

The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor*

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Abstract

Faced with increasing expectations and demands on the new International Criminal Court, the process of preparing its budget for 2005 presented significant challenges to the Court, the Committee on Budget and Finance and the Assembly of States Parties. This article focuses on the major challenges and examines the decisions taken by the Assembly. In particular, it looks at budgetary matters relating to the independence of the Prosecutor and decisions that could undermine it. Furthermore, with planned progress towards the first trials it focuses on key areas of the Court's work, including outreach, victim protection and field presence, that are in danger of being compromised through under-investment.

Key words

Budget; International Criminal Court; independence of Prosecutor; victims; witnesses

The rapid escalation in the work of the International Criminal Court (the Court) since the Rome Statute entered into force in July 2002, reflects the demand of the international community and states affected by these crimes to address impunity when the most serious crimes occur.

* For information about the 2004 budget process see J. O'Donohue, 'Towards a Fully Functional International Criminal Court: The Adoption of the 2004 Budget', (2004) 17 LJIL 579–97.

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As a result of significant investment in establishing the infrastructure of the Court from the earliest stages, the Court already has two full investigations in progress in the Democratic Republic of Congo and northern Uganda. Only a few months after the Assembly of States Parties to the Rome Statute of the International Criminal Court (Assembly) adopted the 2005 budget of the Court, a further referral has been received from the Central African Republic, Côte d'Ivoire has made a declaration pursuant to Article 12(3) of the Rome Statute and the United Nations Security Council is considering referring the situation in Darfur to the Court. Regardless of whether each of these situations proceeds, the need for the Court is proven comprehensively, but ensuring that it has the resources to respond to the demands which also ensure the independence of the Prosecutor is proving an important challenge.

This article looks at these issues in the context of the 2005 budgetary process. In doing so, it examines how measures taken by the Assembly to give the Court flexibility to respond to unforeseen circumstances will likely prove inadequate. Furthermore, with the progress towards the first trials it focuses on key areas of the Court's work, including outreach, victim protection and field presence that are being compromised through under-investment.

I. SUMMARY OF THE 2005 BUDGET PROCESS AND THE ESTABLISHMENT OF A CONTINGENCY FUND

The importance of the 2005 budget in the scheme of developing the new Court was explained by the Registrar in his address to the Assembly:

This third budget submission clearly bears the hallmark of judicial and prosecutorial activities and enables us to foresee the final stages in building the administrative and operational support structures for the Court as a whole. In other words, the Court has now clearly shifted the focus of its work from an operational and administrative establishment with some judicial activities to fully-functioning judicial institution, whose activities will be determined by the work of the investigators, those responsible for prosecutions and the Judges.¹

The draft prepared by the Court and submitted to the Committee and the Assembly was based on the following assumptions of the Court's work:

It is assumed that, in 2005, the Court may be faced with four situations, two in pre-trial, trial and appeals phases and two in the analysis or investigation phase. The Office of the Prosecutor is also constantly monitoring up to eight situations that may potentially fall within the Court's jurisdiction.²

The draft was submitted to the Committee on Budget and Finance (Committee) for consideration at its meeting on 4–6 August 2004. Its report on the budget was issued on 13 August,³ which recommended cuts for all organs of the Court, leading to a total recommended reduction of €4,845,000. As in 2004, serious questions were raised about the criteria used by the Committee in evaluating the draft budget, in

1. Address by the Registrar to the third session of the Assembly of States Parties, 6 September 2004.

2. Draft Programme Budget for 2005, ICC-ASP/3/2, 26 July 2004, para. 13.

3. Report of the Committee on Budget and Finance, ICC-ASP/3/18.

particular, its continued focus on policy decisions of the Office of the Prosecutor (examined in part 2 below).

At its third session held on 6–10 September 2004, the Assembly, after lengthy consideration by its Working Group, adopted a budget of €66,784,200 for the work of Court in 2005. In doing so, the Assembly made cuts totalling €2,779,800 from the original budgetary request of the Court.

