

## Registry *ReVision* Project

### Basic Outline of Recent Proposals regarding the Defence

15 September 2014

#### Introduction

At its twelfth session, the Assembly of States Parties gave the Registrar the 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. The Registrar established a small project team to implement the reorganization project (known as the *ReVision* project). The project is implemented in phases, starting with the high-level organizational design of the Registry, followed by a detailed review of the Registry's operations, including working methods, policies, practices, regulatory framework, systems, etc.

Following an extensive review of all Registry functions, the *ReVision* Project has identified several areas of fragmentation, overlap and gaps in the performance of the Registry. One of these areas concerns the Defence function and how it is supported and administered. The *ReVision* Project's observations are that some of these functions are not performed adequately, there is fragmentation, unnecessary bureaucracy, inefficiency, and a lack of clarity in relation to the performance of Defence-related functions.

At the end of the first phase of the *ReVision* project, the Registrar adopted a number of recommendations for structural changes, including in the area of the defence in order to address and remedy structural issues. The aim is to optimise the Registry structure and to improve and strengthen the Defence function. This document presents a brief overview of the proposals and the way forward towards their implementation.

A new organizational setup is, however, just the first of several steps needed for an optimal performance of the Defence function. The legal aid policy and its administration need to become less bureaucratic. The Defence needs to be more involved in the development of Registry policies and practices that impact on the counsel, defence team members and the accused. The practical requirements of the defence teams need to be re-evaluated and met with adequate solutions. Counsel who are assigned need to receive relevant guidance and training, including the possibility to obtain ethics advice. At the same time, there need to be better processes to address counsel's performance when it is below acceptable standards. While all of these issues are seen as part of the reform of the Defence function at the Court, many of them will be tackled in the next phase of the *ReVision* Project. The proposals made at this time are limited to structural issues.

### **Observations on current structural situation**

Currently two offices handle defence issues – the Counsel Support Section (CSS) and Office of Public Counsel for the Defence (OPCD). CSS is in charge of the administration of the Court's legal aid system, including the maintenance of the List of Counsel, the assignment of counsel to indigent suspects and accused, and their remuneration. It is also mandated to provide support and assistance to the defence, including training for defence counsel. In this regard, CSS is meant to implement the Registrar's duties under Rule 20 of the Rules of Procedure and Evidence ("Rules").

OPCD, established by the Court's Judges through the Regulations of the Court, also provides support and assistance to the defence. In particular it provides legal advice and information to counsel and provides training and support in practical areas, such as the use of information technology. It may also be designated to represent and protect the rights of the defence during the initial stages of the investigation. The OPCD often advances that it is representing the general interests of the defence. While undoubtedly OPCD does this with the best of intentions, despite its best efforts, it is not in a position to effectively put forward and represent the position of all counsel practicing at the Court or the general interest of the defence. This is because, unlike a body of independent counsel, OPCD cannot claim a representational role since it is not an executive body of the profession, nor, more significantly, is it subject to any democratic oversight by the counsel it purports to represent. In this regard, the fact that OPCD is independent in the performance of its functions, is not sufficient to address the fundamental issue with its ability to legitimately speak on behalf of the defence.

At present, the delineation of responsibilities between the two offices is vague and this leads to a lack of cooperation, duplication and conflicts. The reality in practice is that OPCD has taken up the performance of certain "support and assistance" functions because those functions are not being performed effectively within the Registry. While OPCD has been able to fill this gap the Registrar is still under an obligation to provide support and assistance to the Defence and to organize the Registry in such a manner as to promote the rights of the Defence (Rule 20 of the Rules). The current duplication of functions between CSS and OPCD leads to fragmentation and overlap which is a waste of valuable resources. Moreover, it creates confusion as to which office is responsible and accountable for the provision of which service.

### **Proposals**

In order to address the above issues, as a first step the Registrar has decided to consolidate the functions of OPCD and CSS into a new single Defence Office in order to optimise the utilisation of existing resources and improve the services provided to the Defence. This will not affect adversely the money available for legal aid.

