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for Human Rights

Fédération Internationale des  
Ligues des Droits de l'Homme

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Международная Федерация  
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الفدرالية الدولية لحقوق الإنسان

## FIDH Comments on the ICC Registrar's *ReVision* proposals in relation to victims

Mr Herman von Hebel  
Registrar of the  
International Criminal Court

18 November 2014

Dear Mr Registrar,

The International Federation for Human Rights (FIDH) has been following developments around the *ReVision* process. We would like to take this opportunity to congratulate you on such initiative. We believe that enhancing the efficiency, effectiveness and sustainability of the Registry's performance by reconsidering its vision, mission and values, and revisiting its structure and managerial framework is a laudable effort. As external stakeholders we have also observed fragmentation, predominance of a bureaucratic approach and poor internal communication, and acknowledge that this must be addressed. We would like to express our support to this process and emphasise our will to contribute on matters on which we have expertise in order for this to be a successful endeavour.

We have met with you and members of your team on 2 September and 15 October. In those meetings, we heard about the *ReVision* project in general and the proposals envisaged on victims and defence. We received the document "Basic Outline of Proposals to Establish Defence and Victims' Offices" (Basic Outline) on 28 October and attended the Hague Working Group meeting where you gave an update on the *ReVision* project on 30 October, where we shared some of our concerns. The comments contained in this letter are based on information received in those meetings as well as that contained in the Basic Outline.

Because of our experience in support of victims of mass atrocities to access justice, we have taken a keen interest in the change proposals that you are envisaging with regard to the Registry structure to support applicant and participating victims. We express our sincere disappointment that, despite numerous requests made by our non-governmental organisations (NGO) colleagues on behalf of our organisations and repeated promises from your staff, we received the document outlining the proposals regarding victims only recently. When it comes to matters touching upon the restructuring of the units supporting victims to exercise their rights, we understand that you have only held some consultations with Registry staff and in particular with the units concerned. We also note that, to the best of our knowledge, none of the members of the Project Board have direct experience working and interacting on a daily basis with victims of mass atrocities. We regret that external stakeholders, including NGOs and external Counsel representing victims in cases currently before the Court, were not meaningfully involved from an earlier stage in the process. While some external Counsel may have been involved in individual consultations, **there has not yet been an open, transparent and structured consultation process.** We believe that this is regrettable because, as we will explain below, victim participation is a matter that, by its very nature, concerns those who are outside the Court. Therefore, benefiting from the view of those who support victims and outside observers acquainted with the realities of victims in the situation countries is crucial. We see dissemination of the Basic Outline to NGOs and States Parties as the starting point for consultations. However, we worry that the process is moving quickly and that there may not be sufficient time to give adequate considerations to relevant

concerns in relation to the proposals. We understand that you foresee that you will be presenting proposals for amendments to the Regulations of the Court as soon as this month.

These comments aim to contribute to the debate by providing further points for reflection. We believe that the *ReVision* project provides a valuable opportunity to reinforce victims' access to the Court and our contributions aim to help attain that. We realise that the road ahead for implementation of the reform proposals will require more detailed adjustments and fine-tuning. The aim of this paper is two-fold:

- a) To share concerns that we have in relation to the proposals and advocate for adjustments at this point; and
- b) To contribute to fine-tuning of the proposals on the way towards implementation.

### **Specific comments on the proposals**

We understand that the proposal for changes concerns a number of areas, including *inter alia* the merging of two structures supporting victims, namely the Victim Participation and Reparations Section (VPRS) and the Office of Public Counsel for Victims (OPCV). **We will focus in this document on what we believe is the most fundamental aspect of this reform and that is the system for victims' legal representation.** With regard to the areas that we do not address in this paper, we consider that we have little information at this point and that the impact of those on the ability of victims to exercise their rights will depend upon how they will specifically be implemented.

