

Since 2010, ASF has been implementing a project on international criminal justice and transitional justice in Uganda. In this context, ASF has conducted close consultations with victims and affected communities about prosecution of alleged perpetrators of war crimes and crimes against humanity. Victims have shown a strong interest and willingness to be involved in criminal proceedings, both at international and national levels.<sup>1</sup> They seem, however, lacking sufficient information and understanding as to their rights and as what participation to criminal proceedings might encompass. This situation is not new to ASF. Similar concerns have been expressed by victims and affected communities in other contexts where ASF has been implementing international criminal justice and transitional justice projects, such as in Central African Republic and DR Congo.

Through this working paper, ASF seeks to share its experience and reflexions on victims' representation and participation to proceedings before the International Criminal Court ("ICC"). It aims at prompting further discussions amongst stakeholders, including the ICC.

## VICTIMS' CHOICE VS. LEGAL AID?

### TIME FOR THE ICC TO RE-THINK VICTIMS' PARTICIPATION AS A *WHOLE*

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<sup>1</sup> See "Uganda: LRA victims react to the first hearings in the case of D. Ongwen" at <http://www.asf.be/blog/2016/03/25/uganda-lra-victims-react-to-the-first-hearings-in-the-case-against-dominic-ongwen/>; "Thomas Kwoyelo case: heeding the victims' voices" at <http://www.asf.be/blog/2016/04/22/thomas-kwoyelo-case-heeding-victims-voices/>.

## **Introduction**

1. On 27 November 2015, the Single Judge in the case against Dominic Ongwen (“Ongwen case”) issued what some might consider as a quite unusual decision on the representation of victims and legal aid before the International Criminal Court (“ICC”).<sup>2</sup>

2. While upholding the choice of some victims to be represented by two designated lawyers, the Single Judge decided to appoint the Office of the Public Counsel for Victims (“OPCV”) as the “common legal representative” for the remaining victims who had not mandated these two lawyers.<sup>3</sup> The Single Judge further observed that these two designated lawyers did not qualify for financial assistance by the Court as they were “counsel chosen by victims” and not “common legal representatives” chosen by the Court.<sup>4</sup> The Judge stressed that this observation was prompted by the mention in the Registry’s report that the two designated lawyers had informed the victims that they “*would be free of charge as the associated costs could be borne by the Court*”.<sup>5</sup> In his decision, the Judge further noted the Registry’s comments that a number of powers of attorney included a statement that (i) the lawyers would represent the victims on a *pro bono* basis, (ii) the lawyers explained the victims that they would submit a request for legal aid from the Court once appointed, and (iii) the Registry had no information on whether or not the choice of some applicants to designate the lawyers was influenced by this reference to a *pro bono* assistance.<sup>6</sup>

3. At the time of this decision, 249 victims admitted to participate to the proceedings had granted powers of attorney to these two lawyers,<sup>7</sup> while 294 participating victims had not made such a choice (and were thus to be represented by the OPCV).<sup>8</sup> Since then, after further review of the victims’ application forms by the Registry, these two lawyers are representing more than 1400 victims, while the OPCV is representing a group of around 500 victims.<sup>9</sup> This decision has been confirmed by the Trial Chamber (following a request by the designated lawyers to review the Pre-Trial Single Judge’s decision on legal aid).<sup>10</sup>

4. The Single Judge’s decision has prompted a wide range of questions and concerns amongst victims’ communities, victims’ counsel and some civil society organizations. Particularly, some queried its impact on future proceedings, including as whether this would imply that victims would not be able to effectively choose their counsel unless under the presumption that they would then be deprived from any legal aid from the Court.

5. This article seeks to answer these concerns and, more widely, it discusses legal representation and participation of victims before the ICC in light of its current practice.

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<sup>2</sup> Pre-Trial Chamber II, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, 27 November 2015, ICC-02/04-01/15-350.

<sup>3</sup> ICC-02/04-01/15-350, spec. §§ 16, 17 and 19.

<sup>4</sup> ICC-02/04-01/15-350, § 18.

<sup>5</sup> ICC-02/04-01/15-350, § 18.

<sup>6</sup> ICC-02/04-01/15-350, § 18; Registry’s Report ICC-02/04-01/15-346-Conf-Exp (reclassified as public on 2 December 2015), §§ 11 and 12.

<sup>7</sup> According to the Registry’s Report on the Implementation of Decision ICC-02/04-01/15-331, 23 November 2015, ICC-02/04-01/15-346-Conf-Exp (reclassified as public on 2 December 2015), § 1: 492 individuals had appointed the two lawyers, including 249 admitted to participate in the case, 171 applicants whose request was still pending and 70 applicants who application form was yet to be processed by the Registry for transmission to the Judge and the parties,

<sup>8</sup> ICC-02/04-01/15-350, spec. §§ 16 and 19.

<sup>9</sup> Pre-Trial Chamber II, Decision on issues concerning victims’ participation, 15 December 2015, ICC-02/04-01/15-369, §§ 8 and seq.; Pre-Trial Chamber II, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, § 7. On these dates, the exact numbers were: 1434 victims represented by the designated lawyers and 594 by the OPCV. See also: Trial Chamber IX, Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims, 26 May 2016, ICC-02/04-01/15-445, § 1.