One of the most important decisions made by the Assembly was to establish a €10 million contingency fund which the Court can use if it is faced with unforeseen expenses and situations not provided for in the annual budget. The fund addresses concerns raised by the Committee and states in previous budgetary periods that contingency should not be built into the core annual budget. At the same time it aims to ensure flexibility for the Court to respond to unforeseen developments, without requiring the approval of a supplementary budget by the Assembly. Originally, the Committee had recommended a €15 million fund which would be topped up every year;⁴ however, pursuant to a proposal by the German delegation, it was decided to reduce the fund to €10 million over four years ‘and that the Assembly of States Parties shall decide at its session in 2008 on the extension or possible discontinuation of the Fund and on any other question related to the Fund that seems necessary in the light of experience’.⁵

The financial limitations on the fund raise concern that it will be inadequate to allow the Court to respond effectively to all unforeseen developments in the next four years, especially taking into account the failure of the Court to include funding for field offices in the core budget for 2005 (see part 3 below) and the current demands on the Court to be active in other situations. Of course, the Court will likely not be able to launch investigations into every situation referred to it and in the case of a Security Council referral the Court will receive funds from the United Nations for expenses arising from the referral.⁶ However, additional costs will no doubt arise in examining situations referred to the Court, especially those not previously under analysis and in non-states parties; in monitoring situations to determine whether to launch an investigation and in other tasks such as public information and outreach that will be essential to keep communities affected by the crimes informed of its work and its decisions. It is therefore possible that the Assembly may be required to reconsider the amount and structure of the contingency fund if the funds are exhausted before 2008.

Despite concerns about the amount of the contingency fund, it is an important step which provides clearer guidance to the Court, the Committee and the Assembly

4. *Ibid.*, at paras. 28 and 32.

5. Resolution ICC-ASP/3/Res.4 Programme budget for 2005, Contingency Fund, Working Capital Fund for 2005, scale of assessments for the apportionment of expenses of the International Criminal Court and financing of appropriations for the year 2005, para. B, 6.

6. Article 115(b) provides: ‘The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources: (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council. Furthermore, the intention of the drafters in the negotiations leading up to the Rome Conference and during the Rome conference was clearly that, in case of a referral by the Security Council, the relevant expenses of the Court should be borne by the United Nations.’

about their budgetary decisions and recommendations. In particular, the adoption of criteria for the uses of the fund⁷ clarifies that foreseeable tasks and situations in the financial year should be included in the annual budget and the contingency fund should only be used to respond to any unforeseen situations or developments or unavoidable expenses. During the Assembly's third session, the foreseeability test was applied correctly to most recommendations of the Committee and if applied consistently in future will facilitate sound budgetary decision-making.

2. THE RECURRING QUESTION OF THE INDEPENDENCE OF THE PROSECUTOR

A major challenge in the first budgetary processes has been dealing with the tension between the need to ensure efficiency and sound financial management of the Court's budget and the need to grant the Prosecutor flexibility to exercise his independence as set out in the Rome Statute.⁸ The tension arises in two key areas: first, where budgetary decisions threaten to interfere with the ability of the Prosecutor to evaluate situations, start investigations and proceed with trials and, second, where budgetary decisions threaten to interfere with the ability of the Prosecutor to decide the structure of his Office.

2.1. Activities of the Prosecutor

The first issue should be resolved by the Prosecutor's preparation of clear short-term, mid-term and long-term assumptions for the work of the Office. These projections have been presented to states and observers during consultations held by the Prosecutor and have been included in previous budgets which have been endorsed by the Assembly. Therefore, providing the Prosecutor's budget request is consistent with the agreed assumptions, no conflict should arise. However, a problem does arise when there is a need to revise the assumptions of the Court.

