REVIEW COMMITTEE

RESPONSE IN RELATION TO THE OPCV

INTERLOCUTOR:

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Answers to the questions on the possible future role of the Office of Public Counsel for Victims

Answers provided by Mr Jean-Louis Gilissen

Answer to question no. 3(i)

It seems to me that the role of the OPCV should be interpreted as broad and flexible. Thus the support and assistance the OPCV is required to provide to the legal representatives of the victims and to victims themselves should be geared towards giving full effect to regulation 81 of the Regulations of the Court. In fact, the OPCV has clearly proved that its structure and composition are such as to enable it to go beyond the provision of research and legal opinions as well as appearing before a Chamber to address one or more specific issues.

Efforts could also be made to strengthen the complementarity between the OPCV and external legal representatives and their necessary cooperation, with a view to better determining the particular support and assistance that can be provided to the appointed legal representative in each case. The benefits of experience gained by all concerned in this area in the very recent past could be put to use by organising meetings between the appointed legal representative and the OPCV staff member assigned to monitor the proceedings in each case. The valuable experience acquired by the staff of the OPCV and their exceptional knowledge of the decisions already rendered by the Court's various Chambers, as well as their practices, are highly valuable tools. Everything should therefore be done to afford the legal representatives better access to these assets, so as to improve the management of their case files. The establishment of a mechanism that would allow such knowledge-sharing, whilst remaining within the purview of roles assigned to the respective parties, should be encouraged and considered. Clearly, such a mechanism should not be viewed as a forum for decision-making, but principally as a means of supporting legal representatives through a tailored needs assessment process, taking account of the needs and available resources of the OPCV. In light of the long duration of proceedings, such a mechanism would, amongst other things, help to plan this shared endeavour, and make it easier to replace legal representatives when they are unavoidably absent (thus creating the best possible conditions for their replacement by OPCV staff members).

These views apply only when a legal representative for victims is appointed from outside the OPCV.

Where the OPCV is called upon to take action before victims have been granted official status, and before a legal representative is appointed, it would be helpful to consider defining the relationship to be established between the OPCV and the lawyer or the person chosen by the victims to represent their interests. This is obviously essential where the

OPCV is called upon to provide provisional representation for victims or "applicants for victim status".

Answer to question no.3(ii)

Regulation 80 of the Regulations of the Court expressly provides that the Chamber seized of a given case may appoint counsel from the OPCV as a legal representative of victims. From all indications, this option should be maintained because it makes it possible to deal with special cases that will surely arise within the Court.

The appointment of counsel from the OPCV is most appropriate at the stage when applications for participation submitted by victims are being examined pending the choice of counsel by the victims, or in the absence of such choice. The same applies to emergencies; to situations where the appointment of an independent counsel from outside the Court would be a barrier to effective representation (whereas the fact that the OPCV is part of the ICC would appear to remove such a barrier); or in more specific situations. Such specific situations might include, for example, a request by a legal representative who, for exceptional reasons, must be replaced at a hearing (in which case the OPCV would be acting on his instructions), or a case where a victim can no longer be represented by his or her legal representative, as a result of a conflict of interest or for any other reason leading to the withdrawal of representation (in which case the OPCV could assume the mantle of legal representation pending the appointment of a new representative).

However, the OPCV should avoid giving the impression that it is in competition with lawyers (and *vice versa*), and it is essential that the appointment of counsel from the OPCV is made for a specified, clearly explained reason related to the particular characteristics of the case and/or the proceedings.

Clearly, one of the difficulties inherent in the appointment of counsel from the OPCV as legal representatives of victims is the limited resources of the OPCV. Every effort should be made to avoid a situation where assigning the duty of victim representation in multiple cases to the head of the OPCV counsel risks impairing or reducing the quality or extent of support or assistance provided to external legal representatives of victims.

The burden of legal representation has proved to be such that, barring a budgetary revolution and associated changes in the budgetary allocations for the OPCV, the rule underpinning the appointment of legal representatives should in some way prioritise legal representatives of victims who are not employees of the Court, a counsel from the OPCV, as noted before, being appointed only for cases where specific and unusual circumstances arise.

Similarly, it seems to me that it is in the common interest, and in particular in the interest of the OPCV, to avoid affording victims themselves the ability to choose one of the counsel of the OPCV as a legal representative. This would certainly obviate unhelpful allegations,

justified or otherwise, from those who might be inclined to accuse the OPCV of indulging in some form of so-called lobbying. Following the logic of this argument, the OPCV should indeed be appointed only at the Chamber's behest.

In more ways than one, the OPCV counsel are in a completely different objective situation from the counsel appointed as legal representatives. Firstly, they are members of an institution and of the OPCV, which has its own authority, hierarchy, and organisation. Also, the financial situation of the various actors is fundamentally different. The differences in their situations are such that equal treatment does not appear to be either needed or warranted, most obviously in the case of the head (and counsel) of the OPCV, in terms of the inappropriateness of their possible inclusion severally on the list of counsel.

Moreover, although the conditions in which various counsel practise their profession may be radically different, the objectives sought in establishing a list of counsel do not appear to in any way relevant to the OPCV counsel (unless the OPCV were to secure its own representation by appointing an independent counsel, which is hard to imagine).

