Policy Priorities of No Peace Without Justice
for the Twelfth Session of the Assembly of States Parties
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The Twelfth Session of the ICC Assembly of States Parties comes at a time when the ICC itself is under increasing threat. The ICC and its States Parties need to take strong, decisive action to be flexible enough to respond to political demands and various threats to the ICC, while at the same time maintaining the fundamental principles that underpin the Rome Statute, such as the irrelevance of official capacity when it comes to the application of the Rome Statute.

While the ICC as an institution will continue, how it and its States Parties respond to the challenges, particularly those that have arisen as a consequence of the Kenya cases, will determine how much of its time is spent fighting threats or reacting to problems and how much of its time can be spent on forward planning and development. At the same time, life goes on: even as the ICC is under threat, it must still function in its situation countries and continue to strive to provide proper, visible and meaningful justice for the populations affected by crimes. As such, the ICC and its States Parties must continue to maintain their focus on the everyday challenges facing the ICC, including in relation to its investigation teams, outreach, field presence, a completion strategy and its budget, particularly in terms of promoting its efficiency and effectiveness.

As the Twelfth Session begins, NPWJ is therefore pleased to share the following recommendations for the ICC’s 123 States Parties:

1. Prevent abuse of State Immunities: ICC States Parties should protect and maintain the irrelevance of official capacity as a fundamental principle of the Rome Statute and ensure that any proposed amendments are subject to thorough scrutiny and discussion, including with the engagement of non-States Parties, international organisations and civil society as a whole.

2. Investigation teams: ICC States Parties should support full, well-resourced investigation teams primarily based in the field as a means to ensure the integrity of the Rome Statute system and to promote efficiency and effectiveness, including avoiding the need for time-consuming and expensive follow-up investigations.

3. Outreach: ICC States Parties should support outreach at the earliest possible opportunity, preferably whenever an interest in a particular country is indicated or work begins in a particular country.
4. **Field Presence**: ICC States Parties should support the enhancement of the Court’s field presence and encourage the ICC to prioritise it, both as a matter of operational policy and, wherever possible, through holding trials or parts thereof in situ.

5. **Completion strategy**: ICC States Parties should support the ICC in developing its completion strategy, both general guidelines and for specific situations.

6. **Budget**: ICC States Parties should oppose arbitrary zero nominal growth and support an ICC budget that will enable the ICC to fulfil its mandate effectively and efficiently.

1. **Prevent abuse of State Immunities**

The challenges facing the ICC due to the specific circumstances of the Kenya cases have raised the spectre of potential amendments to the Rome Statute and, in particular, a dilution of article 27 on the irrelevance of official capacity. As a matter of principle, NPWJ does not oppose a consideration of amendments to the Rome Statute, provided they are not at odds with the fundamental principles underpinning the Statute, including the right to redress, the fight against impunity and fair trial rights. Amendments to the Court structure, or the Court’s operations, could provide a useful approach that may streamline the operations of the Court and strengthen the fundamental principles that underpin it. However, amendments should not be entered into lightly and those amendments that threaten fundamental principles should be rejected, whether the amendments are to the Rules, the Elements of Crimes or the Rome Statute itself. Any proposed amendment that seeks to provide a shield of State immunity for the application of any provision of the Rome Statute should be resisted as an amendment that threatens the fundamental principles underpinning the Court.

NPWJ calls on all States Parties to protect and maintain the integrity of the Rome Statute, including through rejecting any amendments that seek to dilute article 27, and to ensure that any proposed amendments are subject to thorough scrutiny and discussion, including with the engagement of non-States Parties, international organisations and civil society as a whole.

2. **Full investigation teams**

With some ICC cases coming to the confirmation of charges and trial stages, the effects of a policy of small, targeted investigations are now coming to light. This early policy, while attractive in its low expenditure, is now being revealed as an expensive approach, with the OTP being required to do further investigations and with some charges not being confirmed or an acquittal due to insufficient evidence being brought. It should be emphasised that this is not in and of itself an indication that there is something wrong with the system – far from it, this indicates that the system as a whole is working. It does, however, indicate that there is a problem at the investigations stage and that more resources, particularly human resources, need to be put into this first, early stage of a case to avoid problems, inefficiency and ineffectiveness, both of which could lead to even greater expenditure down the line.

