

ASF POSITION PAPER
**ON THE "PROPOSAL OF THE REGISTRAR ON THE PRINCIPLES GUIDING THE
ESTABLISHMENT OF A VICTIMS OFFICE AND A DEFENCE OFFICE"**

Introduction

1. This document provides for comments and recommendations upon the "Proposal of the Registrar on the Principles Guiding the Establishment of a Victims Office and a Defence Office", transmitted to ASF on 9 June 2015 ("New Registrar's Proposal"). It further considers the complementary explanations given by the Registrar during the Strategic Meetings ICC-NGOs held last month in The Hague.
2. ASF recalls that the initial Registrar's suggestion contained in the "Basic Outline Proposals to Establish Defence and Victims Offices" suggested, on one hand, merging CSS and the OPCD to establish one single Defence Office and, on the other hand, merging VPRS and the OPCV, with legal representation of victims performed by a pool of independent lawyers within the Victims' Office to which an *ad hoc* external counsel *could* be added on a case-by-case basis.
3. It recalls its support to reforming the Registry with a view of effectively enhancing the performance of its duties in support of the judicial process and a better use of the resources allocated, while upholding the rights of the accused and the rights of the victims.
4. ASF praises the New Registrar's Proposal for adjusting this initial suggestion in light of views and concerns expressed by practitioners and NGOs¹. ASF finds, however, that further clarifications are required already at this stage to ascertain a proper understanding of this Proposal and therefore its conformity with core guiding principles.

¹ Particularly the views expressed during the "Expert Conference on the Proposed Victims and Defence Offices" held on 23 and 24 March 2015 at the seat of the Court. This Conference brought together NGOs and representatives of the International Tribunals but also, more importantly, experienced practitioners before the Court. See also the views contained in: CICC Legal Representation Team, Comments and Recommendations on the Proposed Victims Office in the context of the Registry *ReVision*, 3 April 2015; ASF Position Paper: ICC Registry *ReVision* Project – *Basic Outline Proposals to Establish Defence and Victims Offices*, 22 April 2015.

(1) Defence Office

5. During the Expert Conference, several stakeholders, including counsel at practice before the ICC but also other international criminal tribunals or courts, expressed the need for an independent structure to represent the voice of the defence before the Court.

6. According to the New Registrar's Proposal, this structure could be the yet-to-be established "Independent Association of Counsel".

7. ASF recalls its support to the establishment of an independent association of counsel, acting as a bar, which would include all lawyers acting before the Court². However, as of today, there is no clear indication as to when this Association will be established, whether it will be entrusted with such competences of, and adequate resources for, voicing the defence at the level of the Court and the ASP, and whether this Association will indeed be deemed legitimate by both the counsel and the Court. On the other hand, the establishment of such Association should not impair the continuous support to defence counsel until the time it is established.

8. In light of this, ASF recalls its recommendation of maintaining an independent defence structure within the Registry as a transitional structure to fulfill such role of voicing the defence until such time the "Independent Association of Counsel" will effectively be able to perform this task. Similar views were expressed by other NGOs during the meeting held on 12th June 2015.

9. ASF notes with satisfaction that, during this meeting, the Registrar also acknowledged that such an option could prove to be indeed useful and that he would give it some consideration.

(2) Victims' Office

10. ASF joins and supports the comments, principles and recommendations set out in the Team Paper submitted on 3 July 2015 to the Registry by the Coalition for the

² ASF Position Paper, p. 3.

International Criminal Court Legal Representation Team³. The text of this Team Paper is to be considered as full part of the present document (see hereinafter).

11. In addition, although the Registrar has long recalled that this reform is not driven by budgetary issues, ASF would favour the issuance of a public study related to the costs and resources of the system of legal representations. Such a study should provide sufficient elements to assess its methodology. In that regard, ASF would particularly recommend that, when considering the costs of and resources used by a full in-house representation system, such a study includes pension scheme, health care costs as well as other advantages granted to ICC staff members (such as children education grants, duty station allowances...) with a projection of the long term costs affecting the ICC budget (for e.g.: pension scheme has a long term effect on the ICC budget). Such grants are relevant when comparing the costs of and resources allocated to an external counsel who is not entitled to such advantages.

