

Position Paper on IER Recommendations

Submitted by Office of Public Counsel for the Defence (OPCD)

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Introduction

The ICC's Office of Public Counsel for the Defence (OPCD) has welcomed the Independent Expert Review (IER) and engaged in the process with the sole purpose of improving the Court by focusing on the rights of defendants, enhancing structural equality of arms of the defence, and improving working conditions of the defence teams themselves. The final IER Recommendations, as relates to Defence and Legal Aid, are matters that we take seriously and have reviewed in great detail. All are welcomed and, it is our belief, all are entirely possible to achieve.

Of primary interest to the OPCD are the recommendations to strengthen Defence Services by entrusting our Office with further rights and responsibilities. These recommendations recognise the need for a strong Defence voice in the governance and strategy of the institution itself given the unique nature of an international criminal court. The OPCD has always been of the view that a Defence Organ in the ICC is the truest way to secure equality of arms institutionally and, as a result, in the proceedings. The reasons for this are simple in that it would put the Defence on equal footing with the Prosecution as parties to the proceedings while, at the same time, allow for more effective management.

However, the focus of the IER Recommendations is not to create such an organ textually at this time, so much as it is to create organ-like standing in a number of functions. To provide a Defence voice at the decision-making table of several Court processes, to ensure that this voice is heard and all considerations taken at an early stage to ensure the most sound results. To do so, movement to a 'Defence Office' with concomitant responsibilities may not be an 'organ' of Article 34, but it is definitely a pathway to test the viability of such potential in the future and open the idea. The recommendations that we see in the IER Report make improvements to the structures and services in a way that leads naturally to the possibility of 'organ' discussions in the long-range future, should the States wish to entertain such idea down the road.

Overall, the totality of the recommendations relating to Defence and Defence Issues can be categorised into three areas (covering 20 of the IER recommendations), they are:

I. Strengthening Defence within the ICC

1. **Creation of Defence Office** (R322, R323, R327 / R11, R209)
2. **Assignment of OPCD Counsel as 'Duty Counsel' for new suspects** (R320)
3. **Creation of a strategy for Defence Development** (R324)
4. **Create relationship between DO and PIOS similar to that of OTP and PIOS** (R325, R326)
5. **Formalised role of ICCBA** (R321)

II. Legal Aid / Defence Team Contracting (R328, R329, R333, R334, R335)

III. Efficiency of the Judicial Process and Fair Trial Rights (R190, R191, R197, R201, R213)

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The OPCD submits these initial observations to the Review Mechanism on these areas to help open the discussions of the way forward. We thank the Review Mechanism Ambassadors and Focal Points and the States for the opportunity to engage in this process and look forward to engaging in discussions as to how to most effectively execute the tasks necessary to supporting the present and future suspects/accused/convicted/acquitted of the ICC and those who represent them.

To this end, the OPCD intends to continue follow-up with those most impacted by the recommendations and endeavours to submit – as a larger collective – concrete proposals for inclusion in the comprehensive action plan which would fulfil the identified needs outlined in the Experts' work. For this, the OPCD, the ICCBA, and the IBA ICC & ICL Programme have already held an initial meeting and agreed to work together to explore whether it is possible to present common proposals related to some of the Defence recommendations. A Working Group may highlight where there may be areas of consensus between the group of stakeholders involved, although it remains crucial that the Defence practitioners directly form part of the consultation process with the Review Mechanism so their invaluable experience would not be missed. It will also be important to consult the Judges and Prosecutor of the ICC, and larger civil society, given that many of them were consulted and contributed to the creation of the OPCD, its revised mandate (which entered into force 29 June 2012) and its on-going development.

I. Strengthening Defence within the ICC

1. Creation of a Defence Office (R322, R323, R327 / R11, R209)

R322. Regarding internal organic structures, reshaping the current office for the Defence (OPCD) by entrusting it with additional responsibilities would improve efficiency of governance and of administration, increase budgetary transparency, provide a strategy for Defence Services, enhance accountability, and ensure appropriate representation of the Defence in the ACLT.

R323. These objectives may be achieved by bringing under the OPCD's management and governance the Counsel Support Section (CSS)'s Defence services, as well as legal aid. This new Defence Office would retain functional independence, as the OPCD currently has, and represent Defence interests within the Court, as for example through attendance in CoCo+ meetings and representing the Defence in the ACLT. This would also resolve the difficult position the Registry is in, in having to represent the Defence while maintaining its neutrality.