In the 2004 budget, the assumptions adopted by the Assembly were that in 2004 the Court would have one investigation and one situation in preliminary analysis, by 2007 a second or third situation could be before the Court, and by 2010 the Court would have a constant docket of three situations. However, reflecting the increasing demands on the Court, these projections changed considerably in the 2005 budget which assumed that in 2005 the Court may be faced with four situations: two in pre-trial, trial and appeals phases and two in the analysis or investigation phase; by 2008 a third trial situation could come before the Court; and by 2011 the Court would have a constant docket of three or four situations.

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7. Resolution ICC-ASP/3/Res.4, *supra* note 5. Annex provides that the contingency fund will be used for:
 (a) Cost associated with an unforeseen situation following a decision by the Prosecutor to open an investigation; or
 (b) Unavoidable expenses for developments in existing situations that could not be foreseen or could not be accurately estimated at the time of adoption of the budget; or
 (c) Costs associated with an unforeseen meeting of the Assembly of States Parties.'
8. See J. O'Donohue, 'Towards a Fully Functional International Criminal Court: The Adoption of the 2004 Budget' (2004) 17 LJIL 579, at 586–589.

In response, the Committee noted that the assumptions for 2005 were ‘ambitious and reasonable but noted that there were significant uncertainties in the timetable for each situation’ and recommended that the resources for the third investigation team be cut from the core budget for 2005. The Assembly considered the developments at the Court and the statement by the Prosecutor, affirming his intention to launch a third investigation in mid-2005,⁹ and decided that the third investigation team was foreseeable and, therefore, rejected the Committee’s recommendation. Furthermore, it adopted the 2005 assumptions of the Court, which should guide the next budgetary processes.

Changes to the assumptions of the Court’s work are policy decisions of the Court, which the Assembly has a responsibility to oversee. However, while they have often significant budgetary implications, it is important that they are considered independent of the budgetary process through consultations with the Court that respect the independence of the Court and which ensure that these issues are considered on the merits, taking into account the requirements of the Court and the needs of the international community. If such a debate is placed solely in the context of budgetary decisions, then there is a real danger that budgetary considerations will overshadow all other factors which deserve consideration and that the Assembly will control Court policy through the purse strings.

2.2. Structure of the Office of the Prosecutor

While some advances have been made in making effective budgetary determinations about the activities of the Office of the Prosecutor, a major problem continues to exist in budgetary oversight of the management and administration of the Office. The Rome Statute expressly provides that this is the responsibility of the Prosecutor: ‘The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof.’¹⁰ However, the Committee in its report made recommendations that challenge the strategic decisions set out in the draft budget and, in some cases, the recommendations were adopted by the Assembly.

2.2.1. *Cuts to the Jurisdiction, Complementarity and Cooperation Division*

In 2004, the Prosecutor established a new Jurisdiction, Complementarity and Cooperation Division (JCCD) from the External Relations and Complementarity Unit. In his address to the Assembly, the Prosecutor explained:

We created the Jurisdiction, Complementarity and Cooperation Division (JCCD), comprised of institutional analysts and international lawyers who provide systematic analysis and recommendations on referrals from states and on communications from citizens and organizations. These functions require analysts with a different profile and skill-set from that of the criminal analysts in the Investigation Division. The division also helps us overcome the major challenges we face by building cooperation.¹¹

9. Address of the Prosecutor to the third session of the Assembly of States Parties, 6 September 2004.

10. Rome Statute, Art. 42, para. 2.

11. Address of the Prosecutor, *supra* note 9.

In its report, the Committee recommended that two new posts within the JCCD to integrate joint analysis teams and the investigation teams would 'duplicate the skills of other members of those teams and undermine the effectiveness of the clear demarcation between situations analysis and investigation functions'.¹² The Court responded that, if necessary, the Office of the Prosecutor could function without the two posts. However, the Court explained that the inclusion of the posts was a strategic decision by the Prosecutor to ensure continuity between analysis and investigation teams during the investigation phase:

The JCCD members have different profiles and perform fact-finding and legal analysis functions which are very clearly distinguished from other members of the team. While the Investigation Division carry out fact-finding on crime patterns, the JCCD analysts carry out fact-finding on complementarity (national judicial and investigative institutions and proceedings, including questions of willingness and ability) and interests of justice. Article 53(2) of the Statute is explicit that the analysis of these requirements is not finished when the Prosecutor opens an investigation. Because of accumulated skills and knowledge, a JCCD analyst should remain with the investigation and trial team to keep it informed at all times of institutional complexities and problems.¹³

The discussion of the Committee's recommendation took place in a wider debate about the work of the JCCD, which was sparked by a suggestion (not a formal recommendation) in the Committee's report that the Prosecutor should consider restoring the JCCD within his immediate office¹⁴ (an issue which bears no financial significance and is clearly outside the mandate of the Committee). A number of states expressed their broad concerns about the structure and role of the JCCD, while others supported the independence of the Prosecutor to decide the structure of his office, which is set out in the Rome Statute. The general debate about the JCCD, which had little budgetary or financial content, was a clear attempt by some states to address their concerns about the JCCD through the budget process rather than as part of the assessment of the effectiveness of the implementation of prosecution strategy. It was partially resolved only when a representative of the Prosecutor announced that a consultation with states on this and other issues of prosecution strategy would be organized in the future. In the context of this discussion, the Assembly's Working Group, however, decided to accept the recommended cuts to the two JCCD posts with little consideration of the arguments put forward by the Office of the Prosecutor of the strategic need for the posts, and this decision was endorsed by the Assembly.

2.2.2. *Cuts to other OTP units*

The Committee also made recommendations for staff cuts in the Office of the Prosecutor's Public Information Unit and Translation Unit on the basis of perceived duplication with the Registry. The Court, reflecting agreement between the Office of the Prosecutor and the Registry, in its comments on the recommendations explained

12. Report of the Committee, *supra* note 3, para. 66.

13. ICC Comments on the Report of the Committee on Budget and Finance, non-indexed document submitted to the Assembly.

14. Report of the Committee, *supra* note 3, para. 61.

that the tasks of these staff were complementary to and not duplicative of the Registry's roles. In relation to the Public Information Unit, the Court had explained to the Committee that the unit's work 'will be highly sensitive and confidential and requires a thorough knowledge of the inner workings of the OTP: it must therefore be located within the office of the OTP itself'.¹⁵ Representatives of the Office of the Prosecutor also stressed the importance of a separate Translation Unit noting problems experienced by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), highlighting the need 'to ensure respect for confidentiality and avoid potential conflicts when a single translation service serves both prosecution and defence'.¹⁶ Despite these explanations, the Assembly's Working Group decided to implement the Committee's recommended staff reductions in the Translation Unit and did not implement the cuts to the Public Information Unit, on the basis that it would mean reducing posts they had approved only in 2004.

The role of the Committee and the Assembly to detect and reduce unnecessary duplication between organs of the Court is fundamental to ensuring the efficiency of the Court. However, the practice of the Committee and the Assembly has failed to draw on the relevant experience of other international courts which demonstrate that there are some tasks which should be conducted by the Office of the Prosecutor independently of the Registry and which can even promote greater efficiency. These tasks can be performed complementarily to the work of the Registry, provided that there are clear rules or guidelines to prevent duplication. Developing such an approach would likely be more effective than simply seeking to limit all administration to the Registry.

While there is clearly a responsibility of the Assembly to oversee the management and structure of the Office of the Prosecutor, it is essential that policy decisions are dealt with independently of the budget process, in more appropriate mechanisms that allow states input without compromising the independence of the Prosecutor to structure his Office. The budget should not become an alternative avenue for states to address their concerns on matters of policy.

3. A HAGUE CENTRIC BUDGET

An overriding criticism emerging through the budget process is that while the activities of the Court are expanding, there is insufficient investment to ensure that the Court can operate effectively in the field.¹⁷ In particular, the draft 2005 budget submitted by the Court failed to provide for field offices and requested inadequate resources for victim protection and outreach.