³ CICC Legal Representation Team, Comments and Recommendations on the Proposed Victims Office in the context of the Registry *ReVision*.



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

The Coalition for the International Criminal Court 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 Team presents the following guiding principles and recommendations to the Registry *ReVision* Team on the proposed Victims’ Office.

Introduction

12. These comments are related to the “Proposal of the Registrar on the Principles Guiding the Establishment of a Victims Office and a Defence Office”, transmitted to the Coalition for the ICC on 3 June 2015 (“New Registrar’s Proposal”). They also take into account additional explanations given by the Registrar during the Strategic Meeting ICC-NGOs on the *ReVision* held on 10 June 2015 in The Hague.

13. This New Registrar’s Proposal is presented as a result of the Expert Conference on the Proposed Victims and Defence Offices held on 23 and 24 March 2015 at the seat of the Court (“Expert Conference”). In addition to the staff of the Court, this Conference was attended by 24 counsel (including counsel for victims), representatives from 25 NGOs and representatives of the International Criminal Tribunal for Former Yugoslavia and of the Special Tribunal for Lebanon.

14. It is recalled that the discussions at the Expert Conference were based on the proposals set out in the “Basic Outline Proposals to Establish Defence and Victims Offices” (“Basic Outline”). The Basic Outline proposed merging VPRS and the OPCV, with legal representation of victims performed by a pool of independent lawyers within the Victims’ Office to which an *ad hoc* external counsel *could* be added on a case-by-case basis.

15. Following the Expert Conference, the Coalition for the International Criminal Court's Legal Representation Team (Team) submitted to the Registrar guiding principles and recommendations in the establishment of a Victims' Office⁴.

16. The Team reaffirms its support to a reform of the Registry that will effectively enhance the performance of its duties in support of the judicial process and a better use of the resources allocated, while upholding the rights of the accused and the rights of victims. Particularly, the Team recalls its view that 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)⁵.

17. The Team praises this New Registrar's Proposal for giving considerations to some of the views and concerns expressed by practitioners and NGOs. The Team finds, however, that further clarifications on the Victims Office Proposal are required already at this stage of the *ReVision* process to ascertain a proper understanding of this Proposal and therefore its conformity with core guiding principles.

18. The New Registrar's Proposal suggests, in each case, the appointment of an external counsel as lead counsel for the victims, making reference to victims' right to choose their counsel, a key principle that this Team has advocated for. This proposal is also a positive step towards strengthening other core principles in victims' representation.

19. In a recent opinion, 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

⁴ CICC Legal Representation Team, Comments and Recommendations on the Proposed Victims Office in the context of the Registry *ReVision*, 3 April 2015 ("CICC Team Paper").

⁵ CICC Team Paper, 3 April 2015, p. 1.

*through the media - could inhibit victim confidence in LRVs who they view as being aligned with the Court as an institution” (emphasis added).*⁶

20. In its Team Paper of 3 April 2015, the Team expressed similar rationale for supporting giving victims a choice of lead counsel that is external to the Court. Such appointment will better protect the victims’ right to choose their counsel, as they will not be constrained to accept in-house counsel. It will uphold the independence of the counsel, including the appearance of independence. It will increase the confidence in a legal representation system which will not be perceived as tied to a specific institution⁷.

21. For these reasons, the Team supports the New Registrar’s Proposal to appoint an external counsel as lead counsel for victims in each case.

22. A number of elements in the New Registrar’s Proposal need, however, to be clarified, or considered already at this stage, to ascertain whether it will effectively uphold victims’ rights and be respectful of the counsel’s mandate in representing victims before the court (including the appearance of independence of the counsel, full respect of confidentiality and full attention to avoiding conflict of interest). These elements include:

1) Timing for the appointment of the external counsel

23. The New Registrar’s Proposal suggests the appointment of the external counsel “for each case at the latest when moving beyond pre-trial” (emphasis added). It therefore considers the possibility of assigning an in-house lawyer at the pre-trial stage.