R327. The Experts believe the new Defence Office, offering a strengthened voice to the Defence on an institutional level, together with the ICCBA's recognition by the ASP and its reporting to the Assembly, redress what could have been perceived as an institutional imbalance regarding the Defence.

R11. *An extended Coordination Council (CoCo+) should regularly bring together the Principals and the Heads of (functionally) independent offices within the Court (OPCD, OPCV, TFV Secretariat, ASP Secretariat) to ensure strategic coordination at the highest level, enabling the Court as a whole to work in harmony and with unity of purpose.*

R209. *Following delivery of the first modules of the JWP in 2021, the Registry should develop a plan for regular review and evaluation of the current capabilities of the Court digital systems in light of developments in digital technology with a view to taking timely and appropriate steps to update digital support to ensure the efficiency and expedition of proceedings. The OTP and Defence Office should be consulted as appropriate.*

Perhaps the most significant recommendations to the work of OPCD are found in R322 and R323 with summary recommendation in R327. Each of these envisions a kind of restructuring of ICC services to better provide and manage Defence-understood resources while, at the same time, improving the Defence representation in the structure. Recognising the existence of an independent Office that can be bolstered in order to fulfil further tasks, the IER recommends addition of certain duties to the OPCD's mandate and reorganising existing resources.

With regard to **Recommendation 322**, the OPCD agrees that it can be entrusted with additional responsibilities and has, for the entirety of its existence, asserted as much. In particular, the OPCD already has ideas, that have been advanced in the past, as to how the budget can be made more transparent in such a way as the States having better idea of the value achieved in the legal aid system. Further, encouraging a Defence Strategy to provide better service to the Defence teams at an institutional level and better representation in the Rules-making process are themes that OPCD has routinely raised.

As far back as 24 July 2014, the OPCD submitted to the ICC Registry a suggestion for “a larger OPCD” that parallels the IER recommendations for increased role and responsibilities of the institutional independent defence office. Specifically, the OPCD recommended: “[...] the OPCD would suggest that the Registrar's proposal for a 'Defence Office' could be simply the OPCD itself, taking on further duties (and

*staffing) of other sections, such as CSS. To the degree that certain functions are considered incompatible in an independent Defence Office, there could be other sections of the Registry where such functioning may be more appropriate. This, in turn, could benefit the development of a ‘Defence Organ’ as a possibility for the long-term future, if not a reality at this time*¹.

Recommendation 323 develops this Defence Office further in giving it power to make representations within the institution on behalf of the Defence. As OPCD already performs this function, it would not be difficult to imagine it going further into CoCo+ or ACLT or on matters of budget (all areas we have sought to have stronger voice). The OPCD already has systems in place, that could be improved and developed by SOPs, of consultation with Defence teams on significant issues affecting their work. This collaboration would be extended to include the ICCBA’s Defence and Counsel Support Staff Committees (by and through its President and Executive Council). The most significant change would be with regard to preparing and presenting the budget on legal aid. The OPCD fully agrees that bringing these tasks under a unit of an independent Defence Office could only advance the ability to express the true needs of Defence teams in proceedings and explain why they are needed without the constraint that the Registry has (which currently makes representations on behalf of the Defence in the CoCo and before the CBF) to remain ‘neutral’.

The staffing required to assist in the specialised work is already in place in CSS and the OPCD agrees that such staff could be reallocated to the new Defence Office. That alone would not fulfil **Recommendation 322**, however. To fully allow the new Defence Office to have the proper placement and ability to fulfil the other tasks imagined related to budget and strategy, the OPCD suggests that the new Defence Office be realigned so as to be ‘administratively linked’ to either the Immediate Office of the Registry (as was the link in existence from 2006-2014) or the ASP or the Presidency. Discussions with all stakeholders will need to be held to determine which is the most feasible and efficient.

The OPCD notes the proposal to entrust legal aid to the new Defence Office under **Recommendation 323**. While a Defence Organ would be well placed to administer Defence legal aid, further analysis is required whether a Defence Office, and its more circumscribed powers compared to an organ, is the best entity to take on this responsibility. However, this should not impede the creation, as OPCD has previously suggested, of a Major Programme to demonstrate the totality of spending on Defence Teams, such as it is for the OTP. This Major Programme could contain the budget of the Defence Office and the Legal Aid funds to allow the States to have better understanding of the spending for Defence, especially *vis-à-vis* their counterparts within the Prosecution. In this process, a Defence Office can assist in policy-making and in presenting needs of the Major Programme in budget requests and in developing legal aid policies.