<sup>10</sup> ICC-02/04-01/15-445.

## **Right to choose one's counsel, common legal representation and legal aid: Rules and Practice at the ICC**

6. Under Rule 90(1) of the Rules of Procedure and Evidence ("Rules"), "*a victim shall be free to choose a legal representative*". ICC Chambers have, however, held that such right is not absolute.

7. First, according to ICC case-law, this right is "qualified" by Rules 90(2) and 90(3) of the Rules which provide for common legal representation of victims "where there are a number of victims" and "for the purpose of ensuring the effectiveness of proceedings".<sup>11</sup> The determination of when common legal representation is necessary in order to ensure the effectiveness of the proceedings is to be made by the Chamber.<sup>12</sup> Second, in Chambers' views, victims who do not have the means to remunerate their representative have a further limited freedom of choice. In such scenario and according to Rule 90(5) of the Rules, the common legal representative is then to be chosen by the Court.<sup>13</sup>

8. The Decision on common legal representation of victims in the *Bemba* case articulates this interpretation from ICC Chambers:

*"15. The Chamber therefore adopts Trial Chamber II's approach, according to which: [...] although victims are free to choose a legal representative this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court. Common legal representation is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible. The Chamber considers, therefore, that the freedom to choose a personal legal representative, set out in rule 90(1) is qualified by rule 90(2) and subject to the inherent and express powers of the Chamber to take all measures necessary if the interests of justice so require.*

*16. In addition, the Chamber stresses that, pursuant to Rule 90(5) of the Rules, in cases where victims do not have the means to remunerate them, common legal representatives are chosen by the Court, as opposed to by the victims themselves. In the present case, the Chamber is mindful that victims or groups of victims allowed to participate in the trial proceedings may lack the necessary means to pay for a legal representative of their own choosing and, thus, may receive financial assistance from the Registry to allow them to be represented by a common legal representative. As stated by Trial Chamber II, victims in this situation have a limited freedom of choice to select their own legal representative."<sup>14</sup>*

9. A review of the recent ICC Chambers' practice shows that, except in two specific instances due to their own particularities,<sup>15</sup> (i) Chambers have opted for common legal representation of group(s) of victims; (ii) these common legal representatives were appointed

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<sup>11</sup> Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the organization of common legal representation of victims, 22 July 2009, ICC-01/04-01/07-1328, § 11; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on common legal representation, 25 May 2012, ICC-02/05-03/09-337, §§12-14; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, 4 June 2012, ICC-02/11-01/11-138, § 35; ICC-02/04-01/15-445, § 7.

<sup>12</sup> Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victim's participation, 18 January 2008, ICC-02/11-01/11-1119, § 123.

<sup>13</sup> Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005, § 16. Implicitly, Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, Decision Concerning the Organisation of Common Legal Representation of Victims, 2 December 2013, ICC-01/04-02/06-160, § 23; ICC-02/04-01/15-445, § 11.

<sup>14</sup> ICC-01/05-01/08-1005, §§ 15 and 16 (emphasis added).

<sup>15</sup> In the case of O. Al Bashir, the victims are represented by two lawyers acting on a *pro bono* basis; in the situation on Registered Vessels of the Union of the Comores, the Hellenic Republic of Greece and the Kingdom of Cambodia, victims are represented by the lawyers representing the Union of the Comores.

by the Chambers (or with the “authorization” of the Chamber)<sup>16</sup>; and (iii) these common legal representatives appointed by the Court did not necessarily match the choice expressed by the victims, even where victims (or part of them) had been specifically consulted on a potential legal representative and even where a counsel was already representing applicants before their admission to participate to the proceedings.<sup>17</sup>

10. ICC practice further shows that legal aid has been granted to indigent victims when represented by an “external” counsel designated by the Court as common legal representative of these victims. The OPCV legal officers are not paid by the Court’s legal aid since they are ICC staff members and thus on the ICC pay roll. However, even where the OPCV is appointed as common legal representative, the Court’s legal aid system may need to intervene and pay the “external” counsel who is joined to the OPCV teams to provide support thereto from the field. This is currently the situation at least in two ongoing cases before the ICC.<sup>18</sup>

### **Selection process of common legal representatives by the Court**

11. Under Rule 16(1)(b) of the Rules, the Registrar has a general mandate to assist the victims in “*obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information*”. The Registry has further a specific mandate, under Rule 90 of the Rules, in the *selection process* of the common legal representative: either the Registry *assists* the victims in choosing this counsel (Rule 90(2)) or, when the victims are unable make a choice, the Registry *chooses* the counsel (Rule 90 (3)).

12. In 2011, the Registry adopted a policy of “systematic approach to common legal representation” to improve the implementation of its responsibilities under both Rules 16(1)(b)

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<sup>16</sup> *Bemba* case: ICC-01/05-01/08-1005, § 34; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011, ICC-01/09-01/11-249; Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 August 2011, ICC-01/09-02/11-267; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Order inviting the Registrar to appoint a common legal representative, 6 September 2011, ICC-02/05-03/09-209 and ICC-02/05-03/09-337; Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on victims’ representation and participation, 3 October 2012, ICC-01/09-02/11-498, § 60; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on victims’ participation in trial proceedings, 6 February 2015, ICC-01/04-02/06-449; TCVI, *The Prosecutor v. Bosco Ntaganda*, Second decision on victims’ participation in trial proceedings, 16 June 2015, ICC-01/04-02/06-650.