24. Except when exceptional circumstances require so, counsel of victims’ choice should be appointed at the beginning of the proceedings and for its entire duration. The pre-trial phase, and particularly the confirmation of charges, is a cornerstone in the proceedings. Views and concerns of the victims have proven to be instrumental at the preliminary stage. It is therefore crucial to ensure that their interests are effectively and independently represented from the beginning. Likewise, it is crucial to ensure victims’ confidence in the legal representation system from the outset.

25. Changes of counsel can seriously undermine the relationship of confidence and trust with the victims and thus legal representation. In the event the in-house lawyer representing victims at the pre-trial phase will be then assigned to the external counsel, it may cause confusion in the victims’ minds as to who is actually representing them and who to trust. It may raise issues for the external counsel in performing

⁶ 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.

⁷ For further explanations, see CICC Team Paper, 3 April 2015, p. 2.

his/her duties because the victims may not understand why they would need to refer to him/her and no longer to the in-house staff member initially appointed to represent their interests. It may also have an unnecessary and costly financial impact in the event that new consultations with a large number of victims will be required (either in choosing their external counsel and/or in explaining this change of counsel and building up confidence).

26. Conversely, a proper management of the caseload before the court should allow anticipating the need for the appointment of external counsel. A pre-selection of specially trained, competent external counsel, including as to their willingness and preparedness to represent victims before the court, could be considered well in advance of the start of any proceedings. Subject to further consultations with the victims, a roster of external counsel relevant for each case could therefore be constituted sufficiently in advance of the beginning of a case. Such a roster mechanism would also allow a competency-based selection process of counsel to guarantee the quality and the competence of the candidates to be proposed to the victims. This could further ensure a better preparedness of the case by the counsel for victims and therefore, overall, contribute to expeditious proceedings, with full respect of victims' rights.

2) Status and location of the external counsel

27. The New Registrar's Proposal describes the structure of the Legal Support Unit, within the Victims' Office, as a pool of independent lawyers that "*would be complemented by an external legal representative*". It further notes that "*the external legal representative would form an integral part of the legal team*" (at p. 16). From the description in the New Registrar's Proposal (particularly at p. 15-16) and the Registrar's further explanations given to the NGOs on 10 June 2015, it is however understood that the external counsel will not be a staff member of the Court and that he/she would be "supported" by, and leading, an in-house team.

28. According to the New Registrar's Proposal (at p. 16), the "*external counsel would typically be based on the field to ensure closer ties and communication with victims*".

29. In the Team's view, there is no need to set out such a rule as a matter of principle. On the contrary, the guiding principle should be that the external counsel be entrusted with the responsibility to decide when he/she needs to be in the field or in the courtroom. This would ensure the independence of the lead counsel in deciding the best strategy to represent the interests of his/her clients. His/her presence might be more relevant in the courtroom at certain stage of the proceedings (such as the presentation of evidence, including questioning witnesses, or pleadings on substantive matters). Where appropriate, continuous contacts and consultations with the represented victims can be adequately provided for with the support of

an adequate team member on the field (see below – comments on supporting staff). This would also allow adapting the legal representation to the particularities of each situation or case, taking into account the victims’ preference as well as other considerations such as security concerns for victims and/or counsel.

30. Finally, such guiding principle is more consistent with victims’ rights. During the Expert Conference, Counsel for victims at practice before the Court recalled that, as any person who would be represented in a courtroom by a counsel, victims consider that their views and concerns are effectively represented only if (1) they have an actual and full opportunity to share their views with the counsel and, (2) this counsel presents their views in the courtroom in person before the judges. It is further important to recall that the significance of victims’ participation in proceedings does not only have to do with the outcome of the trial. Rather, of equal and reparative importance for them, will often be the process of participating, including the way in which their views and concerns are listened to and channelled to the Court.

3) Supporting staff within the Victims’ Office assigned to the external counsel

31. The wording of the New Registrar’s Proposal concerning the assignment of an in-house supporting team to the external counsel lacks sufficient clarity to ascertain whether this proposal would be consistent with victims’ rights, including the required independence of the victims’ counsel in the performance of his/her mandate.