To this end, the working group consisting of the ICCBA, IBA, and OPCD, as well as consultations with others partners who are directly engaged in Defence work at the ICC could closely review the recommendations and provide concrete solutions that will advance the underlying interests of creating institutional parity and an improved structural equality of arms. The OPCD believes that most, if not all, of these proposals will remain cost-neutral and require only minor modification of the Regulations and/or administrative issuances. Furthermore, upon decision, they can be implemented immediately and with results-based verification measurements implemented to gauge the effectiveness of the recommendations and provide ability to improve efficiency and governance.

¹ Memorandum to Mr Martin Petrov re: Registrar’s ReVision Project, 24 July 2014, Ref. OPCD/0015/XJK/MOL, Annex C to OPCD Commentary on Draft Basic Outline, 11 December 2014.

2. Assignment of OPCD Counsel as ‘Duty Counsel’ for new suspects (R320)

R320. Although accused have mainly been represented by private, external Defence Counsel, appointed from the List of Counsel maintained by the Court, the possibility for the OPCD to be appointed as public Defence Counsel (duty counsel) should be maintained.

Out of only six Staff, OPCD has, at minimum, one Principal Counsel who must – by the current Regulations of the Court – meet the qualifications to be on the ICC’s List of Counsel. [At this time, OPCD has 2 Staff who are currently on the List of Counsel and has at least 4 who meet the qualifications.] The Staffing of the Office is also such that one of these Counsel can be available at all times in The Hague (or elsewhere, if needed) to support a suspect from the very moment s/he arrives in the Court’s custody. While some suspects arrive with a Counsel already retained, many do not and must – in the disorienting time of arrest/summons execution – select from a list of over 800 lawyers.

As in **Recommendation 320**, the OPCD has previously suggested that it could serve as Counsel to the suspect at this time and for the purpose of first appearance, if necessary, to allow a small window of time to let the suspect make an informed choice of more permanent Counsel that s/he is comfortable with and, therefore, will have better chance of continuity. OPCD was routinely assigned in this capacity in the earlier years of the Court and has greatly analysed if any potential conflict of interest can be made by such work. Based on internal policies, conflict can be successfully avoided for the limited purpose of informing the suspect about the ICC system and his/her rights within it, and the first appearance which has limited purpose and does not enter the merits of the case. Further, the Office being one of institutional memory and having routine experience with such hearings and procedures means that the quality of representation for suspects’ first appearances should be consistent.

Finally, cost saving would be realised in such assignments in that OPCD/DO Staff are paid through the regular budget, whereas assignment of a Duty Counsel is an added cost. The savings, then, are 100% when OPCD/DO Staff are assigned for this short period at the start of a case. For example, when assigned as Duty Counsel to Narcisse Arido for 10 days (whilst he took time to consider his options for permanent Counsel), the Court saved up to €6,490 in fees that would have otherwise been necessary to secure an external Duty Counsel for that period of time.²

This is not to say that external Duty Counsel will never be assigned for a first appearance; however, as a routine matter, OPCD/DO’s services could be employed more to create consistency, efficiency, and cost-savings.

3. Creation of a strategy for Defence Development (R324)

R324. The Defence Office would further be responsible for oversight, capacity building and strategic development for defence representatives before the Court.

OPCD has long sought a Defence Strategy to assist not only work of teams, but also the work of OPCD itself.

² Based on a maximum of €649 per day. See Registry’s Single Policy Document on the Court’s Legal Aid System, paras 87-89, http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-3-ENG.pdf (last accessed 10 December 2014).

Recommendation 324 develops that idea and presents new ways in which a newly created Defence Office could contribute to the overall efficiency of the proceedings by creating a strategy for the defence in conjunction with the Defence teams and ICCBA. The strategy would not intrude on the way Defence teams carry out their mandate, which they must carry out entirely independently, but could focus on how the Court could improve services to the Defence teams, to assist them in carrying out their mandates as effectively as possible.

4. Create relationship between DO and PIOS similar to that of OTP and PIOS (R325, R326)

R325. It is further recommended that the PIOS enables Defence-generated press releases on the Court's website, in the spirit of institutional equality of arms.

R326. Finally, in developing the Court's public information and outreach strategies, the Defence Office should also be consulted, to ensure such communication efforts respect the principles of fair trials and presumption of innocence.

In the past, the OPCD has likewise engaged in discussions with the Public Information and Outreach Section (PIOS), as well as Field Offices, to determine better outreach of Defence information. While progress has been made, the OPCD encourages further the discussion of how Defence can better participate in these programmes and in public platforms to fulfil **Recommendations 325 & 326**. Enabling Defence-generated press releases on the Court's website, for example, would enhance the institutional equality of arms and lead to improved transparency on the progress of proceedings.