Unlike other proposals for reform, which may be structural and alter mainly the way in which the Registry is organised without necessarily having an impact on those outside the Court, reforms to the legal representation system crucially affect victims' fundamental rights. According to the Rome Statute, victims have a right to participation. Legal representation is the channel that victims use to express their views and concerns. This is why effective representation is necessary for participation to be meaningful. As will be argued below, **effectiveness of legal representation must be analysed not only from the perspective of the Court and the courtroom, but also and fundamentally, from the perspective of victims.** Their right to participate will only be realised if legal representation is exercised in such a way that it puts victims at the centre of consultation initiatives and allows them to practically and really be part of the proceedings, even through remote non-physical intervention. We respectfully disagree with the Basic Outline's statement: "The proposals do not adversely impact... the rights of victims to participate in proceedings before the Court."<sup>1</sup>

We have understood the reform as far as it concerns legal representation as follows:

- Legal representation will be "internalised", in the sense that it will be primarily conducted by lawyers who are staff members of the Court.
- External Counsel from the situation countries or having sufficient knowledge of those countries may be hired for each case. They will become staff members or consultants for the Court and their main task will be to ensure contact with the participating victims. Legal aid for victims will be eliminated.
- The proposal for such a model of representation is based in the case-law of the Court.
- The intervention of external Counsel would facilitate transfer of knowledge and capacity-building of the latter through their involvement in the cases together with ICC staff lawyers.

We would like to note at the outset that the question of victims' legal representation presents challenges that are specific to the nature of the crimes (high numbers of victims) and the distance between the Court and the situation countries. In this regard, we have observed that discussions around a legal representation system at the ICC have often considered the fact that "victims are (too) far" as a challenge. Actually, the victims are where they ought to be, they are where the crimes were committed, they live in the areas where they have always resided (with the exception of internally displaced people and victims in exile). What is far is not the victims, but the seat of the Court. We believe that this change of perspective is important. The premise must be that the Court needs to adapt to victims; it is not for the victims to adapt to the Court. In short, victim participation (and legal representation) must be understood from the perspective of the situation of the victims, not the perspective of the courtroom.

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<sup>1</sup> Basic Outline, p. 1.

### *Scope of the revision*

Our first observation concerns the scope of the *ReVision* project as far as it is related to modifications in the legal representation system. According to the Overview of Planned Activities for the *ReVision* project, the project scope covers: a. Organisational design; b. Delegations, roles and responsibilities; c. Policies and regulatory documents; d. Work processes, workflows and work methods; e. Internal communication and coordination; f. Key performance and workload indicators; g. Management and operational systems; h. Leadership and management development; i. Staff and personnel issues; j. Staff morale and engagement. Overall, the *ReVision* project covers very relevant structural and managerial matters within the Registry. Legal representation is a substantial matter that fundamentally affects the rights of victims under the Rome Statute: the right to legal representation and the exercise of their right to participation. **FIDH is concerned that, in proposing such changes, the Registrar appears to be going beyond the scope of the *ReVision* project** and encroaching on matters that fundamentally affect victims' trust and relationship to the participation process, and management issues that fall within the responsibility of the judges.

While the Registry is in charge of administration of legal aid and while the Offices of Public Counsel, including the OPCV, fall within its remit, it is important to distinguish between administrative powers, on the one hand, and interpretation of the rights of victims under the Statute, on the other hand. We note that the Basic Outline states:

Within the Victims Office, there will be a pool of independent lawyers [*sic*] would be available for assignment to (groups of) victims at all times, much like a Public Defender's Office. Furthermore, an *ad hoc* "external" counsel could also be added in each case, either as a lead or co-representative and would form an integral part of the team. Preference would be given to a lawyer from the situation country or with sufficient knowledge of that country (or particular group of victims) in order to complement the inhouse capacity. This Counsel would typically be based in the field to ensure closer ties and communication with the victims.<sup>2</sup>

**FIDH is concerned that the reform measures as envisaged would practically have the effect of depriving victims of the option of having external independent counsel represent them.** The presence of external counsel is foreseen as an option, to top up internal capacity. In our view, the presence of external counsel at lead counsel level should be maintained as a matter of priority. While we understand that certain limitations need to be established by the Registry given that victims generally cannot afford the cost of legal representation (such as, for example, grouping and common legal representation),<sup>3</sup> we are not convinced that victims should be deprived of the possibility of benefiting from legal advice of external independent counsel because they are indigent. That reasoning would also lead to internalisation of representation for indigent defendants.