The inclusion of OPCV counsel on this list is neither required nor necessary, as their recruitment to their posts is obviously sufficient to attest to their function, skill and probity. The goal and objective of the list of counsel does not therefore concern OPCV counsel.

As I have said before, I also do not consider it healthy for victims to exercise free choice in regard to the OPCV or an OPCV counsel, since their action in the capacity of legal representatives can only devolve from the Chamber and the objectives it seeks. Otherwise, or in the opposite case, whether or not this were intended, OPCV counsel would be placed in a situation of apparent or potential competition with counsel included on the list.

It also seems to me that the drafters, in drafting the basic instruments, never contemplated allowing the freedom to choose persons who are part of the institution of the Court; the texts allow Chambers alone to choose OPCV counsel as legal representatives of victims.

The OPCV is designed – in my view rightly – to serve the objectives of the Court, the Chambers, the victims, and the legal representatives, but must never risk the appearance, even erroneously, of pursuing what might appear to be its own competing interests. Whilst it is obvious that the OPCV has never done so, it should be borne in mind that some have felt that, in some cases, they were in a position to allege the contrary. In the interests of the OPCV and the Court themselves, it is therefore well worth avoiding such a situation. Denying victims the freedom to choose a legal representative from a section of the Court or the OPCV would be a means of avoiding any difficulty of this nature.

Different remedies should be applied to different situations. Otherwise, there is a risk of breeding confusion that will cause difficulties or be a potential source of tension between professionals who are necessarily called upon to work together and to pursue a common objective.

Finally, I take the view that the appointment of external counsel as legal representatives is one of the guarantees of the success of the ICC, in that such counsel will help to "popularise" and foster recognition of the usefulness, effectiveness and quality of the work of the Court.

It is worth emphasising the extent to which the effective participation of external counsel in the work of the Court can facilitate understanding of the legitimacy of the ICC and increase the potential influence of its decisions and its legal and procedural practices on domestic law.

Answer to question no. 3(iii)

The possibility of conflicts of this nature cannot be entirely discounted. However, such potential conflicts, as said before, should be viewed against the backdrop of the resources provided to the OPCV. The rules suggested above appear likely to avoid such conflicts.

There remains the situation where OPCV counsel might be appointed in a given case where external legal representatives are also appointed to act in a parallel capacity (as was seen, for example, in the *Lubanga* case). The existence of professional rules binding upon legal representatives and the rules governing staff members of the OPCV should enable the resolution of any resulting conflict. One can only with difficulty imagine, in light of the mandate of the OPCV, that it could "favour" its counsel being appointed as legal representative over external legal representatives.

The institutionalisation of a mechanism that provides the best possible opportunity for exchange of views and cooperation between the OPCV and each legal representative (as suggested above in answer to question 1) as an additional tool should obviate the risk of disputes escalating into opposition or conflict.

In this regard, it is probably worth noting that the possibility of differences in approach and strategy between OPCV counsel appointed as legal representative and an external legal representative cannot in themselves be considered as conflict, as the professionalism of the OPCV staff members allows them to distinguish between the types of support and assistance to be provided to various actors according to their free and independent choices.

Answer to question no. 3(iv)

It seems to me that the argument advanced in response to Question 3 can apply here too. Thus, there should be prevention via the institutionalisation of regular contact between the legal representative and the OPCV staff member in charge of managing the case, or with the OPCV counsel where he or she is appointed in parallel. For thornier issues, professional and disciplinary rules should be applied if necessary.

Answer to question no. 3(v)

In light of the strategy and policy devised by the OPCV, the existence of such a conflict is hard to imagine since the strategy and policy are aimed at attaining optimal quality and efficiency in representing victims' interests. Accordingly, the very idea of such conflict appears "unnatural". The (hopefully impossible) event of such a conflict would certainly pose a major problem with regard to the very definition of the strategy and policy of the OPCV.

If such a conflict were nonetheless to occur, it should be resolved in light of article 16 of the Code of Professional Conduct for counsel and, if necessary, by reporting the matter to the relevant Chamber. The real source of conflict of interest would arise from providing legal representation to victims pursuing divergent objectives.

It would therefore be up to the principal counsel to analyse the situation and, after informing the Chamber, to suggest possible solutions.

The creation of autonomous and independent teams in the OPCV could be a first solution, but the nature and degree of the conflict of interest might require the Chamber to address the issue by appointing an external legal representative. All this depends on specific cases; but in any event, it is for the Chamber to be able to resolve situations in case of deadlock or an apparently insurmountable difficulty and to adjust role(s) to the reality so as to ensure good-quality representation of the various victims.

Answer to question no. 3(vi)

It seems to me that the answers to question 4 apply here.

Answer to question no. 3(vii)

In the same vein as in the answer to Question 1, the OPCV does not appear to need to appear on the list of counsel and should therefore only intervene in case of shortage or in specific and unusual circumstances.

Answer to question no. 3(viii)

The choice of an OPCV counsel as a legal representative of individual victims should only be made by the Chamber, as explained above.