<sup>17</sup> See particularly: *Gbagbo* case: ICC-02/11-01/11-138, §§ 42 and 45: the Pre-Trial decided to appoint the OPCV as common legal representative, despite the victims’ choice and the Registry’s selection of a counsel. The Single Judge found such option preferable due to the short time remaining until the date for the confirmation of charges, considering that it would be the most appropriate and most cost-effective at that stage and that the system could be revised at a later stage in light of the victims’ views.

See also Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision appointing a common legal representative of victims, 23 November 2012, ICC-01/09-01/11-479. The Majority of the Chamber (Judge C. Eboe-Osuji dissenting) decided to appoint a new counsel located on the field (and assisted exclusively by the OPCV acting in the courtroom), instead of extending the mandate of the lawyer who had been appointed as common legal representative during the pre-trial phase. That lawyer had indicated that she was unable to relocate in Kenya during the trial, while the Majority found that an ongoing presence in Kenya was a mandatory requirement.

<sup>18</sup> ICC-02/04-01/15-350, §23: “*For this reason, the Single Judge expects counsel from the OPCV to follow the approach taken in a recent case where she was appointed as common legal representative of the victims, which is to include in her team one or more assistants based in Uganda and who possess good knowledge of the social context of the case, if necessary to be financed through the Court’s legal aid budget*” (emphasis added). See also, Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-138, 4 June 2012, § 44: “*The Single Judge is of the view that a Counsel from the OPCV should be appointed as the lead Counsel within the common legal representation team for the victims authorised to participate in the present case and that such Counsel should be assisted by a team member with wide knowledge of the context and based in Cote d’Ivoire to be paid by the Court’s legal aid budget*” (emphasis added). The OPCV is also appointed in the (former) cases against MM. Muthaura and Kenyatta and against MM. Ruto and Sang.

and 90 of the Rules.<sup>19</sup> Particularly, “[a]s part of the Registry’s new approach to the organisation of common legal representation for participating victims, the Registry will recommend in all cases an open and transparent selection of legal representatives”.<sup>20</sup>

13. In this systematic approach policy, the Registry held the view that prior representation of applicants in the case is not of itself a determinative factor in choosing a common legal representative. It is just a criterion amongst others when assessing the various candidates.<sup>21</sup> A counsel already representing victims is therefore to be interviewed as any other candidate, with no guarantee to be ultimately appointed as common legal representative.

14. In its report on legal representation of victims in the *Ruto* case, the Registry justifies this new approach as to avoid encouraging “the practice among counsel of “fishing” for victim clients”. According to the Registry,

“8. [...] As most victims do not know of a lawyer who might represent them at the ICC, they will usually appoint a lawyer who makes him or herself known proactively to the victims (either directly or through the intermediary who assists the victim to apply for participation). It has thus become usual for counsel to identify victim communities and approach them (directly or through an intermediary), explaining that if the victims wish to participate in ICC proceedings the counsel will be willing to represent them.

9. [...] While the Registry notes that the practice does not of itself suggest male fides, it can result in some undesirable consequences:

- Questions may be raised as to whether the victims have had a real, informed choice about their representation. They are likely not aware of other options for legal representation and can be ill-equipped to assess the relative skill and professionalism of the lawyer contacting them as compared with others.
- While lawyers involved in this practice might sometimes have qualities which are desirable in a victims’ legal representative, this is not necessarily the case.

10. An approach to rule 90(3) which prioritizes counsel already representing victims in the case risks unduly rewarding the practice of “fishing” by making an ability and willingness to engage in client solicitation a more significant factor in selection as a common legal representative than other criteria.

[...]

12. However, the Registry notes the complaints often received from lawyers on the Registry’s list of counsel that aside from solicitation, there are no clear avenues available for being appointed to represent victims before the Court. This has meant that many appropriately skilled counsel who refuse to solicit victim clients (including because their national rules forbid this) have not become involved in representing victims at the ICC”.<sup>22</sup>

### **How to make the victims’ choice closer to reality?**

15. Undoubtedly, there is some value in the Registry’s justification for relying upon “an open and transparent selection of legal representatives” in all cases and avoiding “fishing practice”, but not only. The issue is not so much about “fishing practice” but the need to

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<sup>19</sup> Registry, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Proposal for the common legal representation of victims, 1<sup>st</sup> August 2011, ICC-01/09-01/11-243, § 2 and 13 (and Anx1, § 2); Registry, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Proposal for the common legal representation of victims, 5 August 2011, ICC-01/09-02/11-214; Registry, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Proposal for the common legal representation of victims, 25 August 2011 (filed: 26 Aug. 2011), ICC-02/05-03/09-203, §§2-3 (and Anx 1); Registry, *The Prosecutor v. Laurent Gbagbo*, Proposal for the common legal representation of victims, 16 May 2012, ICC-02/11-01/11-120, §§ 2 and 3 (and Anx 1, § 7).

<sup>20</sup> ICC-02/05-03/09-203, § 3.

<sup>21</sup> ICC-01/09-01/11-243, §4(d), §§21-23; ICC-02/05-03/09-203, §3.

