

ASF Position Paper

ICC Registry ReVision Project – Basic Outline Proposals to Establish Defence and Victims Offices

Introduction

1. ASF acknowledges the mandate given by the Assembly of States Parties (“ASP”) to the Registrar to *“reorganize and streamline the Registry’s organizational structure and operations, with the goals of eliminating duplication, increasing effectiveness and efficiency, as well as creating synergies”*.
2. ASF recognizes that the current Registry’s functioning may create confusion and frustration (both from its own staff but also from the clients) as well as an inefficient and inadequate use of its limited resources. ASF supports a reform of the Registry that will effectively enhance the performance of its duties to support the judicial process and a better use of the resources allocated, while upholding the rights of the accused and the rights of the victims.
3. ASF praises the Registrar’s attempts in determining the causes of the lack of efficiency of the current system, as well as in trying to address these causes. ASF supports the establishment of an Independent Association of Counsel which will include all lawyers acting before the Court.
4. However, as explained hereinafter, ASF is concerned that the proposals to establish one single Victim’s Office and one single Defence Office as set out in the *“Basic Outline Proposals to Establish Defence and Victims Offices”* (“Basic Outline”) will effectively address the actual causes of the deficiencies of the current system and will not adversely affect the rights of the accused and the rights of the victims.
5. This Paper seeks to share with the Registrar these concerns and to offer elements of consideration in his decision-making process. It is, however, not to be considered as suggesting as such a reform of the Registry as set out in the Basic Outline.

(1) Victims’ Office

6. ASF joins and supports the comments, principles and recommendations set out in the document submitted on 3 April 2015 to the Registry by the Coalition for the International Criminal Court Legal Representation Team (see full text in the Annex)¹.
7. Particularly, ASF would like to stress that although it acknowledges the need to review the functioning of the Registry in dealing with victims-related issues, it would support, prior to reforming the current system, a more thorough analysis and identification of the issues, challenges, problems and concerns regarding the efficiency and performance of the relevant offices working on victim issues. The Basic Outline’s rationale and its subsequent proposal to set out a legal representation system performed by staff members within the Victims’ Office (“internal legal representation”) raise doubts as whether some core issues and challenges in representing the interests of the victims before the Court have been effectively or sufficiently considered. These issues include the management and the process of applications

¹ Comments and Recommendations on the Proposed Victims Office in the context of the Registry ReVision.

for participations and/or reparations; the necessary relationship of confidence and trust between the counsel for victims and his/her clients, and therefore the need to fully guarantee the independence of the counsel, including the appearance of independence, towards the Court. Furthermore, the Registry's proposal does not refer to any substantiated study (such as a comparative study) as to why and how the internal legal representation as proposed would better serve the victims' interests (including in terms of cost-effectiveness) compared to legal representation with external counsel.

8. Conversely, inclusive legal representation of all the victims by one single organ of the Registry will create a strong appearance of dependence to the Court and a real risk of conflict of interests. Victims represented at the Court may be opposing parties and/or represent opposing views as to their rights. From the victims' point of view, one single organ of the Court will be representing them but also those who they consider as their "enemies" (see for e.g. the situation in DRC: *Lubanga* case, *Ngudjolo* case, *Katanga* case, *Ntaganda* case). It would be difficult, if not impossible, for them to trust their counsel, simply because he/she will be seen as a member of an organ of the Court which, in addition, may represent opposing interests. 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.

(2) Defence Office

9. As a preliminary remark, ASF notes that, contrary to the Registry's organs dealing with victims-related issues, there is no strong evidence of actual duplication and confusion between the current services dealing with defence-related issues (CSS and OPCD). The actual need to merge CSS and the OPCD as proposed in the Basic Outline remains unclear. On the contrary, according to several stakeholders (particularly Counsel at practice at the Court), it would be preferable to maintain both CSS and the OPCD. This Paper is therefore not to be considered as suggesting merging CSS and OPCD functions. It addresses the Registry's proposal as it stands for now.

10. ASF would suggest that if reforming the Registry's organs dealing with defence-related issues, the following **guiding principles** need to be considered:

- (i) Full respect of the rights of the suspect/accused person;
- (ii) Full respect to the independence of the counsel (including: the appearance of independence – see Art. 6 Code of Conduct);
- (iii) Adequate resources administered by counsel and with full accountability for the management of his/her budget;
- (iv) Transparency and predictability: whatever the model chosen, counsel should clearly be informed on the resources available to him/her in the performance of his/her duties and as to the mechanism supervising the use of these resources.

On the basis of these Principles, ASF presents the following **recommendations**:

- 1) If establishing one single Defence Office, consider issues of conflicts of interests between "legal advice" functions and other Registry's functions to be performed within that Office**

The Registry may defend interests and views opposed to the defence's position, in a specific case but also as a general policy. A request from counsel for legal research/advice requires providing the context of that request, and therefore disclosing the defence strategy (or part of) to allow the drafting of an adequate and useful note to the defence. Legal advices provided to a Counsel may concern opposite views and/or interests to those of the Registry. In addition, the supervision of the resources allocated to the defence by the Registry is a source of many contentious issues between the Registry and defence counsel.

