Avocats Sans Frontières

REVIEW COMMITTEE

RESPONSE IN RELATION TO THE OPCV

INTERLOCUTOR:

AVOCATS SANS FRONTIÉRES

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Responses to Questions on the Future Role of the OPCV

1. Regulation 81 of the Regulations of the Court ("Regulations") establishes the mandate of the Office of Public Counsel for Victims ("OPCV") to provide support and assistance to the legal representatives of victims and to victims including, where appropriate, by way of legal research and advice and appearing before a Chamber in respect of specific issues.

2. The judges are currently reviewing the Regulations including, *inter alia*, those that concern the OPCV, in the context of the wider framework of the support provided for the legal representatives of victims and to victims, in order to make any appropriate amendments.

3. Bearing in mind the history of the Court, the present regulatory framework and the course of proceedings to date, your views are sought as to the most effective way for the OPCV to discharge its duties, particularly as regards:

   i) The nature of the support and assistance that it should provide to the legal representatives for victims and to victims?

      According to Regulation 81(4) of the Regulations of the Court, the role of the OPCV consists in providing "support and assistance to the legal representative for victims and to victims, including, where appropriate: (a) Legal research and advice; and (b) Appearing before a Chamber in respect of specific issues". Regulation 80(2) additionally provides that "The Chamber may appoint counsel from the Office of Public Counsel for victims".

      However, ASF maintains the position that assistance and support to victims' legal representatives ought to be the primary mandate of the Office in line with the March 6, 2008 ruling of Trial Chamber I in the Lubanga Case. [1] The said mandate may consist in providing research support and counsel to victims' legal representatives but also appearing before a Chamber when mandated by the legal representatives in proceedings involving short durations, such as status conferences or when a legal representative is prevented from attending the hearing for reasons beyond their control. The latter arrangement would help reduce the resources and time required for legal representatives to travel to The Hague to participate in proceedings that would last a day or two and where their presence may not be indispensable. By contrast, any assistance that the Office

[1] Trial Chamber I, *Decision on the role of the Office of Public Counsel for Victims and its request for access to documents*, ICC-01/04-01/06-1211, March 6th, 2008 ; para.32

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provides to victims should be limited to situations where such victims are not represented by independent counsel and until such time they are so represented. This would reduce the risks of conflict of interest with the legal representatives of victims that the Office is expected to support and the diminution of resources available for the support and assistance function of the Office.

ii) Whether, and to what extent, it should represent individual victims during the course of proceedings before the court (at any stage)? If so, should counsel from the OPCV be included on the list of counsel so as to fall within the pool of legal representatives that the victims are free to choose from under Rule 90(1) of the Rules?

As is implicit in the response above, the representation of individual victims shall not be the principal function of the OPCV. As such, the OPCV may only represent individual victims who are not represented by external counsel, a situation that is likely to arise at the early stages of the proceedings and prior to a decision on their application to participate. Once such a decision is made the victims shall be represented by an external counsel of their choice or through a common legal representative selected by the Registry in consultation with the victims and their legal representatives.
On the other hand, if, as a matter of principle, legal representation is not the principal function of the OPCV, the latter should not be included within the list or pool of legal representatives, which should be open only to external counsel.

iii) The possibility that conflicts may arise between the OPCV's obligations to individual victims it is representing and its wider responsibilities of providing advice and assistance to the legal representatives of victims and to victims generally in the case?

Once again, ASF believes that the ruling of the Trial Chamber referred to above provides an appropriate guidance. The risk of conflict is particularly real in cases involving the representation of groups of victims with conflicting interests, as in the Katanga and Ngudjolo Case. In such cases, the OPCV would directly be confronted with the problem of having to provide assistance and support to legal representatives while at the same time having to represent the interests of victims, which are likely to be in conflict with those of the victims represented by legal representatives. Even in situations where there is no apparent conflict of interest between groups of victims, legal representatives may follow strategies and approaches on issues that arise in the course of proceedings, which may differ from those followed by the OPCV in representing their respective clients' interests and priorities. The OPCV could, therefore, have difficulties in providing support and assistance to legal representatives who do not share the views and positions of the Office on a particular issue. The above scenarios would also place the legal representatives in a difficult situation where they have to stand in opposition to an Office whose services they would require. Beyond the issue of conflicts of interest, the challenges of providing effective legal representation pose the risk of constraining the OPCV's capacity to provide timely and effective assistance to different teams of legal representatives.

iv) If potential conflicts under iii) may exist, how should these be managed?

We believe that potential conflicts could be minimised and managed better if the role of the OPCV were limited to the "core function" described under i) and ii) above.

v) The possibility that conflicts may arise for a member of the OPCV who is

representing individual victims between the instructions received between his or her clients and the strategy or policies of the OPCV as determined by principal counsel?

ASF cannot comment on the internal organisation of the Office or if the said possibility existed for lack of sufficient information.

vi) If potential conflicts under v) may exist, how should these be managed?