<sup>22</sup> Registry’s Proposal for the common legal representation of victims, ICC-01/09-01/11-243-Anx1, §§8-12 (emphasis added).



ensure that victims are effectively put in a position to make a genuine and informed decision about their legal representation.

16. In this regard, the Registry has a proactive duty and responsibility to effectively discharge its general mandate under Rule 16(1)(b) and assist victims in making an informed decision about their counsel, including in providing the adequate information on the restrictions imposed by the Court's rules and practice.

17. This implies for the Registry not only conducting so-called "open and transparent selection of legal representatives" to avoid "fishing clients", but first and foremost informing adequately and fully victims of their rights under the Statute and the Rules, and the ICC practice so far, namely that:

- Victims are free to choose a legal representative, but this right is not absolute;
- "where there are a number of victims" and "for the purpose of ensuring the effectiveness of the proceedings", the Court may decide that it is preferable to appoint a common legal representative to represent a group (or groups) of victims;
- According to the ICC practice, Chambers have adopted such an option in each case thus far;
- This common legal representative is to be appointed following an open and transparent interview process implemented by the Court;
- This process is open to any lawyer and compulsory, even for counsel already representing applicants;
- While the victims may express their choice about their counsel, ultimately the Court will decide (i) whether a common legal representative is appropriate in the circumstances of the case, (ii) who would be this common legal representative and (iii) whether to grant him/her legal aid;
- Only counsel appointed by the Court as common legal representatives are entitled to the financial assistance from the Court;
- In view of the last years' practice and interpretation of Regulations 80 and 81 of the Regulations of the Court, the Judge or the Chamber may decide to appoint the OPCV as common legal representative (including further details as to the OPCV and its functioning – see below).

18. Such information should be made easily accessible to allow its widespread dissemination towards victims but also communities and potential counsel. In addition, in the event where lawyers are already representing, and/or designated by, applicants, the Registry should further inform adequately and in a timely-fashion these lawyers about how the legal representation effectively works at the ICC.

19. Under Rule 16(1)(b) of the Rules, such an obligation for the Registry to inform adequately and comprehensively the victims, communities and potential counsel stands from the outset of any situation or case before the Court, and is independent from any prior decision from a Judge or a Chamber.

20. Applying effectively and systematically such a practice at the Registry would allow avoiding situations such as in the *Ongwen* case where the majority of victims are represented by designated counsel but without any financial assistance from the Court. In that case, the designated counsel took the assumption that they would necessarily be appointed as common legal representatives of victims and entitled to legal aid. They informed the victims accordingly.<sup>23</sup> This most likely lack of adequate information from the concerned lawyers, and their resulting wrong assumption about their designation, had a major consequence on the structure of the common legal representation of victims in that case. It is apparent from the decision that this raised some concern from the Single Judge as a potential "fishing of clients"

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<sup>23</sup> Registry's Report ICC-02/04-01/15-346-Conf-Exp (reclassified as public on 2 December 2015), §§ 11 and 12.

and, ultimately, this had a bearing on his decision not to appoint them as common legal representatives.<sup>24</sup>

21. The Registry's obligation to adequately and comprehensively inform victims about the ICC legal representation system should further include providing detailed information to victims as to the role, mandate and mode of functioning of the OPCV. In the author's view, there are compelling reasons for appointing external counsel as legal representative of victims (over the OPCV), including to uphold the independence of the counsel (and appearance of independence), to prevent conflicts of interests (between cases where the OPCV would be representing different groups of victims, as well as between the interests of the represented victims and those of the institution to which the OPCV ultimately belongs), as well as to avoid standardization of victims' representation (see below under "Re-thinking victims' participation and legal representation as a whole – a way forward"). However, since over the last years, Chambers have shown an increased trend in appointing the OPCV as common legal representative in several cases and despite the strong issues these appointments raise, there is need to adopt a realistic approach and consider that it would be missing the point not to address the OPCV's appointment when discussing how to make the victims' choice closer to reality.

22. In these particular circumstances, victims should thus be entitled to know that the OPCV is one of the potential candidates for their legal representation and, particularly, that (i) the OPCV is an organ within the Court structure; (ii) has already been assigned to represent victims in other cases before the Court, including, where applicable, representing victims in cases with conflicting interests (with further information as appropriate – for e.g. victims in the case against B. Ntaganda should be informed that the OPCV is representing both a group of "civilian" victims and a group of former child soldiers who arguably committed crimes against the first group of victims); (iii) the OPCV may be assisted by a counsel from the victims' country, but this counsel is not necessarily the lead counsel and therefore instructions as to the case's strategy come from the OPCV, the "local counsel" being an assistant to the OPCV in representing victims.