### *Reasons for change*

According to the information that we have received, the reason for the proposed measures in respect of victims' legal representation is the case-law of the Court's Chambers. In this regard, we would like to make the following observations:

- There have been different approaches in the case-law through the different cases. The following models have been put in place:
  - o *Lubanga case*: Two teams of external legal representatives (various lawyers who originally assisted victims to fill out applications gathered together in two teams), and one small group of dual status victims represented by the OPCV.<sup>4</sup> Direct representation by OPCV was an

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<sup>2</sup> Basic Outline, p. 5.

<sup>3</sup> As per Rule 90(2) of the Rules of Procedure and Evidence.

<sup>4</sup> As recalled in ICC-01/04-01/06-2842, para. 20.

exception, as Trial Chamber I ruled that the main function of OPCV should be to provide support to legal representatives rather than representing victims.<sup>5</sup>

- *Katanga case*: Two common legal representatives representing groups of victims with a conflict of interest. The concept of a support structure in the field was introduced (one legal assistant).<sup>6</sup>
  - *Bemba case*: Initially, two common legal representatives representing very large numbers of victims in different locations. After one of the representatives passed away, all victims have been represented by one legal representative. Each legal representative had the assistance of one case manager and minimal support in the field (one legal assistant).<sup>7</sup>
  - *Banda case*: External lead counsel and associate counsel, with the support of one assistant and one case manager.<sup>8</sup>
  - *Ruto & Sang case at pre-trial*: An external common legal representative selected through a competitive selection process, with support of one legal assistant, one case manager, and 2-3 field assistants in the field.<sup>9</sup>
  - *Kenyatta case at pre-trial*: An external common legal representative selected through a competitive selection process, with support of one legal assistant, one case manager, and 2-3 field assistants in the field.<sup>10</sup>
  - *Gbagbo case at pre-trial*: Principal counsel from the OPCV; external counsel based in Côte d'Ivoire; and a case manager.<sup>11</sup>
  - *Ruto & Sang case at trial*: Lead external counsel based in the field, assisted by the OPCV, one case manager and four field assistants.<sup>12</sup>
  - *Kenyatta case at trial*: Lead external counsel based in the field, assisted by the OPCV, one case manager and four field assistants.<sup>13</sup>
  - *Ntaganda case at pre-trial*: Two teams of counsel from the OPCV to represent two groups of victims with conflict of interest. Each counsel is assisted by an assistant to counsel based in the field.<sup>14</sup>
  - *Blé Goudé case at pre-trial*: Principal counsel from the OPCV; a team member based in Côte d'Ivoire; and a case manager.<sup>15</sup>
- The fact that there have been different approaches shows that there has been an evolution in the conceptualisation of victims' legal representation before the Court. However, it is difficult to state that that evaluation has come to a halt, especially considering that the legal representation systems that have been put in place - including in the most recent cases - vary from one case to another.
  - In relation to the case law on which the proposals for change are based (namely, the Gbagbo case, the Ntaganda case and the Blé Goudé case), it is noted that this has emanated from only two (pre-trial) chambers. Decisions have been made in the pre-trial phase of the respective cases only. When making a decision about the appointment of OPCV, Pre-Trial Chamber I's Single Judge justified her decision "in light of the short time remaining until the scheduled date for the confirmation hearing."<sup>16</sup> In another case, she noted that the decision to appoint counsel from the OPCV was "based on considerations of efficiency and expertise that the OPCV can offer in the representation of victims *at this stage of the proceedings*" (emphasis added).<sup>17</sup> It is at this point too early to gather data and come to conclusions as to the impact and benefits of such a system.

