

# REDRESS

*Ending Torture. Seeking Justice for Survivors*

## **Comments to the Registrar in relation to the ReVision project as it relates to victims' rights before the ICC**

**February 2015**

At its twelfth session, the Assembly of States Parties (ASP) gave the Registrar a mandate 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.'<sup>1</sup> As a result, the Registrar launched a 5-stage 'ReVision project' to be completed in June 2015.<sup>2</sup>

In September 2014, the Director of the ReVision Project shared with States Parties and civil society an organigram showing the Registry's proposed new structure. He subsequently shared a "Basic Outline of Proposals to establish Defence and Victims Offices" ('Basic Outline'), in which the following is proposed:

- A consolidation in a single Victims' Office of the functions currently performed by the Office of Public Counsel for Victims (OPCV) and the Victims Participation and Reparation Section (VPRS), as well as a redefinition of some functions performed by the Counsel Support Section (CSS);
- The creation of a 3<sup>rd</sup> division within the Registry to deal with external relations and field related functions;
- The creation of a single Defence Office;
- The creation of an independent association of counsel.<sup>3</sup>

We understand that the Board of the ReVision project has now endorsed the proposals to create a 3<sup>rd</sup> division within the Registry as well as a single Victims' Office.<sup>4</sup> According to the 2014 schedule shared by the Registry with civil society, the ReVision project will now move to its next phase, which will focus *inter alia* on how functions will be performed under the new structure.<sup>5</sup>

Consultations in relation to that phase will be organised in The Hague on 23-24 March by the Registry.

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<sup>1</sup> ICC-ASP/12/Res.1, section H, para 3; Draft Registry ReVision project, Basic Outline of Proposals to establish Defence and Victims Offices, page 1 (hereinafter 'Basic Outline'), on file at REDRESS.

<sup>2</sup> The five phases are: Project Initiation, Registry Foundation and organisation design, immediate change measures, functional performance review, and project closing.

<sup>3</sup> The ReVision project is delivered by a Project Team, under the supervision and overall responsibility of a dedicated Project Director. A Project Board advises and supports the Registrar in the overall direction and management of the project. The project Board approves major plans [...] approves the completion of each project phase and authorises the start of the next phase.' The Registrar 'has the final responsibility for the project and the approval and implementation of its deliverables.' See, *Overview of Planned activities*, ReVision Project, 2014, on file with REDRESS.

<sup>4</sup> Information provided by ICC officials, February 2015.

<sup>5</sup> *Overview of activities*, ReVision project, 2014, on file at REDRESS. The document indicates that this phase will include 'a detailed review of the Registry performance in each functional area [...] and] for Registry functions that may be affected by changes in the Registry's structural design adopted at the end of Phase 2, this Phase will also focus on how that function would be performed under the new structure.' Page 9.

REDRESS is pleased to provide its input on the ReVision project. Our comments focus on those aspects that relate to the victims' mandate of the Registry. We hope these comments and recommendations may be helpful to the Registry as it takes this work forward.

### ***Assessing the benefits of the new structure***

We note that the new structure is presented as a way 'to bring significant improvements in the assistance and support provided to victims participating in the proceedings, strengthen their representation and enable the Registry to provide a more consolidated and effective support to Chambers [...].'<sup>6</sup> REDRESS welcomes these commitments. However, the information shared so far (in the Basic Outline as well as during meetings with Registry officials) does not provide sufficient detail to enable REDRESS to comment on whether the new structure will deliver the expected improvements.

In order to assess any likely improvements in service delivery or in other areas, it would be appropriate for the Registry to enhance its capacity to measure and report transparently on its progress. This could be achieved by developing a framework within which improvements may be measured, include baseline data and indicators to monitor the desired changes.

Performance indicators should be designed to reflect not only the Registry's view of how it should perform but also the views of those who benefit from its services. One of the key objectives of the new structure, as described in the Basic Outline, is to 'improve the experience of victims, as well as intermediaries, when they interact with the Court.'<sup>7</sup> It is also advanced that the 'legal representation of victims [will] be supported more effectively'.<sup>8</sup> The input of victims, intermediaries and Legal Representatives of Victims (LRVs) will thus be essential to help determine how to concretise these aims.

As only a limited number of victims and intermediaries will be able to attend consultations that will be held in The Hague, the Registry should consider using planned field missions over the coming months to gather additional input from them. It could also consider how to engage with existing victims' networks in the field.