In the first place, the limited scope of legal representation defended above could help minimise the risks of potential conflicts that may arise in the above respects. Secondly, even within those limits, the Registry needs to ensure that there is no apparent or potential conflicts of interest between victims represented by OPCV for such a conflict cannot be resolved through an internal division of labour within the OPCV. On the other hand, such division of tasks may be a source of the type of conflict referred to above –where, for example the principal counsel and a member of OPCV have to represent different victims or groups of victims. Third, the OPCV shall be considered as a unitary organ and its members shall act in the best interest of and in accordance with the instructions of the victims they represent. Fourth, where there are differences among members of the OPCV on how best to represent victims, it would be for the principal counsel to take the final decision as would be the case for the Principal counsel within a team of legal representatives.

vii) Bearing in mind the existing practice and arrangements, is it necessary or appropriate for the OPCV to be included in the list of Duty Counsel for the purposes of Regulation 73?

This wouldn't be necessary because the OPCV is mandated by the Regulations of the Court and it would be appointed only where the Court finds it difficult or impossible to appoint a representative from the list of duty counsel.

viii) Should the selection of the OPCV under ii) above be subject to approval by the relevant Chamber or the Registrar?

The selection of OPCV should best be approved by the Chambers in order to ensure its independence

ix) Are there potential overlaps between the functions carried out by the OPCV and the VPRS? If so, should their roles be delineated more clearly (and how)? By way of example, are there circumstances in which it would be appropriate for the OPCV to distribute application forms in the field or to suggest to potential participating victims that they should sign a power of attorney authorising counsel from the OPCV to act as their representative?

It sounds inappropriate for the OPCV to distribute application forms, and as argued above, its role should be limited to complementing the work of legal representatives and representing victims on an ad hoc basis. The distribution can be done by the VPRS informing the victims about their right to choose their own legal representatives and about the possibility for them to be assisted by the OPCV on an ad hoc basis.

x) Should counsel from the OPCV maintain a permanent presence in the field in order to assist the legal representatives of victims (who may be attending the trial in The Hague), in particular to liaise with participating victims whilst their counsel are absent?

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We don't think permanent representation would be necessary in view of the circumscribed functions recommended above.

xi) Should the OPCV assist and advise the legal representatives or their teams in ancillary proceedings involving the Registrar (*e.g.* requests for judicial review of administrative decisions of the Registrar)?

Yes, we believe that the above falls within the core functions of the OPCV.

4. The OPCV is "located" in the Registry "solely for administrative purposes", and in all other respects, as regards the exercise of its functions, the OPCV is a "wholly independent office". In these circumstances, the view has been taken by the Presidency that it is unable to oversee the functioning of the OPCV. Given the apparent absence of any meaningful supervision of the Office within the Rome Statute framework – the overall lack of any effective governance arrangements – what (if any) structure should be created in order to provide appropriate oversight of, and support for, the OPCV?

ASF understands that this is an important issue that needs to be addressed with respect to both the OPCV and the OPCD. The supervision of OPCV would fall within the supervisory remit of the presidency. This may be problematic in view of the dual mandate of the President of the ICC as a senior presiding judge and the principal official of the court. However, ASF has not taken a position on the issue so far.

5. The role of the OPCV is only one element of the services provided by the Court for the legal representatives of victims and for victims, and are there linked or other relevant changes that need to be effected in order to give greater efficacy to these arrangements? For instance, is there a sustainable justification for maintaining the OPCV, the VPRS and the VWU as separate entities, rather than coming within a single victims and witnesses service? In any event, can the arrangements between these offices in terms of coordination and cooperation be improved?

ASF recommends the maintenance of the OPCV, with circumscribed functions, the VPRS and VWU. Each of these organs has a different role. The OPCV provides valuable services to victims' legal representatives and fills in gaps in legal representation to the benefit of the victims but also to the Court. At the same time, the OPCV may have to take a position that is different from that of the VPRS, which as an organ of the Registry, may not only facilitate the participation of victims but also have to apply screening criteria that may be contested by the victims. The Victims and Witnesses Unit, on the other hand, has as its mandate the protection of victims and witnesses for both the defence and the prosecution. The merger of the VWU with the OPCV and the VPRS or with either of these organisations may give rise to a confusion of roles and more complex challenges managing confidentiality issues.

6. Should the Office of Public Counsel for Victims be retained i) at all, ii) in a new role, or, iii) as at present?

ASF believes that the OPCV should be retained in a modified role, with limited and clearly defined functions. To that end, we believe a more precise description of the circumstances in which the Court may appoint counsel from the OPCV under article 80(2) may be useful. This may include qualifying references to the initial stages of the proceedings and the absence of a legal representative.

7. Given the possible different roles the OPCV can fulfil, are there resource implications of which you are aware that make any of the various options more or less desirable?

Limiting the role of the OPCV along the lines suggested earlier and the fact that the Office does not need to have a permanent presence in the field would definitely have

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resource implications. It would mean more limited staff and travel related expenses. On the other hand the merger of VPRS and OPCV, in its modified function, will reduce the autonomy of the office without necessarily producing increased cost-efficiency.

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