<sup>5</sup> ICC-01/04-01/06-1211, para. 32. See also ICC-01/05-01/08-1005, para. 29.

<sup>6</sup> ICC-01/04-01/07-1328.

<sup>7</sup> ICC-01/05-01/08-1005; ICC-01/05-01/08-2964.

<sup>8</sup> ICC-02/05-03/09-215; ICC-02/05-03/09-337.

<sup>9</sup> ICC-01/09-01/11-249.

<sup>10</sup> ICC-01/09-02/11-267.

<sup>11</sup> ICC-02/11-01/11-138.

<sup>12</sup> ICC-01/09-01/11-460.

<sup>13</sup> ICC-01/09-02/11-498.

<sup>14</sup> ICC-01/04-02/06-160; ICC-01/04-02/06-211.

<sup>15</sup> ICC-02/11-02/11-83; ICC-02/11-02/11-111.

<sup>16</sup> ICC-02/11-01/11-138, para. 42.

<sup>17</sup> ICC-02/11-02/11-111, para. 14.

In our view, **the question of the ideal system for legal representation of victims requires a thorough analysis and evaluation of the various systems that have been put in place so far, and the benefits and disadvantages that each of them has offered.** No such assessment appears to have been undertaken as a basis to develop the proposed reform. Victim representation in international criminal trials is a new feature in international law and we dare to say that none of the systems put in place so far has been perfect. We believe that a critical evaluation should be made and that such an evaluation should go beyond concluding that one or another system has been inefficient. It should look at the reasons why the different models have operated in different ways and in particular, evaluate the limitations that each of them faced and how those could be addressed. For example, the Basic Outline identified the following problem:

The possibility for assignment of either OPCV and external Counsel (under the Court's legal aid system) as common legal representatives of victims has in instances led to competition and tensions between these two groups, in addition to sometimes conflicting views on how to approach the representation in a specific case...<sup>18</sup>

This is but one of a number of factors that may have affected the quality and effectiveness of victims' legal representation in past cases. We note that conflicts may also arise as a result of diverse views of victims with different interests. We submit that in order to optimise legal representation, the Registry should undertake a comprehensive evaluation. This would require a critical approach to decisions made by the Registry in the past in relation to legal representation, including regarding selection of lawyers, quality and amount of training, availability and use of legal services support, and functioning of legal aid for victims, among other issues.

### *Structural issues: independence and hierarchy*

**The proposal** to internalise legal representation raises, in our view, fundamental principle issues. First of all, **it does away with the idea that victims have a right to independent legal advice. Lawyer's independence is a fundamental principle of the legal profession.** This is why in certain countries around the world (for example, France) lawyers are not allowed to take employment as per their code of ethics. We note that the Basic Outline establishes that

The Chief of the Victims Office would not supervise the Counsel within the Office nor would he or she be able to give them instructions on how to conduct representation. The Counsel would be independent in the performance of their representation role and subjected to the Code of Professional Conduct.<sup>19</sup>

While it is possible for structures to be designed in such a way that they are independent within the Registry, we submit that a lawyer that is an employee of the Court could nevertheless be limited in its ability to act fully independently. We believe that restrictions to independence do not necessarily and always arise as a consequence of specific structural limitations, although they may (for example, if the lawyers' unit must have its budget approved by the Registrar). Limitations to independence may also arise as a consequence of belonging to an institutional culture and perception limitations. **We submit that victims' views about the ICC and the proceedings, including harsh criticism, could not be understood fully and be acted upon in a fully independent manner by persons who are employees of the Court.** Furthermore, we recall that it is of utmost importance that the interest of victims should be the primary concern that guides all of the lawyer's motions and interventions. **We are concerned that lawyers who are staff members of the Court may at times have in mind other interests, such as policies of the Court or of their own office or (actual or possible) interests of clients in other (present or future) cases.** We are concerned that such other priorities may detract the lawyer's attention from strictly and solely following the clients' instructions. This could lead both to motions that are not necessarily in the victims' interests or at least not prioritised by the victims (for example, specific ways of approaching cases that the office follows systematically in all cases as a matter of policy) or lack of action to act upon the victims' interests including by introducing innovative

<sup>18</sup> Basic Outline, p. 3.