This has been recognised by both the Prosecutor and Registrar of the ICC, who have requested resources to support wider and better-staffed investigations. NPWJ strongly supports this request, according to which the resources should be employed efficiently and effectively, and emphasises that well-resourced, full investigations teams that are based in the field give better investigative results. Better investigative results in turn support better prosecutions that, when properly defended,
produce the kind of fair trials that populations affected by conflict need and deserve. It also saves resources in the long run by removing the need to “re-do” investigations that should already have been done efficiently, effectively and completely and by avoiding the waste accompanying days, weeks and months spent in trials that are doomed to failure due to insufficient foundations for those trials.

3. Well-supported, early outreach

Outreach plays a vital role in creating conditions conducive for cooperation with the Court and preventing or stemming the spread of misinformation; in facilitating participation and legal representation of victims in the proceedings; in explaining due process rights; to facilitating redress for affected communities; and in creating an enabling and supportive environment. International Criminal Court (ICC) outreach activities are of crucial importance and remain one of the most important ways to improve ICC work in situation countries. Outreach remains critical not only for populations affected by the crimes, but also for victims, to enable them to make informed choices about their participation in ICC proceedings, including reparations. The ICC needs to continue to optimise its outreach activities and States Parties need to provide the necessary accompanying financial support and oversight to ensure that those funds – like all ICC funds – are spent effectively and efficiently.

Outreach assists in reducing the impunity gap by directly engaging people affected by crimes with the court mechanisms and staff that bring them justice. It enhances the effectiveness of ICC proceedings because it promotes understanding of, and hence support for, the Court’s mandate – which is not always obvious to victims or affected communities. In an impact and legacy survey on the Special Court for Sierra Leone carried out by NPWJ and its partners in Sierra Leone and Liberia during 2012,\(^1\) the importance of outreach and the fact that it should be included in a court or tribunal’s budget from the outset came to the forefront.

Outreach helps prevent misunderstandings regarding ICC activities in situation countries and outreach staff will be able to provide specific information about what will happen under the framework of transitional justice processes. For example, the ICC needs to implement a program in Libya to raise awareness of its procedures regarding complementarity and domestic capacity to prosecute the relevant actors. The Libyan case provides a clear example of a situation in which a lack of information and outreach has resulted in widespread confusion and disillusionment with the ICC as a whole and as an accountability system. Just over two years ago, when NPWJ first began working in Libya, perceptions of the ICC were largely positive; now, however, people’s perceptions have changed and it has become very difficult even to talk about the ICC there. While the lack of outreach is not the only factor, it does point to the difference outreach can make for the Court’s ability to carry out its work and fulfil its mandate.

NPWJ recommends that outreach should be started at the earliest possible opportunity, preferably whenever an interest in a particular country is indicated or work begins in a particular country, and should as far as possible extend to encompass the whole country, irrespective of where crimes were committed. Victims and populations in countries that are under preliminary examination should be engaged to ensure accurate information is disseminated, to manage expectations about the ICC, and

\(^1\) Making Justice Count: Assessing the impact and legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia (September 2012); available from http://www.npwj.org/node/5599.
to maximise the ICC’s impact in terms of deterrence and the promotion of national proceedings. Outreach activities should be adapted to respond to the effects of judicial developments in different areas of the situation countries, in coordination with the Office of the Prosecutor. Vulnerable victims and communities such as women, victims of sexual violence and children should be targeted and information on victims’ participation and reparations as an integral part of outreach activities should be included from the early stages of an investigation. NPWJ recommends that States Parties retain and highlight these points in the omnibus resolution and ensure sufficient financial support is provided.

4. Strengthened field presence

The involvement of the ICC raises the hope of redress for thousands of victims of war crimes, crimes against humanity and genocide. To have any chance of fulfilling these hopes, the ICC has to increase its field presence through effective field offices in order to carry out day-to-day operations and to maintain meaningful interaction with people there. For this reason, NPWJ has consistently advocated for the ICC to become closer to the victims, communities and other stakeholders affected by its work in situation countries. The ICC’s field presence in a situation country confirms the on-going engagement and commitment of the ICC to ensure its continued relevance and to maximise its impact on victims, communities, the public and other stakeholders. A permanent in-country presence of the ICC could help bridge the huge gap between The Hague and the people living in situation countries and provide strong support to complementarity, legacy and completion efforts. Field presence also brings logistical assistance and administrative support for all organs of the Court, particularly in regards to local investigations. For example, the Kampala field office seems to have been a regional hub in promoting support of other situations in neighbouring countries.