23. Considering the current Chambers' practice to appoint the OPCV, providing such transparent and clear information to the victims is instrumental to ensure that they effectively "*have had a real, informed choice about their representation*", according to the Registry's own wording.<sup>25</sup> Failure to do so would precisely result in the situation the Registry sought to avoid when adopting a policy of "systematic approach to common legal representation": that the victims "*are likely not aware of other options for legal representation*" and "*ill-equipped to assess the relative skill and professionalism of the lawyer contacting them as compared with others*".<sup>26</sup>

24. In addition to informing adequately and comprehensively victims from the outset, the Court ought to implement a systematic selection process of common legal representative and,

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<sup>24</sup> ICC-02/04-01/15-350, § 18: "At the same time, prompted by certain information provided by the Registry (ICC-02/04-01/15-346-Conf-Exp, paras 11-12), the Single Judge wishes to make the following observation. Rule 90(5) states that "[a] victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance". Counsel chosen by victims under rule 90(1) of the Rules is not a common legal representative within the meaning of rule 90, and not chosen by the Court. Therefore, the victims that have chosen to appoint Joseph Akwenyu Manoba and Francisco Cox as their legal representatives, even if they lack the means to pay, do not qualify for financial assistance by the Court. Considering that it appears from the information provided by the Registry that counsel appointed by the victims have informed their clients that their representation would be free of charge as the associated costs could be borne by the Court and that a substantial number of victims even signed powers of attorney indicating that the lawyers would represent them on a pro bono basis, it is imperative that the appointed counsel inform their clients that they presently do not qualify for financial assistance by the Court but may, if they so wish, benefit from legal representation free of charge by the common legal representative appointed by the Single Judge."

<sup>25</sup> ICC-01/09-01/11-243-Anx1, §9.

<sup>26</sup> *Ibidem*.

for the above-mentioned reasons (Chambers' practice to appoint the OPCV, see at §§ 21 and 22), this selection process ought to include the OPCV staff members as well as the external counsel who would support the OPCV, as any other candidate.

25. In his decision not to appoint the two designated counsel as common legal representatives in the *Ongwen* case, the Single Judge considered, among other things, the circumstance that they had not been "selected pursuant to a transparent and competitive procedure organised by the Registry".<sup>27</sup> Holding open, objective and transparent selection process for common legal representatives seems indeed the most reasonable way to ensure a fair balance between meeting the victims' choice (or preferences) for a (category of) counsel, and protecting them against lawyers who would not offer the professional standards to represent adequately their interests in the context of the case. Such selection process should however be systematically set out by the Court whenever a common legal representative will most likely be appointed (i.e. where there are a number of victims; to ensure the effectiveness of the proceedings and/or where there is a need for financial assistance). Victims, communities and lawyers should be fully informed about the existence of this selection process and about its results. The Court's organs, including the Registry and the appropriate Judge or Chamber, should work in close cooperation and coordination in accordance with Rule 90 (2) and (3) of the Rules. At the earliest time possible in a situation or case, the Judge or the Chamber should therefore give the appropriate instructions for the Registry to organize this selection process in a timely-fashioned manner. Considering the constant ICC practice to appoint a common legal representative in each case, organizing such a selection process could be considered as an automatic rule, without further instructions from the Chamber. This would largely simplify the management of the appointment of legal representative and also guarantee some "legal security" for the victims, the parties, but also the Court itself, including the Registry.

26. This selection process should necessarily include lawyers already designated by victims. For above-mentioned reasons (see §§ 21 and 22), it further should systematically include OPCV staff members as well as any external counsel the OPCV would intend to work with on the field.<sup>28</sup> There is no objective reason for excusing the OPCV from the selection process, quite the contrary. To quote again the Registry, "[w]hile lawyers involved in this practice might sometimes have qualities which are desirable in a victims' legal representative, this is not necessarily the case."<sup>29</sup> Without disputing the quality of the work of the OPCV, there can be no presumption that it necessarily offers the best skills to represent the interests of each victim in each case. In the past, the OPCV has submitted views and arguments about important factual or legal issues which are not necessarily shared by other groups of victims and/or legal representatives. As any lawyer, the OPCV defends its own points of view, which do not necessarily represent the most generally accepted interpretation of the law or which might be considered by other legal representatives as detrimental to the interests of the victims in another case. The requirement to apply the selection process to external counsel appointed in support to the OPCV is even stronger as this external counsel is not in a different situation than any other external counsel who would then be subject to the selection process.

27. If the Chambers' policy will remain to appoint the OPCV as legal representative, despite the legal issues it may raise (see below under "Re-thinking victims' participation and legal representation as a whole – a way forward"), then, not including the OPCV in a transparent and objective selection process as any other candidate would additionally impair the victims' choice as to their common legal representative.

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<sup>27</sup> ICC-02/04-01/15-350, § 20.

<sup>28</sup> See for e.g. in the case against B. Ntaganda: two OPCV staff members are lead counsel for 2 separate victims' groups; they are assisted by external counsel residing in DR Congo. In the *Ongwen* case, the Head of the OPCV is the lead counsel and is assisted by a domestic counsel located in Uganda.

<sup>29</sup> ICC-01/09-01/11-243-Anx1, §9.



28. The adoption and implementation of a systematic, transparent and objective approach to common legal representation at the ICC is crucial to uphold the victims' rights to an effective, adequate and meaningful participation to the ICC proceedings but, more largely, is instrumental to the ICC system as a whole. If victims feel that the Court simply disregards their views without any apparent objective and transparent criteria, then they have no ground to believe that their participation will be meaningful and, more largely, they have no good reason to have trust and faith into what ICC is supposed to represent, namely justice, reparation and reconciliation.