### ***Support in the field***

In the Basic Outline, the new Registry structure is presented as a way to 'allow the Registry to provide better support in the field'<sup>9</sup> and 'to support all court activities including those of the victims' legal representatives.'<sup>10</sup>

REDRESS welcomes the Registrar's commitment to providing better support in the field, closer to victims and affected communities.<sup>11</sup> However, as mentioned above, we encourage the Registry to seek and take into account the views of those directly benefiting from the Registry's services when determining how victims' functions undertaken in the field are to be performed.

The new structure is also intended to provide better support in the field to victims' legal representatives. One of the functions of the Victims' Office will be 'providing information about the cases and relevant trial developments to participating victims and intermediaries.' Based on the information provided in the Basic Outline, it is not clear whether the Registry is proposing to take over some functions currently performed by the LRVs' field assistants - and if so, which functions will

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<sup>6</sup> Basic Outline, page 2.

<sup>7</sup> Basic Outline, page 2-3.

<sup>8</sup> Basic Outline, page 3.

<sup>9</sup> Basic Outline, page 3.

<sup>10</sup> Basic Outline, page 3.

<sup>11</sup> The Registrar and the Director of the ReVision Project stressed this commitment in a meeting with civil society on 15 October 2014.

be assumed. REDRESS would welcome more information on what additional support is envisaged. For example, currently, the Registry undertakes outreach, which may also include outreach to participating victims, but it is the victims' legal representative and members of his or her team in the field who bear the primary responsibility of keeping participating victims informed, as required under the Code of Conduct.<sup>12</sup> Thus, it is not clear whether the ReVision proposal suggests that this could now be the responsibility of the Registry. REDRESS thus calls upon the Registry to clarify which functions it will assume.

Regardless of whether the Registry assumes certain responsibilities of sharing information with victims, LRVs are nonetheless obliged to communicate with their clients regularly and to take instructions from them. LRVs also require opportunities for private meetings with their clients on sensitive aspects of the case. Therefore, it would not be appropriate for Registry field staff to take over LRVs' responsibilities vis-à-vis their clients. REDRESS calls on the Registry to consult LRVs about the new structure and to ensure that confidentiality and other client-counsel obligations are guaranteed in the new structure.

### **Legal representation**

#### *Victims' Office and appointment of counsel*

The Registry proposes that the Victims' Office 'would perform the full range of victim participation related functions including [...] providing legal advice and representation to victims through the appointment of a (common) legal representative from within the Victims' Office.'<sup>13</sup>

This proposal goes beyond the purpose of the ReVision Project as initially defined by both the ASP and the Registrar.<sup>14</sup> Beyond improving the efficiency or effectiveness of an existing Registry function, it suggests the allocation of a new function to the Registry - appointing victims' counsel as a rule.

This proposed new function contradicts the legal framework governing the appointment of LRVs as defined in Rule 90 of the Rules of Procedure and Evidence. Rule 90(1) provides that 'a victim shall be free to choose a legal representative'. If a Chamber rules that common legal representation is more appropriate, it may ask the Registry to assist victims in choosing a common legal representative.<sup>15</sup> If victims are unable to choose a common legal representative, the Registrar may be asked by the Chamber to appoint a counsel for them.<sup>16</sup> While the Registrar can propose a common legal representative the ultimate decision lies with the Judges who can appoint counsel under Regulation 80 of the Regulations of the Court.<sup>17</sup> REDRESS thus recommends that the Registrar clarifies that the scenario envisaged would only apply in instances when the Registry has been requested to appoint counsel under Rule 90(3).

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<sup>12</sup> Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, 1 January 2006, Article 15, which provides that 'Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation.'

<sup>13</sup> Basic Outline, page 4-5.

<sup>14</sup> The ASP mandated 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'. The Registrar's office later shared an Overview of planned activities relating to the 'ReVision Project' in which the following objectives are set out:

- "Perform a thorough analysis of the Registry's current organisational design, mandates, roles and responsibilities [...] and provide recommendations for optimising the overall structure of the Registry.
- Conduct a Registry-wide survey on strategic elements such as vision, mission and values[...].
- Identify and recommend immediate actions, such as managerial decisions or policy changes on Registry-wide or cross-sectional matters affecting the performance of the Registry and/or staff morale [...].
- For each Registry function, provide recommendations for enhanced performance based on gap analysis and measurable performance indicators. In this context, resource requirements, work processes and methods, procedures and systems will be the main areas of review and analysis." On file at REDRESS.

