network of national and international civil society groups and experts created in 1997 under the auspices of the Coalition for the International Criminal Court. Its membership includes international as well as local NGOs and experts from a wide array of countries, in particular those affected by ICC investigations and prosecutions.

barriers faced by certain groups of victims, to ensure resources and activities are targeted efficiently and as needed towards underrepresented groups.

Recommendations to the Court

- Develop a comprehensive security framework inclusive of witnesses, victims and intermediaries to ensure that protection mechanisms are tailored to their particular status, level of risk and specific circumstances. Currently, victims and intermediaries do not benefit from the security provisions and as such participate or assist the Court at great risk to themselves, their families and their communities.
- Ensure that protection and support measures are sensitive to the particular circumstances of women in conflict situations and are implemented in consultation with those to be protected or supported. Ensure also that women and girls who are recognized as ‘victims’ by the Court benefit from protection procedures.
- The protection framework must ensure that applicants and victims are not overly exposed to each other, to the community in which they live or to NGOs who are not directly involved as intermediaries with the specific victims.
- The Registry should urgently request, and the ASP should immediately provide, the necessary funds for the position of Psychologist/Trauma Expert to be upgraded to an established post. This position has been categorised as a GTA since 2009. Such expertise is mandated by article 43(6) of the Rome Statute and as such this position should be securely integrated within the structure of the VWU as an established post. In addition, four new Psychologist/Trauma Expert posts should be urgently recruited to support the five trials and one confirmation of charges hearing expected in 2013.

F. Victim Participation

Equitable gender representation among victims participating in proceedings is essential to ensure gender justice. The recent decisions in the Gbagbo case¹² and the both cases in the Kenya situation¹³ set up new application processes favoring collective participation of victims. The team is concerned that the approach taken by the Court, as well as by states parties¹⁴ may prevent the particular views of victims of sexual and gender-based violence, disproportionately women and girls, from being heard. Collective applications may not be appropriate for these victims who are often already marginalized and stigmatized. The Court therefore needs to ensure that those victims will not be further excluded. The application scheme must guarantee access to participation to all victims of all crimes and must contribute to achieving equitable gender representation among victims participating in the proceedings.

Recommendations to the Assembly of States Parties

- The ASP should encourage equitable gender representation among victims’ participation for example through supporting gender specific outreach to reach out to women and girls victims.
- The ASP should grant the Court the financial means requested to process the growing number of victims’ applicants in a fair and effective manner.

¹² Decision on issues related to the victims’ application process, 6 February 2012, ICC-02/11-01/11-33.

¹³ Decision on victims’ representation and participation, 3 October 2012, ICC-01/09-01/11-460 - and ICC-01/09-02/11-498.

¹⁴ See also Report of The Hague Working Group on Victims and affected communities and the Trust Fund for Victims and Reparations, 11 October 2012. It reads for instance para. 20: “It was noted that Rome Statute crimes tended to have mass victims and therefore, there was a need to look at the totality of the victims. It was suggested that the collective approach should be the basic approach, given the mass nature of the crimes under the Court’s jurisdiction [...]” and para. 27: “It has been suggested that with a view to strengthening the consistency of the system, a collective approach to victims’ participation throughout the system, at all stages of the proceedings, i.e., application, participation and reparations, may in the long term contribute to guarantee its effectiveness and sustainability.”

Recommendation to the Court

- The Court should develop a gender-sensitive approach to the victim application process, in particular taking into account the special needs of victims of gender-based crimes as required by article 68(1) of the Rome Statute.