### **Re-thinking legal representation and victims' participation as a whole - a way forward**

29. In his decision to deny the appointment of the designated lawyers (and instead appoint the OPCV), the Single Judge has considered the "*OPCV's knowledge and experience in the procedure before the Court*" as well as the fact that "*appointment of external counsel would bring a disproportionate and unjustified burden to the Court's legal aid budget*".<sup>30</sup> This increasing trend from the ICC Chambers in appointing the OPCV as common legal representative raises a number of issues which questions the actual victims' right to participate to the proceedings and to present their views and concerns, as enshrined under Article 68(3) of the Statute.

30. The discussion here is not about the experience and competences of the OPCV but about principles. The wide appointment of staff members from the ICC – even if "independent" on the paper<sup>31</sup> – in several cases raises questions in connection with the principle of independence of the counsel, the "standardization" of the victims' representation, conflicts of interests, cost-effectiveness, trust and confidence of the victims in the ICC and, ultimately, as to the goal of the ICC in providing for the victims' participation and reparation.

### ***Cost-effectiveness and principles***

31. The argument of the cost-effectiveness of the OPCV has yet to be shown. Thus far, no actual objective comparative study of the costs incurred by an external counsel versus those incurred by the OPCV seems to have been conducted (or, at least, made public). A quick overview of the main costs differences between the two regimes shows however that such comparison would be worth considering. External counsel are paid according to time sheets (with a maximum amount of working hours that can be claimed per month and thus a maximum amount of fees; with potential decision from the Registry to decrease the number of working hours of the counsel and/of his/her team, depending of the stage of the proceedings). External counsel do not receive health insurance or pension. They pay taxes in their home countries. Conversely, ICC staff members receive a monthly remuneration supplemented by other advantages such as pension, health insurance, house and education allowances; they are immune from domestic taxes. In the event of the appointment of the OPCV combined with an external counsel on the field, the costs of this external counsel (including fees and travel costs) would further need to be added thereto. At this juncture, where indeed there is a crucial need for the Court to consider the most efficient use of its resources, it would therefore worth effectively conducting an objective and transparent comparative study between appointing an external counsel and appointing the OPCV (with an external counsel) as common legal representative.

32. The matter is however not only about cost-efficiency. It is first and foremost about rights and principles. The victims' right to have a counsel representing their interests must go with all the key attributes of any lawyer bound to discharge his/her representation agreement: independence (and appearance thereof); respect for professional secrecy and confidentiality;

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<sup>30</sup> ICC-02/04-01/15-350, §§ 24 and 20.

<sup>31</sup> Regulations of the Court, Regulation 81.

relationship of trust; placing the client's interests before counsel's own interests or those of any other organization; ensuring a fair representation of his/her clients and preventing conflict of interests.<sup>32</sup>

33. In a dissenting opinion in the *Ntaganda* case, Judge K. Ozaki articulated the rationale for appointing external counsel as lead counsel for victims as follows:

*"12. In the context of establishing the relationship of trust and proximity, there are reasons why victims may prefer to be represented by counsel who are external to the Court. This includes questions of independence, and, in particular, the appearance of independence. This is an important issue for victims, the Court and the LRVs themselves.*

*13. By way of example, victims' interests may not always be in conformity with those of the Court as an institution, and LRVs who are structurally aligned with the Court may be perceived as having greater conflict in that regard. Moreover, for victims who might not have a full understanding of the Court structure, the receipt of different messages from various organs of the Court - whether directly or through the media - could inhibit victim confidence in LRVs who they view as being aligned with the Court as an institution".<sup>33</sup>*

34. In a Position Paper on the Registry's ReVision of the legal representation of victims, ASF held a similar view.<sup>34</sup> This was further shared by the Coalition for the ICC legal Representation Team, a group of non-governmental organizations and lawyers' organizations.<sup>35</sup>

35. A systematic and exclusive legal representation of all the victims by one single organ of the Registry would create a strong appearance of dependence to the Court and a real risk of conflict of interests. "Victims" are not an abstract legal category. They are not talking from one single and universal voice. They have their own views on their cases and claims, and they are not necessarily sharing the same opinions on how to assert their rights before the Court. They may hold opposing views, including because they may belong to opposing groups (see for e.g. the situation in DRC: *Lubanga* case, *Ngudjolo* case, *Katanga* case, *Ntaganda* case). It would therefore be wrong to presume that victims would have no difficulties to be represented by a counsel who is a member of an organ of the Court which, in addition, may represent opposing interests.

36. A systematic appointment of a single organ of the Court – such as the OPCV as it stands for now – as common legal representative of victims will further raise the issue of "standardization" or "institutionalisation" of the views on legal representation. While some might claim value in having "pro-formatted" submissions from victims, this is not in favour of an adequate development of the rights of the victims, this is not the mandate of a counsel and ultimately it might be in breach of the right of the victims to have a counsel acting in their best interests.<sup>36</sup> The appointment of a single organ of the Court in various cases further raises issues as to the full respect of rights of the defence. Is it appropriate for one office (or for one single head of this office) to have access to all confidential and incriminating information in related cases (see, for e.g., *Lubanga* and *Ntaganda* cases)?

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<sup>32</sup> See ICC Code of Professional Conduct for Counsel, particularly Articles 6, 8, 12, 14, 15 and 16. These core principles are also enshrined in various domestic Codes of conduct and in the Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers ([http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_CoCpdf1\\_1382973057.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf));

<sup>33</sup> Partly Dissenting Opinion of Judge Ozaki, Annex to Trial Chamber VI, *The Prosecutor c. B. Ntaganda*, Second decision on victims' participation in trial proceedings, 16 June 2015, ICC-01/04-02/06-650-Anx (emphasis added).