<sup>15</sup> Rule 90(2) states: 'Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.'

<sup>16</sup> Rule 90(3) states: 'If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.'

<sup>17</sup> Regulation 80 of the Regulations of the Court states that 'A Chamber, following consultation with the Registrar and, when appropriate, after hearing from the victim or victims concerned, may appoint a legal representative of victims where the interests of justice so require.'

Any broader review of victims' legal representation should be undertaken separately from the ReVision project. The appointment of LRVs is ultimately a judicial decision and so representatives from the Plenary of the judges should be included in such a review. In addition, as detailed below, practice by Chambers has not been uniform with regards to the appointment of external v. internal counsels. An assessment of that practice ought to be undertaken by the Court before proposals to reform the legal representation framework are formulated.

#### *Composition of victims' legal representation*

The ReVision outline stipulates that LRVs are to be assigned from a 'pool of independent lawyers' within the Victims' Office and that 'ad hoc external counsel 'could' be added to the representation team'.<sup>18</sup> The Registrar has since confirmed that the proposal would be amended to indicate that external counsel 'shall' be added to the representation team.<sup>19</sup>

Previous consultations on an enhanced role for internal counsel brought to light a 'clear opposition to an overly enhanced or exclusive role of the OPCV in the representation of victims in Court proceedings' by the legal profession and civil society.<sup>20</sup> As was previously stressed, external counsel add value by:

- providing a diversity of legal argumentation to the Court's proceedings as a result of their geographic diversity and experiences which cannot be replicated by in-house, institutional counsel;
- bringing the court's proceedings closer to affected victims and communities, ensuring an outward looking and inclusive Court.<sup>21</sup>

We would welcome a recognition that external counsel would be involved in all cases.

Under the ReVision outline, each legal representation team would be composed of one external counsel and one in house counsel drawn from a 'pool of independent counsels' present within the Victims' Office. REDRESS would welcome more information on the composition of the pool. We submit that the Registry should ensure that in-house counsel possess the minimum qualifications required to be registered on the list of counsels. Adequate gender and geographical representation should also be ensured. The appointment and retainment mechanisms for pool counsel should also be sufficiently flexible to accommodate the varying caseload of the Court.

In addition, Rule 90(4) provides that the 'Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives [...] any conflict of interest is avoided.' Under the new structure, it is envisaged that in house counsel be appointed in more than one case. Therefore, conflict of interests should be identified and avoided via an appropriate mechanism.

In the ReVision document, external counsel is referred to as 'part of an ad hoc support team' whose work will be directed by the Lead common legal representative.<sup>22</sup> This reference suggests that external counsel may only be appointed as part of a team lead by in-house counsel. This appears to contradict an earlier reference in the document according to which external counsel can be appointed as lead or co-counsel.<sup>23</sup> To date, chambers have adopted different practices with regard to the appointment of internal/external counsels. Recent cases have seen the appointment of 'mixed' teams with both external counsel and the OPCV appointed, but not always in the same roles. For example, at the pre-trial stage of the *Gbagbo* and *Ntaganda* cases, counsel from the OPCV were appointed as lead common legal representative. In the Kenya trials, the lead common legal

<sup>18</sup> In the Basic Outline, it is stated that the new system would 'no longer [rely] on external legal representatives', at page 4.

<sup>19</sup> Information shared from the Registry with the CICC in January 2015.

<sup>20</sup> Supplementary report of the Registry on four aspects of the Court's legal aid system, ICC-ASP/11/43, 1 November 2012, para 50.

<sup>21</sup> Comments and proposals on the Legal aid consultation, REDRESS, June 2012, page 4.

<sup>22</sup> 'The Counsel assigned as the lead common legal representative in each case would be responsible for all aspects of the representation. This includes directing the work of an ad hoc support team, consisting of the external Counsel', Basic Outline, page 5.

<sup>23</sup> 'Ad hoc external counsel could also be added [...] either as lead or co-representative', *Ibid*, page 5.

representatives were external lawyers based in the field, with counsel from OPCV attending certain hearings in The Hague on their behalf. As mentioned earlier, there is no assessment available as to how these various legal representation models worked in practice, for the Court, victims or the legal representatives themselves. There are no known conclusions as to which model has worked best. REDRESS recommends that the possibility for external counsel to be appointed as Lead Common Legal Representative be clearly recognised.