The Basic Outline's suggestion to extend the client-counsel privilege to all staff members of the Defence Office including for those handling the legal aid does not address these potential conflicts of interests. If a single office were to provide legal research/advice to defence counsel, there would be therefore need to consider how to ensure effectively the confidence of the Counsel therein, including its independence, and appearance of independence, from the Registry.

2) If establishing one single Defence's Office that would no longer provide "legal advice" functions and/or provide a "voice" for the Defence located within the ICC's structure, take the necessary measures to counterbalance any negative impact on the rights of the defence

- Consider increasing the resources allocated to the Defence Counsel to make up for a loss of legal support provided currently by the OPCD: in doing so, consider the overall impact of such budgetary increase on the legal aid and Registry's budget and whether it is a cost-effective alternative to maintaining current structures;
- Consider the need for an independent structure within the Court to represent the voice of the defence:
 - o This structure could ultimately be the yet-to-be established "Independent Association of Counsel" provided that (i) this Association is indeed entrusted with such competences, (ii) is provided with the adequate resources to perform such tasks and (iii) it can be demonstrated that this Association can play such a role of voicing the defence at the level of the Court and the ASP;
 - o In the meantime, consider maintaining an independent defence structure as a transitional structure to fulfill such role of voicing the defence and, where applicable, to serve as an interface with an independent association of counsel (rather than anticipating that this association will indeed play this role of voicing the defence at the level of the Court).

(3) The Independent Association of Counsel

11. ASF support the establishment of an independent association of counsel, acting as a bar. In ASF's view, this association should include all lawyers acting before the Court (Defence Counsel; Duty Counsel representing witnesses; Independent Counsel appointed by Chambers; Legal representative of victims; Counsel for States, etc.). There is no justification to distinguish between the different persons represented before the Court as any lawyer acting in that capacity should be submitted to the rules set out in the Court's Counsel Code of conduct.

12. ASF notes that consultations amongst the lawyers as to the establishment of an Independent Association of Counsel are still ongoing and that a number of important issues remain to be solved. The establishment of such Association should, however, not impair the continuous support to defence counsel until the time it is established.

ANNEX



CICC LEGAL REPRESENTATION TEAM

Comments and Recommendations on
the Proposed Victims Office in the context of
the Registry *ReVision*

3 April 2015

The Coalition for the International Criminal Court (CICC) Legal Representation Team (“Team”) is a group of non-governmental organizations and lawyers’ organizations with expertise in issues related to the legal representation of defendants and victims.

The CICC Team on Legal Representation presents the following guiding principles and recommendations to the Registry *ReVision* Team on the proposed Victims’ Office.

The starting points of the below principles and recommendations are:

- 1) the Registry’s “Basic Outline of Proposals to Establish Defence and Victims Offices” (“Basic Outline”), proposing to establish one single Victims’ Office combining the functions currently performed by the Office of Public Counsel for Victims (“OPCV”), the Victims Participation and Reparations Section (“VPRS”), and to some extent the Counsel Support Section (“CSS”), with legal representation performed by in-house counsel;
- 2) an alternative proposal (“New Vision”) concerning legal representation that emerged from the discussions with Registry’s representatives during the *Expert Conference on the Proposed Victims and Defence Offices* held on 23 and 24 March 2015 at the seat of the Court, consisting of an external counsel “supported by in-house supporting staff”.

The Team acknowledges the following:

- There is a need to review the sections at the Registry dealing with victims-related issues, with the aim of improving the Registry’s performances and ensuring the best use possible of its resources, while ensuring effective implement of the rights of the victims;
- There are too many sections at the Registry (VPRS, PIDS, CSS and the OPCV) interacting with victims and with counsel for victims (including lack of adequate cooperation and adequate working procedures between these organs);
- There is a need to create synergies and, if possible and appropriate, maintain and make the best use of the institutional knowledge to provide the best support possible to the victims.

The Team would like to note that, although it acknowledges the need to review the functioning of the Registry’s sections dealing with victims-related issues, it would support first a more thorough analysis and identification of the issues, challenges, problems and concerns regarding the efficiency and performance of the relevant offices working on victim issues, as mandated by the Rome Statute. On the basis of the results of this review, existing or new models for strengthening and, if needed, streamlining the ICC’s strategies and methodologies for its work with victims may be identified. This could result in designing new structural

models and other changes. This Paper is therefore not to be considered as suggesting, as such, the reform of the system dealing with victims-related issues as set out in the Basic Outline or as presented now in the New Vision.