G. The Independent Oversight Mechanism

By virtue of article 112 paragraphs 2(b) and 4¹⁵ of the Rome Statute, the ASP established an Independent Oversight Mechanism (IOM) in 2009¹⁶ with the mandates of inspection, evaluation and investigation. However, the Team is dismayed that discussions until now did not lead to the operationalisation of the IOM and aligns itself with the CICC Team on ASP Oversight in strongly urging the ASP to ensure full operationalisation of the IOM as soon as possible.¹⁷

Recommendations to the Assembly of States Parties

- The ASP should prioritize the development of a full breadth of functions of the IOM in 2013, including investigation, inspection and evaluation, as described in article 112(4) of the Rome Statute.
- The ASP should take measures to amend the Staff Regulations of the Court to define “serious misconduct.” Such a definition should utilize the existing definition of ‘unsatisfactory conduct’ found in the Administrative Instructions (to staff), which includes areas such as unlawful acts (including fraud), assault upon or threats to other staff, sexual and other forms of harassment, and abuse of authority; and the definition of ‘serious misconduct’ in the Rules of Procedure and Evidence (for elected officials). The definition of serious misconduct should include areas not adequately addressed by the existing definitions such as issues of sexual exploitation and abuse, and should be extended to contractors and consultants in addition to staff and elected officials.
- Ensure that the IOM fully integrates gender-sensitive measures in its operations, both by achieving a fair representation of women and men in its composition and requiring gender expertise among its staff.
- The ASP should provide full oversight of and support to the IOM, including: (i) ensuring that it has adequate resources to conduct investigations, including in the field; (ii) ensuring that court staff found to have committed acts of misconduct or criminal acts are held accountable, including ensuring that immunities are never allowed to impede investigation of staff suspected of human rights violations or sexual and other forms of harassment and accountability for those proven to be responsible for such acts.

Recommendations to the Court

- All staff should be provided with training so that the Court discharges its duty to ensure that staff members are fully aware of conduct that is not acceptable and the potential consequences of such misconduct. The Court should provide its staff with training on the role and mandate of the IOM.

¹⁵ Article 4 of the Rome Statute addresses the legal status and powers of the Court. It provides that the Court shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes. It also provides that the Court may exercise its functions and powers, as provided in the Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

¹⁶ Eighth Session of the Assembly of States Parties, Resolution ICC-ASP/8/Res.1.

¹⁷ CICC Team on ASP Oversight, Comments and Recommendations to the 11th session of the ASP, 2012.

H. Complementarity

In a great number of situations where the Court exercises or could exercise its jurisdiction, the lack of relevant or comprehensive legislation can lead to a situation of unwillingness or inability to genuinely prosecute sexual and gender based crimes. Particularly, the implementation of the Rome Statute provides the opportunity for an increased protection of the rights of victims of sexual and gender-based violence, enhancing their access to justice and all forms of reparation (including restitution, rehabilitation, compensation, satisfaction and guarantees of non-recurrence). Incorporating a gender perspective in processes and mechanisms of domestic justice is thus essential to ensuring gender justice. Such an approach includes ensuring both equal access to justice for women and men and removing obstacles to the investigation and prosecution of gender-based crimes, particular by defining crimes in line with the Rome Statute and international standards.

Recommendations to the Assembly of States Parties

- The ASP should promote the adoption of legislation (establishing effective mechanisms) for the investigation and prosecution of sexual and gender-based crimes at the national level, including defining crimes in line with international standards and strengthening domestic criminal justice systems to ensure functional and effective justice processes and equal access to justice for women and men;
- The ASP should promote the adoption of legislation on the rights of victims and witnesses, especially to protection, support, participation, information and reparation that includes a gender-sensitive approach.

I. OTP Gender Policy

Ensuring that sexual and gender-based crimes under the jurisdiction of the Court are fully investigated is essential to ensuring that justice is delivered to female and male victims of these crimes, who are often marginalized and stigmatized. This requires an adequate focus on this category of crimes in the policies of case selection and prioritization, as well as in relation to a number of other issues. The Team welcomes the announcement of the development of a gender policy by the OTP in 2012-2013 that will be consulted with concerned stakeholders including the states parties, victims' organisations and civil society.

Recommendations to the Assembly of States Parties

- The ASP should encourage the OTP to comprehensively address gender issues in all of its policies, including its prosecution policy, without infringing on the independence of the Prosecutor's functions in respect to prosecutorial decision-making in relation to situations, cases and preliminary examinations.

Recommendations to the Office of the Prosecutor

- The OTP should engage in meaningful consultation with all concerned stakeholders, including states parties, victims and their representatives and civil society concerning the scope and content of the proposed OTP gender policy.