<sup>19</sup> *Ibid.*, p. 5.

motions.

**The experience of the cases so far shows that independence also allows Counsel to undertake actions which may be seen as going beyond their strict legal representation mandate in proceedings, but that are nevertheless in connection with the ICC cases and in the interest of the victims.** For example, the legal representative in the Kenyatta case addressed a letter to the United Nations' Security Council in relation to matters on which the victims he represented had a keen interest on (request for suspension of prosecutions in the case in accordance with article 16 of the Rome Statute).<sup>20</sup> Other legal representatives have made use of their position to highlight victims' needs and advocate for assistance in their favour.<sup>21</sup> Actions of such nature could be seen by the ICC as not strictly related to the proceedings and would, most likely, not be undertaken by ICC staff members – including because they could create real or perceived conflicts with other parties or institutions. From a victim's perspective, however, strict compartmentalisation of tasks can be detrimental and may certainly not be in the best interest of the victims. Victims have a myriad of needs and justice is one of them. They do not always have access to other interlocutors and will often request of their legal representatives a broader role than the one they are called to play. We believe that it should be up to each legal representative to make up their mind, in all independence, as to whether they would want to take up tasks that go beyond representing victims in the courtroom. While we are not advocating for the Registry to specifically encourage such initiatives, **we believe that the Registry should not foreclose such a possibility.** Internalisation of legal representation would produce that result.

A problem that is related to independence is the question of reporting and supervision. We understand that the "pool of lawyers" and independent lawyers will not be supervised by the Chief of the Victims Office. However, we do not have at this point sufficient information as to how the Victims' Office, in particular the section dealing with victim representation, would be organised. **We are concerned about any reporting requirements and performance appraisals that lawyers who are staff members may be subject to.**

### *Elimination of legal aid for victims*

We understand that a consequence of internalisation of legal representation would be the elimination of legal aid for victims. We acknowledge that legal aid has posed significant problems to legal representatives in the past, and that the legal aid system has been and will continue to be closely monitored by States Parties. We note that most of the problems encountered by legal representatives in relation to legal aid do not arise from the existence of a legal aid scheme, but rather from problems in its conceptualisation (the system for legal aid for victims, as conceived at the ICC, is still not fully adapted to the situation of victim clients as it originated as a copy of the legal aid system for the defence) and numerous hurdles resulting from the management of legal aid by the Registry (for example, excessive amount of time and resources spent by legal teams to obtain and justify resources; being at the mercy of unclear policies; etc.).

We understand that costs for legal representation of victims would be incorporated into the Court's regular programme budget. Not having seen a proposal as to what resources will be allocated, we cannot offer specific comments on the extent of such resources. We note that the Basic Outline states that internalisation of legal representation would allow the Registry to provide a more cost-effective and efficient service.<sup>22</sup> However, **no specific and thorough cost study of the implications of the new structure appears to have been undertaken.** For example, there is an assumption that staff members will be able to work on more than one case simultaneously. However, that will depend on the Office's staffing levels.

With regard to the concept of internalisation of legal aid costs, we make the following observations. First, **elimination of legal aid will deprive lawyers of the possibility of challenging the extent of resources**

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<sup>20</sup> Letter by Fergal Gaynor, legal representative of victims in the Kenyatta case, to members of the United Nations' Security Council, 3 November 2013, available at: [http://www.iccnw.org/documents/Letter\\_to\\_UNSC\\_from\\_the\\_Victims\\_Lawyer\\_in\\_the\\_Kenyatta\\_case.pdf](http://www.iccnw.org/documents/Letter_to_UNSC_from_the_Victims_Lawyer_in_the_Kenyatta_case.pdf) (last accessed 28 Oct 2014).