Answer to question no. 3(ix)

The roles and functions of the OPCV and the VPRS are distinct and complementary. Further clarification might be made by developing contact between these two organs with a view to establishing an active synergy between them. Practice seems to suggest that their working methods are, in some respects, too different.

Strengthening "bridges" between the OPCV and VPRS might be a possible means of improving their efficiency. Here again, regular joint consultation with external legal representatives might be instituted.

The distribution of forms suggested above might increase the risk of confusion and make the situation of victims more precarious.

Care should be taken to avoid creating any situation that might suggest a risk of instrumentalising victims, and to give priority to a system that is transparent and fosters complementarity of the work of the OPCV and that of external legal representatives, rather than placing them in competition with each other.

Again, the specific characteristics of both sides should contribute to providing high-quality representation of victims, rather than giving rise to situations that might be considered conflicting or adversarial.

Answer to question no. 3(x)

No, firstly, because the OPCV lacks the resources to do this, and such representation would certainly require a huge resource outlay disproportionate to the results sought. Secondly, it should be clearly emphasised that such a role would inevitably expose victims to a clear and present risk.

Representatives who are employees of the OPCV will certainly be quickly identified in the field.

Finally, this would be a new mission for the OPCV, requiring careful prior reflection, first on the underlying principle and the conditions for its implementation, and second on its funding.

Answer to question no. 3(xi)

At first glance, this does not appear to be the kind of work consistent with the OPCV's role and may even be problematic for the OPCV. Conversely, the possibility of providing information without acting as counsel would probably improve secondary procedures. Any inclination to improve the conditions under which it could be done [sentence unclear at this point] choice to resort to secondary procedures [sentence unclear in the French].

Answer to question no. 4

By its very nature, the OPCV is independent, and so it should remain.

This independence should not signify an autonomy that would shield the OPCV from any necessary or useful control and monitoring.

Thus, this does not at all imply mistrust of its operation but rather the establishment of guarantees as to the quality of the conditions under which it operates. The idea of using one or more external auditors appears to be a possible solution. The difficulty probably arises from the unique and unprecedented nature of the OPCV's work. It would therefore be advisable to ensure that the auditors understand this uniqueness, and that there is no conflict of interest on their part. Using UN audits is an interesting idea. Using the system in place just as, in the final analysis, identifying independent private auditors who can understand the ramifications of the peculiarities of the OPCV's work [sentence unclear in the French]. As well as the criterion of "independence", that of "neutrality" should also be emphasised.

Answer to question no. 5

These three entities carry out specific work that is sufficiently discrete to justify their continued separation. That said, coordination and cooperation amongst them can be improved and, frankly, it should be. As a legal representative, I have had the impression on several occasions that some staff of the VWU had difficulty defining, or indeed understanding, the specific characteristics of my role. I am rather afraid that there are fundamental differences, not only of approach but also of basic choices amongst the three entities. I do not think that there are conflicts as such, but there is an undeniable lack of information on, or understanding of, the role of a legal representative. Here again, a forum for dialogue including legal representatives should help to improve the quality of the work done by people who must work together whilst respecting the specific characteristics of each entity.

Answer to question no. 6

I think the mandate of the OPCV has been well thought out and defined, and that the OPCV has fully performed its role, even though it has had to do so in difficult circumstances and in a radically altered context.

Accordingly, it is not the role and mission of the OPCV which need to be reappraised or redefined; rather, it is the conditions in which they are implemented.

Thus, it seems to me that there is a need to reappraise the adequacy of the resources made available to the OPCV in light of its workload in the fulfilment of its mandate. It is undeniable that the increase in the number of judicial proceedings raises new problems for the OPCV, and, despite the unimpeachable professionalism of its staff, choices will inevitably be required between missions or between the means of their accomplishment. This is why, in several of my answers on this form, I have suggested that representation of victims be left to one OPCV counsel, who will deal with specific and unusual circumstances (for example, where the appointment of an independent external counsel might place him or her in a difficult or even a dangerous situation, or where the OPCV's position as an integral part of the Court might seem to be a distinct advantage for the effective legal representation of the victims concerned).

Here, it is worth highlighting the laudable publication of the manual for legal representatives. This sort of initiative should be encouraged. In this context, the proposal to invite legal representatives to contribute to professional and technical information of all forms is worth considering.

Clearly, coordination and an atmosphere of mutual trust should be encouraged in the work of the OPCV and legal representatives, as should efforts to promote the emergence of a whole new culture of association to address the needs and conditions for optimising the legal representation of victims before the ICC.

Answer to question no. 7

Improving the quality of cooperation between the OPCV and external legal representatives should generate considerable savings in time and resources without requiring additional resources. It is far from easy to identify clearly which resources might be reduced or eliminated, or even transferred, when the OPCV is obviously doing all it can to perform the roles and functions assigned to it by the basic texts or by the Chambers. My personal feeling is that, unless the resources allocated to it are reappraised, the OPCV will have to make some difficult choices in the short and medium term.

The OPCV's workload is continually increasing. The quality of the work the OPCV has produced thus far should be preserved. Accordingly, any effort that might increase cooperation between external legal representatives and the OPCV can only be welcome.