There are several challenges associated with establishing and maintaining a strong field presence in conflict countries; the early days are particularly challenging as complex political and operational environments. Nonetheless, the ICC is an institution established precisely to deal with conflict and post-conflict situations and can and must find ways to work within those environments, as many other international agencies do. To do so, it needs to have the vision of itself as serving the people affected by conflict and by the crimes within its jurisdiction, a vision that ICC States Parties must share and must demonstrate to the Court through its policy guidance.

NPWJ therefore recommends that States Parties support the enhancement of the ICC field presence and encourage the Court to prioritise it, both as a matter of operational policy and, wherever possible, through holding trials or parts thereof in situ. In the context of the ASP, this can be done through the omnibus resolution and through ensuring there is sufficient support for field operations in the budget, alongside oversight to ensure the resources are employed effectively and efficiently.

5. Development of an ICC Completion Strategy

While the International Criminal Court is a permanent institution, its presence in and interaction with each particular situation country is, by design and by necessity, transitory. The ICC’s engagement begins with a preliminary examination, proceeds through investigation and prosecution
and ends with appeal: it must fulfil its mandate and once it has done that, it must leave. This is true even as the length and intensity of its engagement is in many ways a product of the Prosecutor’s strategy for that particular situation and cannot be too curtailed or delineated by other actors. Nonetheless, the ICC will need to implement a completion strategy in each situation country in accordance with its mandate and vision in order to address the issues that arise as it concludes its work. These issues comprise its judicial cases, residual functions and physical legacy issues, including infrastructure and equipment.

The earliest possible development of a completion strategy will also facilitate the ICC’s approach on legacy, clarifying its vision on various issues including its impact on victims and affected communities and on the capacity of national judicial systems to investigate and prosecute crimes under international law, thereby maximising its capacity to work efficiently, effectively and in a timely manner. The ICC should start planning for its legacy and completion from the moment it begins work in a particular country and, preferably, have a well thought-out strategic plan for legacy and completion, including outreach on these issues, from before they enter a particular country to begin work. This planning and implementation should be carried out with a wide range of actors, both local and foreign, to maximise the potential legacy work and the chances of those actors also fulfilling completion roles.

NPWJ considers that any ICC completion strategy must fulfil the criteria discussed above and should consider the lessons learnt from the experiences of ad hoc courts such as the SCSL, the ICTY and the ICTR. At a more specific level, it is suggested that the ICC develops both general guidelines for its completion and situation-specific strategies that are phased to include short, medium and long-term objectives. This is crucial for the ICC to be aware of what is seeks to have achieved in a situation country from the earliest stages of investigation and is able to publicise to local populations the nature of these particular goals. This again contributes to expectation management. The completion strategy timeline for different parts of the ICC need not be the same; outreach would perhaps require longer engagement than others such as the OTP, as the need for outreach would likely continue beyond the OTP’s direct engagement. Finally, any completion strategy must be based in country in order to maximise local knowledge and participation.

6. Efficient and effective budget

While the annual budget is inevitably a controversial issue, the ICC can only improve on its areas of weakness (such as field presence, outreach and investigations), continue its existing functions and fulfil its mandate when financed with an adequate budget. All of this is threatened by an arbitrary zero nominal growth budget, which NPWJ strongly opposes. The ICC budget needs to be able to respond to new and unforeseen situations in an efficient and effective way.

NPWJ recommends that ICC’s annual budget be directed to where it matters most to maximise the Court’s impact, namely its field presence, outreach and investigations, all of which are the bedrock for the Court’s overall effectiveness and impact in countries where the crimes have been committed. For example, sufficient funds should be provided to ensure an appropriate field presence and outreach for Libya, based on a proper legacy and completion strategy, which will ensure proper oversight and allow States Parties to ensure ICC funds are spent efficiently and effectively.