15. Report on the outreach activities of the Court (pursuant to para. 26 of the Report of the Committee on Budget and Finance of 31 March 2004), ICC -ASP/3/CBF.2/10, 9 July 2004, para. 3.

16. ICC Comments, *supra* note 13.

17. CICC Submission to the 3rd session of the Assembly of States Parties on the Report of the Committee on Budget and Finance, 20 August, available at www.iccnw.org/documents/asp/papersonaspissues/3rdASP/CICCBudgetTeam_CommentsCBFreport26Aug04.pdf; Human Rights Watch Memorandum to States Members of the Assembly of States Parties, 2 September 2004.

3.1. Field offices

Field offices have been a key mechanism for the functioning of the ICTY and the ICTR. In 1995, the ICTY opened its first field office in Zagreb and opened two others in 1996 in Sarajevo and Belgrade. In 1999 other field offices were opened in Skopje and Pristina. The immediate need for field offices was summarized in the ICTY's 1995 Annual Report:

[The] offices are intended to fulfil a number of essential functions: to provide support to investigative teams for their fieldwork in the former Yugoslavia; to act as liaison between the Office of the Prosecutor and local and national Governments, war crimes commissions, NGOs and various United Nations agencies; to provide expert legal advice to the Office of the Prosecutor on republic and federal law in the former Yugoslavia; to coordinate and report on the work of the observers monitoring war crimes trials in the former Yugoslavia; and to advise the Office of the Prosecutor of important developments relevant to the work of the Office of the Prosecutor, including monitoring the situation with respect to the United Nations peace forces in the former Yugoslavia and local media reports.¹⁸

The ICTR also focused immediately on establishing a field office in Kigali:

Most of 1995 was devoted to the following activities: establishing cooperation with the Rwandese Government and with other Governments; establishing relations with United Nations bodies and specialized agencies and with non-governmental organizations; selecting and recruiting qualified staff; developing a strategy for investigations and prosecutions; establishing and furnishing an office in Kigali; drawing up a budget; establishing an organizational structure; establishing operational procedures and setting up office automation equipment.¹⁹

Although the Court will function very differently from the ICTY and ICTR, which had lengthy mandates to investigate broadly the crimes committed in the two countries,²⁰ it is surprising that the Court took the initial decision not to establish any field offices in 2005, despite the fact that two investigations are currently taking place and the possible commencement of a third. The draft programme budget for 2005 did not request any resources for field offices. Instead, the budget provided for professional staff in The Hague to travel regularly to the field and in many cases to work with locally recruited staff. In its report on the budget, the Committee noted the importance of such offices:

the decision not to establish field offices at this stage should save money and reduce the security risks inherent in creating an ongoing field presence, and agreed that it would be preferable to avoid creating such offices if possible. However, the Committee was

18. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, A/50/365-S/1995/728, para. 37.

19. Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994, A/51/399-S/1996/778, para. 40.

20. See Address by the Prosecutor to the Assembly of States Parties, 16 September 2004: 'A focused prosecutorial strategy: This means centering our efforts on perpetrators bearing the greatest responsibility, with a policy of short investigations, targeted indictments and expeditious trials, and an interdisciplinary investigative approach, adjusted to the peculiarities of each situation.'

also aware that it could yet prove necessary to establish offices if the Court found it was unable to perform investigations and witness protection functions effectively without a field office. Since only limited resources were provided in the draft programme budget for a field office, the Committee expected that any decision to expand field activity would probably make it necessary to obtain substantial additional resources from the contingency fund or future programme budgets.²¹

On the first day of the Assembly the Registrar announced a significant change in position by the Court:

As cases develop and the Court is in a position to more accurately evaluate the concrete realities on the ground, we are finding that it may be necessary to slightly adjust the working assumptions that relate to the need for a presence of the Court in the field. In August, the OTP and the Registry together carried out two reconnaissance missions in the field in the Countries which are the subject of investigations by the Prosecutor. They concluded that, in some instances a more permanent presence of the Court may be required than initially anticipated. We ask the Assembly to mindfully take this proposal into account when considering the budget submission.²²

The decision to present the request directly to the Assembly represents a serious failure by the Court to address the important need for field offices in its original draft budget.²³ More disturbingly, the decision of the Assembly not to include resources for field offices in the core budget on the basis that the Court could obtain such funds through the contingency fund²⁴ is not consistent with the criteria for the use of that fund adopted by the Assembly at the same session. The need for the field offices in 2005 was clearly foreseeable and had been provisionally estimated at €885,000 in submissions to the Assembly by the Registrar. In making this decision, the Assembly committed almost a tenth of the limited resources of the contingency fund to field offices which were considered by the vast majority of states and the Court to be foreseeable.

3.2. Protection of victims and witnesses

The protection of victims and witnesses must be a major concern to any international criminal court, particularly to the Court, which is conducting two investigations in situations with continuing conflicts. It is, therefore, a matter of concern that the budget only provides for two locally recruited staff in the field to assist with support and protection for victims and witnesses, who will be overseen by four

21. Report of the Committee, *supra* note 3, para. 58.

22. Address of the Registrar, *supra* note 1. The President in his address to the Assembly on the same day also referred to the need for field offices: 'As observed by the CBF and several NGOs, the Court provided only for limited resources for field presence in its draft budget programme. When the Court started the discussion about a future field presence, it was not yet possible to accurately estimate the needs. Since then, as mentioned earlier, two joint OTP-Registry reconnaissance missions to the field have been undertaken. On the basis of their findings, it is now possible to provide you with a clearer picture as to the specific needs of a field presence.'

23. Indeed, non-governmental organizations had been urging for a considerable time (more than a year) that field presences be established as soon as practicable to support investigations and to provide support and protection for victims and witnesses. At the end of 2004, the Court was advanced in the preparations to establish its first field offices.

24. Official Records of the Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. ICC-ASP/3/25, Part II: Programme Budget for 2005 and related documents, para. 8.

professional staff based in The Hague. The Hague-based staff will be 'required to travel extensively so as to ensure that VWU field operations are planned thoroughly and function properly, and that the Section can extend the international network of support and protection resources for witnesses'.²⁵ Both the ICTY and the ICTR have realized the importance of having an operations centre in the field. In 2002, the ICTY Victims and Witnesses Section opened a field office in Sarajevo 'to expand and enhance the services provided to witnesses, particularly those who are especially vulnerable or sensitive'.²⁶ The ICTR opened a sub-office in the Kigali field office in 1997:

The Kigali office has responsibility within Rwanda for operations such as travel and relocation and other activities relating to witnesses resident there. It serves as a liaison with the local Rwandan authorities in the context of implementing the witness support and protection programme.²⁷

Despite serious concerns expressed by non-governmental organizations,²⁸ the Committee and the Assembly did not make any recommendations or decisions relating to the Victims and Witnesses Unit. Victims' rights groups have stated that the proposed structure of the Court's Victims and Witnesses Unit set out in the budget is seriously flawed and that the Court will likely face serious challenges in 2005 in conducting protection and support tasks for victims and witnesses remotely from The Hague.

3.3. Outreach

The experience of the ICTY, ICTR and Special Court for Sierra Leone demonstrates that effective outreach programmes in the countries where crimes are being investigated and prosecuted are essential to ensure understanding and co-operation from victims and witnesses, the general public and the authorities. In this respect, the Court's steps to develop effective outreach programmes have been more limited than the current programmes of these other international criminal courts.

The ICTY and ICTR have made considerable investment in outreach in the field. The ICTY over time established outreach offices in Zagreb, Banja Luka, Sarajevo, Pristina and Belgrade. Likewise, in late 2000, the ICTR opened its Information and Documentation Centre in Kigali.