<sup>34</sup> ASF Position Paper on ICC Registry ReVision Project – Basic Outline Proposals to Establish Defence and Victims Offices, 22 April 2015; ASF Position Paper on the "Proposal of the Registrar on the Principles Guiding the Establishment of a Victims Office and a Defence Office", 3 July 2015.

<sup>35</sup> CICC Legal Representation Team, Comments and Recommendations on the Proposed Victims Office in the context of the Registry ReVision, 3 April 2015; CICC Legal Representation Team, Comments and Recommendations on the "Proposal of the Registrar on the Principles Guiding the Establishment of a Victims Office and a Defence Office", 3 July 2015.

<sup>36</sup> ICC Code of Professional Conduct for Counsel, Art. 16(1).

37. Conversely, there is a true added value in having a wide range of lawyers, including from the countries concerned by the situations and cases, representing victims before the ICC. Involving domestic lawyers may contribute to strengthening the ownership of ICC proceedings by those directly concerned, and thus may contribute to achieving a goal of reconciliation and non-recurrence. Likewise, appointing domestic lawyers at the ICC may contribute to increasing domestic capacities to prosecute and try perpetrators at the domestic level and, thus, to achieving better complementarity between the ICC and domestic courts. Lawyers assigned at the ICC can indeed, in turn, share their experience in their home countries, either by representing defendant or victims or by training/sharing experiences with peers. To take few current examples, this could be the case in Uganda, where former LRA leader T. Kwoyelo is about to resume trial, in DR Congo where prosecutions for international crimes is becoming an increasing practice before domestic courts, in Central African Republic, where a Special Criminal Court is about to be set up.<sup>37</sup> Complementarity is to be considered at the institutional levels but also as to how strengthen domestic capacities and skills in prosecuting those responsible for the most serious crimes. The importance of increasing domestic forms of ownership and participation into ICC proceedings is even more crucial at a time where the ICC is perceived as the “justice of the whites against the African continent” and threatened with a global withdrawal from African States.<sup>38</sup>

### ***Victim’s representation and victims’ participation: what for?***

38. The mere goal of victim’s legal representation is to permit victims to present “their views and concerns” during criminal proceedings. Likewise, the admission process of victims into ICC proceedings is to serve this objective of allowing persons “*who have suffered harm as a result of the commission of [the] crime*” held against the accused to participate to these proceedings, including, where appropriate, claiming reparations.<sup>39</sup> In other words, legal representation and admission process are to be conceived under that perspective to permit victims of the crimes for which a person is prosecuted to participate to the criminal proceedings.<sup>40</sup> However, thus far, the Court has adopted a piecemeal approach to these issues.<sup>41</sup> Even the Chambers Practice Manual seems to conceive the admission process separately from the legal representation of victims.<sup>42</sup>

39. The recent experience in the case against G. Katanga is, however, quite illustrative on how these issues (legal representation, admission process and participation to proceedings) need to be addressed from the outset and as a whole. In that case, the legal representative of

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<sup>37</sup> See for e.g., ASF’s reports: “Thomas Kwoyelo case: heeding the victims’ voices” at <http://www.asf.be/blog/2016/04/22/thomas-kwoyelo-case-heeding-victims-voices/>; “La réparation des crimes internationaux en droit congolais” at <http://www.asf.be/blog/publications/francais-la-reparation-des-crimes-internationaux-en-droit-congolais/>; “Mise en œuvre judiciaire du Statut de Rome en RD Congo” at <http://www.asf.be/blog/publications/la-mise-en-oeuvre-judiciaire-du-statut-de-rome-en-rdc-congo-april-2014/>; “Recueil de jurisprudence congolaise en matière de crimes internationaux” at <http://www.asf.be/blog/publications/recueil-de-jurisprudence-congolaise-en-matiere-de-crimes-internationaux/>; “Central African Republic: Make Justice a Priority” at <http://www.asf.be/blog/2016/04/22/central-african-republic-make-justice-a-priority/>.

<sup>38</sup> African Union, Decision on the International Criminal Court, Doc. EX. CL/952(XXVIII), p. 3: “*The Open-ended Ministerial Committee’s mandate will include the urgent development of a comprehensive strategy including collective withdrawal from the ICC to inform the next action of AU Member States that are also parties to the Rome Statute, and to submit such strategy to an extraordinary session of the Executive Council which is mandated to take such decision*” (emphasis added).

<sup>39</sup> See definition of victims under Rule 85(a) of the Rules of Procedure and Evidence. Under Rule 85(b), the definition of “victims” also include “*organizations or institutions that have sustained a direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes*”.

<sup>40</sup> See ASF Report on Modes of Participation and Legal Representation at <http://www.asf.be/blog/publications/modes-of-participation-and-legal-representation>.

<sup>41</sup> See the various Chambers’ decisions on this matter (ICC Presidency, Report on Cluster D(1): Applications for Victim Participation, 25 August 2015); and the Registry’s proposal to reform the legal representation system (April 2015).