32. On one hand, the New Registrar’s proposal describes the Legal Support Unit as consisting of “*a pool of independent lawyers*” who would be on the list of Counsel and who would be subject to the Code of Professional Conduct (“CPC”) (see at p. 14 and 16)⁸. On the other hand, the New Registrar’s Proposal refers to “*an ad hoc support team consisting of one or more legal assistants, case managers and data processing clerks*” (see at p. 16).

33. From this wording, it is unclear whether legal assistants, case managers and data processing clerks are considered as part of this “pool of independent lawyers” and will therefore be on the list of Counsel and/or subject to the CPC. Likewise, the status of the field supporting officers who would be assigned to the

⁸ At p. 14, the New Proposal states that a “*consensus emerged among the stakeholders on the following:*

- *The Court’s in-house lawyers (...) would have to belong to the list of counsel, and all substantive and professional issues pertaining to legal representation should be subject to the CPC”.*

Without commenting on the substance of this proposal, the Team recalls that the discussions at the Expert Conference were based on the Basic Outline’s proposal (i.e.: the lead counsel would be in-house staff and an external counsel could be appointed where necessary and, as a matter of principle, not as lead counsel). The scenario to have in-house lawyers as supporting staff to an external counsel was not presented as such during the discussions. Therefore, there was no discussion, and no consensus, as whether this pool of in-house lawyers should be on the list of Counsel.

counsel lacks specificity in the New Registrar's Proposal, while these field officers are paramount to an effective and successful victims' representation (involving victims through consultations, informing them of developments in the proceedings and taking instructions).

34. It is necessary to clarify from now the exact status of these staff members with respect to, and their relationship with, the external counsel to assess whether the proposed supporting structure would be respectful of victims' rights, including the independence of the counsel. Particularly, it is necessary to specify what will be the reporting lines between the staff members and the external counsel and whether any staff member assigned to the external counsel (be it legal assistant, case manager, data processing clerks) will be acting under his/her supervision and instructions exclusively.

35. Likewise, it is crucial to clarify that team members assigned to the counsel, including field officers, will perform tasks exclusively for the lead counsel and will not be shared with other sections of the Registry (than the Legal Support Unit, "LSU"). This is vital for upholding the independence of the counsel. Any team member to the counsel is supposed to represent him/her. This is even more relevant to field assistants since they are representing the counsel on a daily basis and interacting directly with the victims on his/her behalf. This is also crucial for confidentiality reasons (team members have access to information in the case, including names of witnesses, which other sections of the court are not privy to) and to preserve a relationship of trust between victims and the legal representation team as a whole.

36. In this regard, the wording "*supporting team assigned from a pool of personnel within the Victims Office*" needs to be clarified to ascertain the consistency of this suggestion with core principles. Under the New Registrar's Proposal, the Victims' Office will consist of two separate and distinct units: the Victims Participation and Reparations Unit ("VPRU") and the LSU. Full respect of victims' rights requires that the in-house staff members be assigned exclusively from the LSU. If staff members from VPRU could be assigned to the victims' representation, the effective and strict separation of functions between these two Units will then no longer be guaranteed. This would affect the required neutrality of the VPRU when performing its duties and would raise conflicts of interests. "VPRU's" functions are incompatible with the representation of the victims' interests since they imply dealing with the admission of victims in the case and providing advices to the judges. In addition, legal representation may imply challenging VPRU's advices or decisions⁹. Likewise, it deems necessary to clarify the meaning of "field-related functions" that will be "facilitated by the new Division of External Relations within the Registry" (New Registrar's Proposal, at p. 17) to ascertain

⁹ See CICC Legal Representation Team Paper 3 April 2015.

that field officers assigned to the counsel will not be part of other sections of the Registry (than the Legal Support Unit, “LSU”).

37. According to the New Registrar’s Proposal, the “supporting team” “*would be assigned to one or more victim representatives’ teams at a time, provided that this does not lead to a potential conflict of interests*”.

38. Potential conflict of interests is, however, not the sole standard to take into consideration when deciding the assignment of a staff member from the Legal Support Unit to several cases at a time. The guiding principle should be that this assignment to several cases does not impair the external counsel in discharging his/her duties in defending the interests of his/her clients, including that this does not affect his/her independence, client-counsel privileged relationship and/or does not raise conflict of interests.