The establishment of these offices aimed to overcome the most obvious difficulty encountered by both Tribunals: the physical distance of their seat from the countries they were serving. The creation of outreach offices in these different locations aimed

25. Draft Programme Budget, *supra* note 2, para. 417.

26. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, A/57/150, para. 269.

27. Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, A/53/429-S/1998/857, para. 84.

28. See CICC Submission, *supra* note 17.

to ensure that there was a localised focal point for each tribunal, to enable people the opportunity to directly approach each for accurate information.²⁹

It is now generally recognized that international criminal courts need to begin outreach at the earliest possible date. The ICTY and ICTR did not begin their outreach programmes until years after the first investigations began, which led to considerable difficulties in gaining support and co-operation from the general public and authorities in the countries where crimes occurred. The Special Court for Sierra Leone, which is located in the country where the crimes took place, on the other hand, developed a comprehensive outreach policy from its very beginning and serves as the most progressive model:

Between September 2002 and February 2003, the Chief Prosecutor and the Registrar held a series of “town hall meetings” in all 12 districts to explain the Court’s work to the population in the provinces and receive feedback . . . By April 2003, the Registry had put in place an Outreach Unit that would eventually comprise 17 people, with small offices spread throughout the country in a District Grassroots Network. Through the Network the Outreach Unit has built capacity to get information to and from the district in the country within a 36-hour period, despite lack of phone coverage and poor road infrastructure.³⁰

The Special Court’s outreach unit has encountered serious funding problems in its development originating from its Management Committee’s perception that outreach is not an essential component of the Special Court and on the basis that funding for the activities would not come from the core budget but would be sought from outside sources.³¹ Eventually, the European Union has assisted in funding the programme.

Despite the experiences of other international courts, the Court has yet to develop an effective outreach strategy in countries where it is active or to request adequate funding in the 2005 budget to implement effective outreach. In a report to the Committee on the Outreach Activities of the Court,³² the Court describes in detail the strong activities of the President, the Judiciary, the Office of the Prosecutor and the Registry in promoting the Court in states parties and non-states parties around the world. In relation to the document, the Committee in its report notes:

the Committee was concerned at the lack of a coherent strategy for public information, outreach and communication. There appeared to be a mindset of independence in each of the organs which inhibited cooperation on a holistic strategy for the Court and which could lead to duplication of efforts.³³

The Committee fails to note that at the time the Court’s report on outreach was submitted on 9 July 2004, the Court had been publicly conducting a preliminary

29. Special Court Task Force, Briefing Paper on an Outreach and Public Education Program for the Special Court, 7–18 January 2002.

30. International Centre for Transitional Justice, ‘The Special Court for Sierra Leone: The First Eighteen Months’ (March 2004).

31. See Human Rights Watch, ‘Bringing Justice: The Special Court for Sierra Leone, Accomplishments, Shortcomings, and Needed Support’ (September 2004).

32. ICC-ASP/3/CBF.2/10, 9 July 2004, *supra* note 15.

33. Report of the Committee, *supra* note 3, para. 107.

examination into crimes committed in Uganda for over six months and had just commenced a full investigation in the Democratic Republic of Congo, which had been in preliminary analysis for almost a year. However, the Court does not report any substantive outreach initiatives in the two countries. In the 2005 budget, the Office of the Prosecutor provides only one local liaison assistant per investigation team, if security conditions permit, to 'combat misinformation regarding the activities of the Office, manage local expectations (which can be unrealistically high), help to rebuild the trust of leaders and community organizations, and take the pulse of the local people with whom investigators must interact in order to gather testimony and evidence'.³⁴ The ability of one person to conduct all these tasks in a wide area is impossible. The Public Information Unit of the Registry does provide some resources for outreach and for establishing a local presence in the field; however, the provision of €150,000 for this in both countries will mean only a minimal outreach will be possible.