5. Formalised role of ICCBA (R321)

R321. In light of ICCBA's recognition as the Bar of the Court, its role in the annual training for counsel ought to be formally recognised. Further, consideration could be given to having an elected ICCBA representative as a member of the Advisory Committee on Legal Texts (ACLT).

Recommendation 321, from the OPCD's perspective, is an opportunity to not only formalise the role of the ICCBA, but to engage with it on a systematic partnership level to assist in determining and acting on the needs of Counsel and teams before the Court.

The OPCD hopes to discuss with the ICCBA the possibilities that exist in such recognition as part of the working group it has agreed to form with the ICCBA and IBA.

With regard to the ACLT process (and in conjunction with linked Recommendation 322 to include the Defence Office in ensuring defence representation on the ACLT), discussions as to potential amendment of its constitution or working methods, pursuant to RoC 4, could also be examined by the OPCD, ICCBA, and IBA as part of this working group.

Suggested next steps for Strengthening Defence within the ICC (R320-327 / R11 / R209):

- ICCBA, IBA, and OPCD to create a Working Group, which, in consultation with other stakeholders, can examine and make proposals on the following for the comprehensive action plan:
 - All areas of Court support already provided to Defence and defendants and determine feasibility of those functions being transferred to the OPCD/Defence Office and, if not, where they should be performed.
 - Manner of OPCD's transition into a 'Defence Office' and any movement of Staff internally to support added functions with as little disruption as possible.
 - Areas of the Court where a Defence Office can be included for greater Defence presence at decision-making level.
 - Manner of formalisation of ICCBA's partnership with the Court, including the OPCD/Defence Office.
 - Potential to create a Major Programme for Defence.
 - Possible internal regulation or policy regarding use of the OPCD/Defence Office Counsel for initial appearances.
 - Development of assigning Focal Point for Enhancing Fair Trials within the HWG.
 - Review the Court's legal frameworks/texts for any necessary amendments.

II. Legal Aid / Defence Team Contracting (R328, R329, R333, R334, R335)

R328. Renewed efforts, taking into account past assessments and consultations already carried out, should take place to finalise the reform of the legal aid policy. It should be accessible, effective, sustainable, and credible, including ensuring equality of arms with the Prosecution and adequate facilities to Defence teams to prepare and conduct an effective defence. A full reform of the Policy is recommended, rather than only updating numbers. Otherwise, the topic will return to the ASP agenda in the coming years. The reform should be carried out and finalised with the help of a working group composed of individuals with specific experience working with defence and victims and legal aid policies before international courts, nominated by the Registrar, OPCD, OPCV and ICCBA. The working group should not begin its work within confined limits (e.g., budgetary limitations).

R329. Decisions on interpretations and application of legal aid should be made accessible to other Defence and Victims' teams, with any needed redactions that might be necessary, to ensure uniform application of the policy.

R333. The Court should consider elaborating scales of professional fees for legal staff working in external victims' teams, especially young professionals and women

R334. The relationship between the Court and support staff assisting external counsel for Defence and Victims should be formalised by granting them SSA contracts or consultant status.

R335. In line with the One Court principle, the Court wellbeing framework (including for example the system foreseen by the Administrative Instruction on harassment, access to OHU) and disciplinary procedures should be extended to support staff.

As indicated by the IER, “[a] full reform of the legal Aid Policy is recommended, rather than only updating numbers. Otherwise, the topic will return to the ASP agenda in the coming years. The reform should be carried out and finalised with the help of a working group composed of individuals with specific experience working with defence and victims and legal aid policies before international courts, nominated by the Registrar, OPCD, OPCV and ICCBA.”³

The OPCD has, from the beginning, advocated for the provision of all necessary resources for Defence Counsel and their support staff and have engaged in previous discussions and reincorporate our previous suggestions here. In particular, through the process, many ideas and suggestions were tested, and core issues remain, especially, the need to find a solution for:

1. Tax exemption (or reimbursement) of fees paid to Counsel and Staff, by the authorities of the Netherlands or any State, as creating an inequality in pay for the similar functions before the Court.
2. Support staff protection from abusive work practices, harassment and or vulnerability in attempts to negotiate sufficient wages by inclusion of staff rights/entitlements and minimum wages that provide equal pay for Court Staff counterparts.

³ See, e.g. Office of Public Counsel for the Defence (OPCD) Comments on the International Criminal Court Registry's Consultation on the Legal Aid System, 4 July 2017; OPCD Initial Comments on the Legal Aid Policy of the International Criminal Court, 23 November 2018 *in preparation of the 3 December 2018 meeting*.