39. For instance, after the delivery of the *Lubanga* judgment, one case manager initially assigned to one of the external counsel in that case was then assigned progressively to another victims’ external counsel in a different case and, then additionally, to a third external counsel in another situation. This was only possible after consultation and agreement between the counsel that this assignment to several cases *would not affect the performance of their mandate*, including their independence, their client-counsel privileged relationship and/or the avoidance of any conflict of interests.

40. The New Registrar’s Proposal is also unclear on the criteria that will guide decisions on the composition of the supporting team and whether those decisions would be made by the external counsel or the Head of Office. It is important to provide clarification already at this stage of the *ReVision* process on what will be the model chosen to determine that it will effectively:

- Uphold the counsel’s independence;
- Guarantee the confidentiality of information (including restricted access to information; separate offices; specific qualifications and trainings of legal representation team members);
- Guarantee the absence of any conflict of interests (including strong firewalls, monitoring and effective measures to address conflict of interests); and
- Ensure loyalty of these staff members towards the counsel (including addressing the issue of compatibility between the CPC and Court staff regulations).

Head of Office

41. The Team supports the suggestion that the Head of Office will not represent victims, nor will the Head of Office instruct or manage the legal representation teams. In the Team’s view, it is advisable to

consider applying such a rule to any legal representation system that would imply sharing in-house resources.

42. Such an amendment would better protect victims' rights. It is more consistent with the need to ensure the independence of counsel for victims, to protect the client-counsel privileged relationship (including access to confidential information) and to avoid any conflict of interests. Victims represented at the Court may be opposing parties and/or represent opposing views as to their rights. For example, in the situation concerning the Democratic Republic of Congo, the accused persons (Mr. Lubanga, Mr. Ngudjolo Chui, Mr. Katanga, Mr. Ntaganda) belong to different ethnic groups and have been involved in crimes committed against opposite ethnic groups. Victims' views in a given case may lead their counsel to advocate for jurisprudence that may not be favourable to victims in another case. Finally, as indicated above, VPRU-related functions may be in conflict with legal representation.

43. In the Team's view, it would be further advisable to provide more details as how the Head of Office will perform his/her duties, particularly when deciding upon the resources allocated to the external counsel. For example, there is need to provide some clarification about the basis for the Head of Office's decision on the assignment of staff members to several cases in the event that the external counsel claims that he/she needs this staff on a full time basis, including whether the Head of Office will have access to strategic and confidential information in that case to take his/her final decision. This clarification at this stage of the *ReVision* would be appropriate to allow for a full-assessment as to whether the proposed structure will meet required standards, including full respect of the counsel's independence and avoidance of conflicts of interests.

44. Clarification is also required regarding the mechanism to be set up in the event of disagreement between the external counsel and the Head of Office. So far, the judicial review of Registry's decisions has often not proven to be the most efficient and cost-effective. On the contrary, it has created additional work for the Registry, the Chambers and the counsel. In addition, often, counsel are reluctant to request review of a Registry's decision on resources before the Chamber because they fear irritating the judges or simply because the request might be moot by the time the Chamber delivers its ruling. While not necessarily excluding an improved system of review of the Registry's decisions, consideration could also be given to alternative solutions, such as determining in advance areas where the counsel may decide without requiring preliminary authorization from the Head of Office (e.g., attendance in the court room, based on a predetermined budget).

4) Budget management

45. To ascertain whether the New Registrar's Proposal would be consistent with victims' rights, it would be helpful to have an indication as to the resources allocated to the external counsel (including the rules determining how much will be allocated and by whom). Budgetary issues are paramount to the effective independence of the counsel in performing his/her duties and thus in representing the interests of the victims. The Team has no doubt that the Registrar has considered this issue when determining the reform of the current structure.

46. Whichever the model chosen, external counsel should clearly be informed, at the outset, on the resources available to him/her in the performance of his/her duties and the mechanism supervising the use of these resources. He/she should have full accountability for the management of his/her budget. This would address problems that have arisen in the current system, where Counsel are not always informed of the budget assigned to them and expenditure.

5) Assessing the forthcoming structure

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