The new Defence Office would be responsible for exercising the Registrar's duty to promote the rights of the defence and will have the capacity to carry out the full range of defence-related functions, except for the actual representation of suspects and accused, which will continue being carried out by external independent counsel.

The new Defence Office would be performing the following functions:

- maintain the list of counsel and rosters of persons assisting counsel;
- appoint counsel and persons assisting counsel;
- administer legal aid;
- maintain effective relations with counsel and counsel's representative body;
- provide information and legal advice to counsel ;
- provide practical support and assistance to counsel, including in the use of information technology such as eCourt, travel to the Court, planning of (field) missions and investigations, obtaining State cooperation in relation to defence matters, etc; and
- act as a defence focal point for other (Registry) services required.

While a single Defence Office would facilitate and optimise the representation of the defence interests within the institution, it is also recognized that certain aspects of the general interests of the Defence or the collective interests of counsel are best represented by an independent body of counsel, not least because they may concern the Registry or require the adoption of positions contrary to the Registrar's. An independent self-governing association of counsel, representing all counsel practicing before the Court and founded on democratic principles, would be ideally placed to take up that role. The Registrar recognises that such an association of counsel must be in a position to effectively exercise its role, and as such must be recognised by the Court, must receive relevant information and be actively involved in relevant areas of the administration of justice.

The Registrar views the establishment and formal recognition of an independent self-governing Association of Defence Counsel as another key element of the reform of the Defence function. Membership is envisaged to be a requirement for admission to the List of Counsel. The recognition would reinforce the independence of the legal profession and would ensure the proper and legitimate representation of the general interests of the defence and the collective interests of counsel. It is envisaged the association could have the responsibility to:

- Act as the Court's interlocutor on defence issues as the legitimate representative of all counsel practicing before the Court, including through participation in various (consultative) bodies, such as the Advisory Committee on Legal Texts (ACLT);
- Appoint members to disciplinary organs;

- Play a role in the assessment of counsel's competence for the support of admission to the List of Counsel in partnership with the Registry;
- Organise (mandatory) training for defence counsel practicing before the Court;
- Provide advice to counsel on conduct and ethics issues;
- As a self-regulating body, oversee counsel's performance and adherence to standards of ethics and conduct, including through peer reviews; and
- With the leave from a Judge or a Chamber, make submissions on matters of collective interest to the Defence.

The Association of Defence Counsel would complement the institutional support provided to the Defence by the Registry. It would represent the collective interests of counsel and would be an interlocutor for the Registrar and others in the Court dealing with defence issues. It is recognized that even with the envisaged mandatory membership for counsel wishing to be admitted to the List, in view of the still limited number of cases the funding of an association of counsel may be problematic, certainly in the first years. The Registrar would therefore be willing to seek the ASP approval for a subsidy for the recognised association of counsel.

### **Way forward**

The implementation of the above proposals and the redistribution of OPCD's functions to a new Defence Office requires an amendment of the Regulations of the Court. The Registrar has briefed the Judges of his plan and will shortly submit proposals for amendments to the Regulations of the Court to the ACLT.

Should the proposed Defence Office be established, OPCD and CSS would cease to exist as such. A single manager, to be appointed after a competitive recruitment process, would head the new office. In principle, other staff in both offices will be administratively redeployed to the new Defence Office. In other words, it is not envisaged to reduce the resources available for the support of the Defence.

As for the establishment of an association of counsel, the Registrar would like to work closely with the List Counsel to identify a preferred initiative and support the process of the formal establishment of the association. The process should, however, be led by counsel. Throughout the establishment process, there should be a dialogue with the Registry in relation to the process and requirements for recognition, i.e. the association's governance structure and the definition of its role, etc.

The establishment of a new Defence Office will not have an impact on current assignments, the current entitlements under the legal aid regime, etc. Obviously, there will need to be detailed discussions on a transitional period for re-admission of counsel to the List of Counsel following the establishment of the association.