<sup>21</sup> *Avocats sans frontières*, Modes of Participation and Legal Representation (2013), p. 36.

<sup>22</sup> Basic Outline, p. 5.

**allocated for legal representation when those are insufficient.** Up until now, the existence of a legal aid system - and acknowledgement that counsel may disagree with the Registry as to the resources allocated to their team following their independent assessment of what is needed - provided counsel with the possibility to request a judicial review of legal aid decisions.<sup>23</sup> While an office within the Registry may (or may not) have more leverage within the Registry to advocate for resources when needed, the litigation avenue via an independent request to judges would be foreclosed.

Second, **another consequence of internalisation of costs will be the loss of a certain degree of flexibility and likely increase in costs for compensation of individual lawyers and other team members.** Indeed, once representation is internalised, all counsel and staff involved in representation will have to be compensated in accordance with the ICC salary scale. In the past, external counsel have been allowed to apply some degree of flexibility to use their legal aid budget for compensation of field staff. For example, given that the ICC salaries are too high for some local economies, they could split the budget in two and hire two field assistants with the funds initially allocated to one position. In addition, counsel who become ICC staff members will be entitled not only to salaries but also to additional benefits. In 2012, the Assembly of States Parties reduced the level of compensation offered to counsel<sup>24</sup> as it understood that it was not necessary to compensate, through legal aid, for benefits that they fail to obtain due to their independent status. Internalisation of legal representation costs will amount to reinstating those costs.

We have not been provided with a description of how the unit in charge of representation will be composed. **We caution that internalisation could lead to the creation of permanent positions.** Arguably, an advantage of internalising legal representation, including creation of new resources, could be optimisation of use of resources as staff could work on various cases simultaneously. While we agree that that is an advantage, we believe that it does not outweigh the disadvantages of internalisation that we outline in this letter.

### *Perceptions and reality: double standards*

According to the model proposed by the *ReVision* project, international counsel (“pool of lawyers”) will lead representation in the cases, while local lawyers may assist in such representation through communication with the victim clients. The intervention of counsel from the situation countries or with specific expertise on the country concerned appears as an option. The Basic Outline states:

an ad hoc “external” counsel *could* also be added in each case for the duration of the case, either as lead or co-representative and would form an integral part of the team... This Counsel would typically be based in the field to ensure closer ties and communication with the victims (emphasis added).<sup>25</sup>

Such a way of organising legal representation raises concerns of application of double standards. We believe that the most relevant aspect of victim participation takes place in the field, by genuinely involving victims through information and taking of instructions. However, transforming those views into legal arguments and, most importantly, participating to the conception of a litigation strategy constitute the other side of that work and it is where experienced lawyers can provide a substantive added value. **We are concerned that local counsel could be relegated to assistants,<sup>26</sup> with no opportunities to participate to decision-making in relation to the litigation strategy and no appearance before the Chambers in The Hague.** Ensuring that they have such an opportunity and could plead in court if necessary would prevent applying a patronising approach. **We are concerned that prioritising international counsel and making assistance by external counsel optional perpetuates a top-down approach** in matters involving assistance from situation

<sup>23</sup> Regulation 83(4) of the Regulations of the Court.

<sup>24</sup> ICC-ASP/11/2/Add.1.

<sup>25</sup> Basic Outline, p. 5.