GUIDING PRINCIPLES

The Team submits that any legal representation system should take into consideration the following guiding principles:

- (v) Full respect of the right of the victims to choose their counsel (Rules 90(1) and (2) of the Rules of Procedure and Evidence) to effectively implement their right to participate to the proceedings;
- (vi) Consultation: victims should be consulted in the selection of their counsel as well as throughout the proceedings;
- (vii) Flexibility: legal representation should be sufficiently flexible to fit the specific features of the case and victims concerned since it is impossible to foresee all future scenarios;
- (viii) Adaptability: legal representation in a specific case should be adaptable to the victims' needs;
- (ix) Genuine participation: legal representation should ensure genuine victim participation in ICC proceedings;
- (x) Full respect to the independence of the counsel and other team members (including: the appearance of independence – see Art. 6 Code of Conduct): Legal representation is a client-counsel relationship based on the confidence of the client in his/her counsel;
- (xi) Adequate resources administrated by the counsel with full accountability for the management of his/her budget;
- (xii) Transparency and predictability: whatever the model chosen, counsel should clearly be informed on the resources available to him/her in the performance of his/her duties and as to the mechanism supervising the use of these resources.

RECOMMENDATIONS

On the basis of the above principles, the Team offers the following recommendations to the *ReVision* Team in the establishment of a Victims' Office:

3) When establishing one single Victims' Office, consider issues of inherent conflicts of interests between "VPRS" functions and "Legal Representation" functions

As described in the Basic Outline, "VPRS functions" imply dealing with the admission of victims in the proceedings and providing advices to the judges (e.g. where VPRS is tasked to filter out application forms – see the *Bosco Ntaganda* case). Such functions are incompatible with the representation of the victims' interests; counsel for victims is mandated to represent the interests of his/her clients and not those of the Chamber. In addition, legal representation may imply challenging VPRS advices or decisions.

4) Victims should have a choice of a Lead Counsel who is "external"/not a permanent staff member of the Court, from the early stage of each proceedings and for the entire duration of the proceedings (including reparations)

Rationale:

- This would better protect the victims' right to choose their counsel;
- This would uphold the independence of the counsel (including appearance of independence) and confidence in the legal representation system: in particular, victims represented at the Court may hold opposing views. The Team queries how a victim's group could have confidence in a counsel co-located in the same Office with counsel representing, at the same time, what may be opposing interests;
- This would ensure stability and legal security: except where exceptional circumstances require so, the Lead Counsel should be appointed from an early stage and for the duration of the entire proceedings (including the reparation phase) – changes of counsel at each stage of the proceedings can seriously affect the relationship of confidence with the victims and thus the legal representation; it also has an unnecessary and costly financial impact (since it will require a new consultation with a large number of victims);
- This would limit the risk of "standardization/institutionalisation of the views on legal representation": a full in-house legal representation may lead to the development of uniform representations of the rights of victims, which may be contrary to the specific interests of victims in the particular case they are being represented; there is also a risk that counsel's views could be coloured as a result of counsel's ties to the institution and its culture.

5) The Lead Counsel should be entrusted with the responsibility to decide when he/she needs to be on the field and in the courtroom

Rationale:

- This would ensure the independence of the Lead Counsel in deciding the best strategy to defend the interests of his/her clients;
- This would ensure flexibility: the need to adapt the legal representation to the particularities of each situation/case;
- This would uphold the relationship of trust between the counsel and the victims: the ability of the counsel to meet his/her clients and effectively relaying their views and concerns in the courtroom.

6) Legal Representation Team's composition

- The guiding principles should remain independence and flexibility, including allowing the Lead Counsel to determine his/her needs as to his/her team's composition (whether need for co-counsel; legal assistant at the seat of the Court and/or on the field; case manager);
- Consideration should be given to providing the Lead Counsel with a specific budget with clear indication of its use;
- One or more external persons in the field to support the counsel to allow continuous contacts with represented victims should be provided for. Given that the field team member(s) will be representing the Lead Counsel on a daily basis and interacting with the victims on behalf of the counsel, it is crucial to guarantee that these team members (or, at least, one of them) have a legal background and sufficient seniority to speak on behalf of the Lead Counsel ;
- The possibility to use in-house supporting staff (such as a case manager) needs to be considered further before deciding on its appropriateness and feasibility. This would require considering and detailing the measures that would effectively:
 - o Uphold the counsel's independence (including determining clearly and in advance to whom the staff member reports and how, who decides whether this staff member may be assigned to another case considering the workload management and the conflict of interests);

- Guarantee the confidentiality of information (including restricted access to information; separate offices; specific trainings of staff members);
 - Guarantee the absence of any conflict of interests (including strong firewalls, monitoring and effective measures to address conflict of interests);
 - Ensure the loyalty of this staff member towards the counsel;
- Overall, uphold the confidence of the represented victims in their counsel.

7) In-house support to the Legal Representation Team

- In-house support should provide for efficient, competent and objective support in legal research (including reviewing and compiling relevant case-law on victims' rights in general), and maintain institutional knowledge on representation of victims;
- Measures to protect the independence of this support should be considered;
- Efficient and functional IT tools should be provided, particularly unified databases which could serve different actors (those dealing with application/reparations forms; those dealing with protection of witnesses; those dealing with legal representation), separately and under strong restrictions access and controls.

- 8) The forthcoming new structure and, where appropriate, the new system of legal representation, should be independently assessed after 1-year implementation period and thereafter on a regular basis.** To the extent possible, the system's beneficiaries should be consulted during such review exercises.