<sup>42</sup> Chambers Practice Manual, February 2016, p. 22, available at [https://www.icc-cpi.int/iccdocs/other/Chambers\\_practice\\_manual--FEBRUARY\\_2016.pdf](https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf) (consulted 10 March 2016), pp. 20-23.

victims has requested the withdrawal of applications on behalf of 99 victims so far participating to the proceedings.<sup>43</sup> He further requested the termination of his representation for 93 other victims.<sup>44</sup>

40. The legal representative explains that these withdrawals resulted from individual discussions with the concerned persons about their application as well as from further explanations about the scope of the case against G. Katanga.<sup>45</sup> He further emphasizes how the way by which application forms have been completed raises serious issues about their content.<sup>46</sup> He notes:

*"At the time of filing out the application forms, the concerned persons did not receive detailed explanations as to the proceedings and the harm they would be legally entitled to claim. The conditions under which the application forms are filled out (namely quickly, with no discussion on the substance of the applicant's request and without the assistance of a person that may provide them legal advices and directions) contribute to compiling erroneous information due to lack of adequate information given to the victims, or even to filling out forms with persons who, in practice, did not meet the necessary requirements to benefit from reparations (in the absence of any causal link with the crimes committed by G. Katanga)".<sup>47</sup>*

41. As a result of the work achieved by the legal representative in that case, more than 50% of the initial 364 victims are now sought to be removed (172 applicants), while another group of 132 new applicants is sought to be admitted for reparations, after individual meeting with, and assessment by, the legal representative about their individual claim<sup>48</sup>.

42. While this situation may partially be explained by the scope of the conviction against G. Katanga, it sounds that a proper legal advice at the time of the filing of the application forms would have most likely improved the admission process and contributed to avoid the participation (and review of corresponding applications) of persons who were not adequately informed on their rights and whether they qualify as victims in that case.

43. This example shows the need to adopt a holistic view to victims' legal representation, admission and participation (including reparation).<sup>49</sup> It also raises the broader question of what is the ultimate goal of victims' participation before the ICC.

44. After more than 10 years of judicial practice and many attempts to regulate the participation of victims to its proceedings, it is probably the right time for the Court to now fairly and genuinely address the goal of victims' participation to ICC proceedings, the meaning the Court is ready to give to Article 68(3) of the Statute, and, accordingly, to decide upon an improved mechanism of participation (and thus representation) of victims.

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<sup>43</sup> *Communication du Représentant légal relative à la situation de certaines victimes*, 12 October 2015, ICC-01/04-01/07-3609 ; *Rectificatif de la deuxième communication du Représentant légal relative à la situation de certaines victimes*, 15 March 2016, ICC-01/04-01/07-3669-Corr ; *Troisième communication du Représentant légal relative à la situation de certaines victimes*, 16 March 2016, ICC-01/04-01/07-3671.

<sup>44</sup> *Rapport sur la mise en œuvre de la Décision n°3546, en ce compris l'identification des préjudices subis par les victimes suite aux crimes commis par G. Katanga (Article 75-1 du Statut et Norme 38-1-f) du Règlement de la Cour*, 13 mai 2016, ICC-01/04-01/07-3687, § 23.

<sup>45</sup> ICC-01/04-01/07-3687, § 23.

<sup>46</sup> ICC-01/04-01/07-3687, § 46.

<sup>47</sup> ICC-01/04-01/07-3687, § 21 (unofficial translation).

<sup>48</sup> ICC-01/04-01/07-3687, §§ 4, 26 and 32.

<sup>49</sup> See ASF Report on Modes of Participation and Legal Representation at <http://www.asf.be/blog/publications/modes-of-participation-and-legal-representation/>.

## **Conclusion**

45. It cannot be said that the decision on the legal representation in the *Ongwen* case departs from the recent ICC Chambers' practice or would constitute a new trend in the case-law as such. Since the two designated lawyers were not appointed by the Court as common legal representatives of the victims, they could not be afforded with legal aid.

46. As such, there is no opposition between the victims' right to choose a counsel and legal aid. The actual issue is thus about how to make it effectively compatible and reasonable, balancing all the interests at stake.

47. Informing adequately victims in full transparency, but also communities and lawyers, as to the legal representation system before the ICC, and systematically implementing a transparent and objective selection process of common legal representatives are instrumental to the successful and cost-effective functioning of the Court. Knowing from the outset what they can effectively expect in terms of legal representation before the ICC (including as to common legal representation and legal aid) will assist victims in making better choices, reducing misunderstandings about their rights, managing better their expectations, reducing their frustrations towards the ICC system and, hopefully, strengthening their confidence therein. This should also contribute in reducing repeated time-consuming and costly consultations with victims, communities and/or, where applicable, designated lawyers, such as in the *Ongwen* case. In that case, the Registry had to go back to the field to verify and acknowledge the powers of attorney. During individual consultations, the Registry had to ascertain the level of understanding of legal representation of 38 victims. It also met with the two designated counsel.<sup>50</sup>

48. Failure for the victims to trust that their views and concerns will effectively be presented before the Court, their participation to the Court's proceedings will be jeopardized and, ultimately, so will be the Court's mandate under its Statute. It is therefore time that the Court starts addressing the questions of the participation, reparation and legal representation of victims, as whole.

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<sup>50</sup> ICC-02/04-01/15-346-Conf-Exp (reclassified as public on 2 December 2015).