3. Transparency and predictability in the remuneration and entitlements scheme, especially for Article 70 cases and later stages of Article 5 cases.

4. Adequate investigations budgets to allow equality of arms with the Prosecution given the adversarial nature of the investigations process in the Rome Statute system.

In particular, OPCD has long supported **Recommendation 334** in formalising the relationship between the Court and Defence support staff, although it is of the view that granting SSA or consultant contracts would not be sufficient. Rather, providing General Temporary Assistance (GTA) contracts to Defence support staff would be preferable. This is done in at least one other Tribunal and for the purposes of creating parity with their counterparts in the Prosecution for similar work.

Further, such GTA contracts would also address **Recommendation 335** in that as ‘Staff’ the Defence team members would be provided with the necessary wellbeing framework – automatically granting access to OHU and inclusion in the Administrative Instruction on harassment and access to its disciplinary processes. It would also address the issue of income tax exemption for Defence support staff since they would be entitled to the privileges and immunities accorded to staff of the Court.

Finally, as noted above, **Recommendation 328** could be assisted by the creation of a Major Programme to house all Defence spending and provide more transparency and easier ability to see resources allocated to Defence teams as a whole.

Suggested next steps for Legal Aid / Defence Team Contracting (R328, R329, R333, R334, R335):

- ICCBA, IBA, and OPCD to create a Working Group, which, in consultation with other stakeholders, can examine and make proposals on the following for the comprehensive action plan:
 - Inclusion of OPCD/Defence Office in legal aid discussions ongoing.
 - Re-introduce conversation of GTA contracts for support staff
 - Review Administrative Instructions for inclusion of Counsel, where appropriate
 - Review Code of Professional Conduct for Counsel for any necessary amendments.

III. Efficiency of the Judicial Process and Fair Trial Rights (R190, R191, R197, R201, R213)

R190. The system of Pre-Trial disclosure of evidence and all related matters, including redaction and other relevant protocols, should be the subject of urgent review by a Review Team which should be chaired by a Judge and should include a senior prosecutor, a senior member of Chambers staff, the Head of OPCD and the President or nominee of the ICCBA with a view to making recommendations to render the system more predictable and expeditious.

R191. Throughout the conduct of confirmation proceedings, Judges should have regard to the purpose of the confirmation process as a filter for inadequately supported charges and to ensure the fair trial rights of the accused, including by conducting efficient and expeditious proceedings leading to a clear and unambiguous confirmation of charges decision.

R197. The Pre-Trial Division Judges should have regular meetings to discuss matters that are the source of inconsistent practices among differently composed Chambers with a view to harmonising procedures as far as possible. The Judges of the Pre-Trial Division are encouraged to continue to meet as necessary with the OTP and the Head of the new Defence Office (currently OPCD) to discuss matters of mutual concern including matters relating to the interface between their respective roles at the start of the confirmation process, with a view to identifying ways of improving and maintaining the efficiency of the pre-trial stage.

R201. Recognising that a motion for acquittal on the ground that there is no case to answer is now an established feature of the Court's procedure, the Judges should draft Regulations of the Court to govern the procedure, including specifying the effect of a successful motion, to ensure a consistent approach by Chambers and providing for an appeal in appropriate circumstances.

R213. The Judges should consider introducing into the Chambers Practice Manual guidelines regarding decisions on substantive and procedural issues which may be subject to interlocutory appeal, as well as clarification of the cases in which the proceedings should be stayed for the time necessary to adjudicate the interlocutory appeals.

The inclusion of these recommendations in the OPCD's response is to support the suggestion of Defence participation in developing court-wide policies – especially those that are generated or led by the Presidency or Judiciary as impacting both parties to the proceedings. For these issues, and more globally, the OPCD would suggest the Court examine areas where the existing OPCD and future Defence Office can better monitor fair trial rights of the suspects at the earliest stages of the proceedings and even when there are no proceedings initiated, but where decisions taken impact the eventual suspects and accused or their Counsel/team before the Court.

Suggested next steps for Efficiency of the Judicial Process and Fair Trial Rights:

- ICCBA, IBA, and OPCD to create a Working Group, which, in consultation with other stakeholders, can examine and make proposals on the following for the comprehensive action plan:
 - Determining areas of the Court in which Defence can be better represented including, but not limited to: a Disclosure System Review team, PTC review groups to improve judicial efficiency.
 - Examining areas of improvement of Defence Office participation in proceedings to monitor Defence rights when no Counsel assigned.