The failure of the Court to establish an effective outreach programme is already having a significant adverse impact in Uganda and the Democratic Republic of Congo. Criticism is mounting of the failure of the Court to conduct meaningful outreach in both countries and reports indicate that there is widespread misunderstanding of the Court and its work. A report of a leading women's non-governmental organization of its mission to Uganda in November 2004 demonstrates the extent of the problem:

It seems that neither the Ugandan state nor the International Criminal Court cared to consult with or raise awareness about the ICC among the people of Northern Uganda. As a result, misconceptions and misinformation abound about the period from which the ICC would begin investigations, the potential conflict between amnesty laws and the ICC, the limited sense of justice for the community if only a few top leaders are tried by the ICC, the offender being unfairly better off in custody at the ICC than in Uganda or the bush, the possibility of the ICC prosecuting children and the possibility of reparations for victims. None of the people we spoke to had seen or met any ICC officials in the field, leading some to term the ICC's investigation as an 'undercover' operation.³⁵

Recognizing that the situations are taking place in continuing conflicts, and therefore are very different from other outreach programmes of international courts, cannot excuse the fact that outreach initiatives in these countries has been almost non-existent and even the most basic information about the Court is not being communicated to the public. There is a real danger that misinformation about the work of the Court could undermine its investigations. The Court has a responsibility to the communities to inform them about its work and at an appropriate stage to inform victims of their right to participate in proceedings and apply for reparations.³⁶ While a more unified outreach strategy is reportedly being developed by all organs of the Court, it is unlikely to have sufficient resources in 2005 to operate

34. Draft Programme Budget for 2005, *supra* note 2, para. 250.

35. Press Release by the Women's Initiatives for Gender Justice, in collaboration with Isis-WICCE and Ugandan Women Activists, 23 November 2004.

36. See Rome Statute, Arts. 68(3) and 75 and Rules of Procedure and Evidence, Rule 16.

effectively without accessing the contingency fund or outside funding which should not be sought for funding core functions of the Court and would set a worrying precedent for other key activities of the Court.

4. CONCLUSIONS

The major challenge of the first three budget processes of the Court has been to determine the extent of developments in the new Court's work in the following year. This has now to a large extent been resolved by the establishment of the contingency fund and the foreseeability test, which must be applied properly and consistently to ensure more accurate budgetary oversight of the Court's work and provide flexibility guaranteeing the Court's independence and ability to respond to unforeseen circumstances. Given the current demands on the Court and the limited resources of the contingency fund, the Assembly should be prepared to invest more in the fund if it becomes necessary in the next few years.

The independence of the Prosecutor to establish effective strategies and structures within his Office continues to be undermined in the budget process. The problem arises primarily from the approach taken by the Committee to focus on strategy decisions of the Office of the Prosecutor in its report. Equally, having failed to invest in appropriate mechanisms to consult with the Prosecutor on strategy issues which fully respect his independence, states have actively used the budgetary process as a forum for strategic discussions and have made decisions that impact on the strategy of the Prosecutor. It is important that the Assembly establish mechanisms to consult with the Prosecutor on strategy which fully respect the Prosecutor's independence. At the same time, the Assembly should instruct the Committee that its role is not to challenge policy decisions through its recommendations but to focus on matters of efficiency. These measures would be a significant step towards ensuring that the policies of the Court drive the budget, instead of the budget process decided by the Assembly being used as a tool for driving policy.

Major problems in the budgetary process continued to emerge this year. In particular, the failure of the Court to incorporate effective field strategies and resources in the budget will likely pose significant problems to its work in 2005. Inadequate provision for victim and witness protection means that victims and witnesses that the Court has a duty to protect could be compromised. Failure to develop national outreach strategies in countries where investigations are taking place means that the general population will continue to have little or no information or understanding about the Court. It is essential that this lack of investment is addressed in the 2006 budget process and in the meantime, if necessary, the Court should be prepared to access the contingency fund to perform these tasks effectively in 2005.