### ***Support to counsel by the Victims' Office***

In the Basic Outline, it is proposed that services provided to legal representatives be consolidated within the Victims Office to 'allow legal representation to be supported more effectively in an integrated way.'<sup>24</sup> It is stressed that 'currently legal representatives of victims interact with several Registry sections [CSS, VPRS and OPCV], which sometimes cause confusion [...] and results in support that is overly decentralised and sometimes uncoordinated.'<sup>25</sup>

REDRESS supports the consolidation of the services provided to LRVs by the Registry within the Victims' office. In our view, this has the potential to simplify the interactions between LRVs and the various units/sections of the Registry tasked with providing them with support. It also has the potential to ensure that decisions regarding the assistance (including financial) to be granted to counsel are taken by a section with direct expertise on victims issues.

With regards to the specific changes that are being considered, the Registrar and his team have indicated that:

- Legal aid for victims would disappear with the implementation of the new framework: support to legal representation would be provided in house rather than through the provision of legal aid and external LRVs would be hired by the Court, for example as consultants or staff, rather than paid under a separate legal aid budget;<sup>26</sup> This may threaten the independence of legal representation for victims, and undermine the purpose of such representation, which is to afford victims an independent and unfiltered voice in proceedings.
- LRVs are to be supported by an 'ad hoc support team, consisting of [...] one or more legal officers, case managers, legal assistances and data processing clerks within the Victims Offices, assigned from a pool of support personnel [to be] assigned to one or more different victims representative teams at a time, provided [this] doesn't lead to a potential conflict of interest';<sup>27</sup>
- The Chief of the Victims' Office will be responsible for the allocation of support and resources to the victims' representative.

REDRESS submits that the proposal needs to be further developed with regards to the level of support envisaged and the means of delivery. For example, we recommend that the specific resources to be made available to counsel be detailed, together with the criteria which will be used for their allocation. This could be done in a policy document, similar to the current consolidated legal aid policy of the Court.

One of the problems identified with the current legal aid system in the Basic Outline is its 'resources intensive application and administration'.<sup>28</sup> While we agree that the current legal aid system is ineffective<sup>29</sup>, it is not clear how the new framework will address that problem. Counsels will still

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<sup>24</sup> Basic Outline, page 3.

<sup>25</sup> Ibid.

<sup>26</sup> Discussion with the Registrar, Dec 2014.

<sup>27</sup> Basic outline, p 5.

<sup>28</sup> Ibid.

<sup>29</sup> Some LRVs have described in filings the bureaucracy of the current model, the delays in the release of funds, the lack of clarity as to what resources they can request, the resource intensive process in place to request additional fund and the overly detailed process

need to request funds to travel to the field to meet with their clients. They may request additional resources and/or challenge decisions taken by the Head of the Victims' Office in that regard.<sup>30</sup> Staff from the Registry will still need to assess such requests. REDRESS recommends that the next phase of the ReVision project carefully considers how these scenarios will be tackled under the new structure to ensure that it is more efficient.

### ***Changes to the Regulations of the Court***

The Registrar has indicated that amendments to the Regulations of the Court will be required to implement the new Registry structure. No information has been provided with regards to which Regulations the Registrar is contemplating to amend.

REDRESS stresses that the Regulations of the Court 'shall be read subject to the Rome Statute and the Rules of Procedure and Evidence'.<sup>31</sup> As mentioned above, some of the proposals relating to the legal representation of victims contradict Rule 90 of the Rules. We thus call on the Registrar to refrain from formulating amendments in relation to proposals that would contradict the Rules and to ensure that all proposed amendments fully comply with the Statute and the Rules of Procedure and Evidence.

REDRESS also calls on the Registrar to share the specific amendments that are being proposed with participants in advance of the March consultations. This would allow for their review ahead of the consultations, and facilitate constructive discussions amongst participants.

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related to the justification of field related expenses. For example, see: *The Prosecutor v. Jean Pierre Bemba*, Requête de la Représentante légale des victimes relative au maintien de l'aide judiciaire allouée à son équipe après les plaidoiries finales, ICC-01/05-01/08-3184, 3 November 2014; *The Prosecutor v. William Samoe Ruto and Joshua Arap Sang*, Filing of the victims' representative pursuant to the "Order scheduling a status conference, ICC-01/09-01/11-419, 28 May 2012.

<sup>30</sup> Regulation 83-4 of the Regulations of the Court provides that 'Decisions by the Registrar on the scope of legal assistance paid by the Court [...] may be reviewed by the relevant Chamber on application by the person receiving legal assistance.'

<sup>31</sup> Article 1 of the Regulations of the Court.