<sup>26</sup> This is arrangement put in place by the decisions in the Gbagbo, Blé Goudé and Ntanganda cases, where external counsel have been involved as assistants to counsel or team members. Following consultations with the OPCV, we understand that the Office has made a decision to appoint counsel with sufficient experience to plead in court.

countries' individuals and organisations, which has been typical of ICC policies over the years (for example, use of intermediaries). It makes no sense to apply a top-down approach to victim participation, a matter which, by its very nature, has been designed to do exactly the opposite: favour a bottom-up approach. Allowing for external independent advice to victims without any ties to employment contracts with the ICC is a guarantee for that bottom-up approach to be implemented. And so is the genuine involvement of external counsel across all decisions in relation to the case and including pleading in the courtroom.

An argument that has been made for local counsel to be employed is that they would benefit from capacity building. They have limited knowledge about international criminal proceedings and involvement in ICC cases through would provide them with the opportunity to acquire competences in that field. While this is true and we believe that participation in ICC proceedings represents a priceless opportunity for local lawyers, it is equally true that they also have much to share and from which others at the Court could learn. In other words, capacity building works both ways, with local lawyers having invaluable knowledge to share on the relevant conflict, the political and historical context, domestic law and litigation experience in domestic proceedings.

Finally, involvement of local lawyers as mere assistants could pose perceived and actual problems in relation to the victims' degree of involvement. Firstly, victims may find that there is a disconnection between them and the ICC as the lawyer whom they meet and trust is not the same that pleads their case before the judges. Second, if the only role of the local lawyer is to act as an intermediary that relays views and concerns, that creates an additional (and unnecessary) lawyer of communication between the lead counsel and the victims.

### *Perceptions and reality: duplication of tasks*

**Internalisation of legal representation would favour a perception that the ICC applies different standards to victims and to the Defence.** The *ReVision* project proposes that while Defence should be completely externalised, victims' representation should be completely internalised (although an argument is made that external counsel will continue to be involved even if as consultants or staff members, in practice that amounts to internalisation and elimination of external independent counsel). **This reinforces the perception that victims are and should be closer to the institution and closer to the prosecution.** It overlooks that victims do not always align with the prosecution and can be critical of both the institution and the prosecution.

Internalisation of legal representation could in practice actually lead to increasing identity between submissions by the prosecution and submissions by victims' representatives. Critics of victim participation have objected that the participation of victims may amount in practice to having the accused have to face two prosecutors. If the reform goes ahead, they may have a point. The main proposal of the *ReVision* project in relation to legal representation, i.e. internalisation of legal assistance, is based upon the idea that knowledge of the Court and the ICC jurisprudence is very relevant to act as counsel. (Based on this notion, Defence representation should also be internalised, because it is similarly important for Defence Counsel to be acquainted with international criminal law jurisprudence to represent the interests of the accused.) **The more knowledge of the substantive and procedural law is prioritised over the knowledge of the context and understanding of the victims concerns, the more chances there are that representation becomes a legal exercise detached from the actual views of victims.** It also increases the chances of high number of filings on procedural and other issues that may not necessarily have a link with the victims' interest. When contacts with the specific personal views of victims are lost, representation becomes based on the "general interest" of victims (i.e. what would generally and normally be in the interest of victims according to an abstract and theoretical interpretation, as opposed to resulting from a hands-on enquiry). The prosecution already represents such a general interest, and having another entity representing the same interest becomes superfluous.

In this regard we note also that the Basic Outline mentions a number of positions to be based presumably at headquarters: legal officers, case managers, legal assistants and data processing clerks.<sup>27</sup> **The change**

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



**proposals, however, fail to elaborate on the specific structure that will be put in place** to support victim participation throughout the proceedings and legal representation **in the field**. The Basic Outline indicates that “the new envisaged set up for field presences will ensure effective and efficient provision of support to the teams in the field.”<sup>28</sup> While field services may provide general support in areas such as security, information technologies and basic logistics, coordination of victim participation in the field requires assignment of personnel specifically devoted to that task. **It is erroneous to believe that one external counsel alone (if appointed at all) will be able to maintain regular contact with large numbers of client.** The experience of latest cases at the trial phase (Ruto & Sang and Kenyatta cases) demonstrates that support of field assistants is essential. Field assistants are young(er) lawyers with field experience. They support counsel by regularly calling clients and organising meetings between victims and the legal representatives. Such activities demand mobilisation activities and a great degree of logistical coordination. Lack of field support for these tasks can easily lead to overreliance on intermediaries. Field assistants develop a relationship of trust with victims and victim communities. This is why it is important that persons are specifically selected and assigned to this task. **Having field office staff perform such tasks on an *ad hoc* or intermittent basis would be inefficient** given the extent of involvement required and the need to maintain continuity in relation to persons interacting with represented victims. It is an intense full-time job and confidentiality and security plead against delegating contacts with victims, even if partially, to intermediaries (except, to a limited extent, for example to support mobilisation and dissemination of some categories of non-confidential information).

### ***Importance of innovation and flexibility***

The bottom line is: staff members will never have the same view about victims’ concerns as those who are outside the Court. It is a matter of positioning and perception and recognising staff lawyers’ independence is simply not enough. **It is inevitable for someone who is employed by the Court to be influenced or have his/her interpretation coloured by institutional policies and/or the experience of other cases.** While experience of representation in other cases is always very valuable, such experience needs to be put at the service of the victims and not the other way around (which is what a system favouring primarily knowledge of the ICC and its jurisprudence could promote).

In this regard, it is important to recall that victim participation and victims’ legal representation are new features in international criminal proceedings and that it has only been implemented in courtrooms for about eight years. This is a very short time in the history of developments in international law. There is certainly a lot of space for further evolution. We fear that institutionalising the latest jurisprudence of the Court in relation to legal representation will result in halting further judicial interpretation as to what the ideal system for victims’ legal representation could be. We are also concerned that that may also affect evolution of the notion of victim participation, as legal representatives play a crucial role in interpreting provisions on victims’ rights and pleading for interpretations before the judges. In this regard we disagree that there should be consistency in legal representation.<sup>29</sup> On a matter as new as victim participation there is certainly no unified view as to how participation should unfold in practice. At this point in the evolution of the legal concept and for the benefit of those most interested, the victims whose rights are at stake, it is important to favour promotion of different views and interpretations. **Concentrating victim representation at the ICC in one office would undoubtedly be detrimental to the evolution of victims’ rights.** It is possible that the office will develop its own interpretation of victims’ rights and become closed off to innovation. Innovative strategies are important to expand interpretation of victims’ rights.

**Lastly, a disadvantage of institutionalising one interpretation of how legal representation would look would be the loss of flexibility to adapt to the traits and needs of different victim communities and country settings.** In some of the cases before the Court, the Chambers came to different conclusions as to whether victims needed a local lawyer or an international lawyer, a lawyer based abroad or a lawyer based in their country, as well as in relation to the composition of the team that was needed to adequately support communication with clients. It is unclear what degree of flexibility will apply once representation is

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<sup>28</sup> *Ibid.*

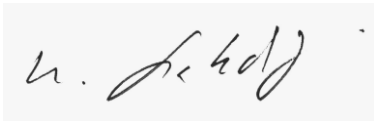
<sup>29</sup> Basic Outline, footnote 7.

internalised. It is also unclear whether judges will make pronouncements on the structure for legal representation, or whether those decisions will be of a purely administrative nature. Most importantly, **it appears as though victims will not be consulted on their needs in relation to legal representation.** For example, the Basic Outline does not indicate how counsel will be appointed and whether victims will be consulted at all in relation to their needs regarding legal representation. The reform proposals amount to an assumption made at the outset that what is best for all victims in all cases in all situations is to have a lawyer (lead counsel) who is a staff member of the ICC and could often come from a country that is not theirs.

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We thank you for considering our serious concerns regarding the *ReVision* proposals on victims' legal representation and remain at your disposal for any clarification.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'K. Lahidji', is centered within a light gray rectangular box.

Karim Lahidji  
FIDH President