

Annex 2

Summary of information relevant to the grouping of victims

1 Background

1. As set out in paragraphs 6 to 8 of the report to which this document is annexed, the Registry has considered whether or not the victim applicants in the present case might have conflicting or distinct interests with respect to each other, as contemplated by rule 90(4).
2. The Registry considers it inevitable that a variety of interests will exist among victims who participate in the proceedings. Thus it has sought to identify whether any of these variances of interest are so substantial as to justify separate representation. In doing so it has taken into account factors such as the nature and extent of the difference between victim interests, the number of victims in each potential group, and the existence of other basis for separating the representation of participating victims.

2 Possible conflicts of interest

3. Based on the information available to the Registry, two possible bases of conflict of interest existing among the participating victims could be identified:

(i) [REDACTED]

Unless or until such information emerges, the Registry does not regard a conflict of interest as apparent in this regard.

- (ii) A possible conflict between the Nigerian soldiers, or some of them, and the other victims: During the confirmation of charges hearing in the case of *The Prosecutor v Bahar Idriss Abu Garda* suggestions were made by the defence that some of the deaths during the attack at the Haskanita camp

might have resulted from “friendly fire” from the Nigerian soldiers.¹ The Registry notes that such allegations are not presently argued by the defence and nor was any significant evidence of this theory presented during the present case or even the case of *The Prosecutor v Bahar Idriss Abu Garda*. Unless or until relevant information supporting this theory emerges, the Registry does not regard a conflict of interest as apparent in this regard.

4. The Registry therefore currently takes the view that no conflict of interest exists among the participating victims. However it recommends that the issue be re-opened should any new information or arguments bring to light the existence of such a conflict.

3 Distinct interests

5. The Registry notes that, following rule 90(4), there may be circumstances in which the “distinct interests” of different participating victims justify their separate representation. Reference in this rule to the “distinct interests” of the participating victims appears to be broader than conflicts of interest in a strictly legal sense. However it is also apparent that within any group of participating victims, a variety of interests will co-exist. The Registry considers that where distinct interests are identified among participating victims it is necessary to consider whether the interests are so substantially different as to justify separate representation. For example, the existence among a subset of victims of an *additional* interest or viewpoint, which is not shared but also not disputed by other participating victims, would not necessarily justify separate representation. This question must be determined case-by-case taking into account factors such as the nature and extent of the

¹ ICC-02/05-02/09-T-14-Red-ENG, pages 59 and 63.

difference between victim interests, the number of victims in each potential group, and the existence of other bases for separating the representation of participating victims.

6. The Registry notes that some “distinct interests” have been identified in the present case. Concerning these, the Registry has considered the views of the current legal representatives and the victims themselves. It has also taken account of the proceedings to date and the effectiveness of the current victim groupings. The Registry takes the following view regarding the “distinct interests” raised:

(i) Differences in the forms of harm suffered by different groups of victims

7. It was suggested by current legal representatives that distinct interests exist as between the victims injured in the attack, those whose family members were killed, those who lost property, and those who suffered other forms of harm. The Registry considers it inevitable that cases before the Court will involve victims who have suffered various forms of harm. This does not of itself mean that the victims have different interests. Where the victims’ interests relate principally to a desire for justice and/or reparations, these interests may substantially coincide. In any event, dividing the victims in the way proposed would have the result in the present case of dividing victims who for other reasons (for example, cultural, linguistic and geographical) may prefer to be represented together and who, in some instances indicated to the Registry that they preferred to be represented together.

(ii) Differences related to the victims’ national, cultural or linguistic backgrounds

8. The Registry notes that in its meetings in 2009 with the victims (then as applicants) many of them did indeed express a wish to be represented by a

person from their own country or at least who spoke their language. The Registry understood these requests to stem above all from a desire to achieve mutual understanding and good and regular communication. The Registry considers this to be an important goal, but one which can be achieved through ensuring a legal team with multiple members which includes different languages and countries of origin in composition. The Registry has not received information from the victims or from the legal representatives suggesting that such an approach would not meet their concerns. Indeed to date the victims from Senegal, Gambia and Botswana have been represented together by Ms Cissé and no difficulties have been reported as having arisen from this arrangement.

(iii) Distinct interests said to relate to the views of the Darfuri victims

9. It is said by the legal representatives of the Darfuri victims that they may wish to argue for the enlargement of the factual scope of the case to include the attack on Haskanita village, and/or which involve critiques of the Prosecutor's approach. The suggestion of the legal representatives appears to be that the other participating victims would object to the proposed arguments from these victims. However from the information so far made available to the Registry, it is not clear why this would be the case. As indicated above, the fact that a sub-group of victims has particular additional interests in a given case, does not necessarily mean that their interests are so substantially different from those of other victims as to make their separate representation necessary or appropriate. In the present instance the Registry sees no reasons why the points said to be put forward by the Darfuri victims would interfere with the ability of counsel to also adequately represent the interests of the other participating victims.

4 Other factors

10. Rule 90(4) requires the Registry to take into account distinct interests including conflicts of interest, but does not exclude that other factors might also provide a basis for arranging the representation of victims through two or more groupings. In the present case it has been suggested by some current legal representatives that particular logistical barriers to accessing some of the victims may justify their separate representation. This question has arisen as follows:

- (i) Comments from Colonel Adaka, current legal representative of victims who are serving members of the Nigerian military, suggest that alternative counsel may encounter difficulties in arranging meetings with his clients owing to their membership of the Army and the need to secure permission from military authorities for such meetings;
- (ii) Counsel currently representing Darfuri victims, Sir Geoffrey Nice QC and Rodney Dixon, have likewise suggested that alternative counsel may face difficulties in accessing their current clients, who reside in Darfur. In response to Registry questions regarding where such challenges would emanate from, the legal representatives have indicated that they are not presently able to provide further clarification, and simply state that they would not be in a position to guarantee such access.

11. The Registry considers that problems of principle and practice would arise should the Court allow counsel (or intermediaries working with counsel) to determine the outcome of a rule 90 process by insisting that newly appointed counsel would be unable to access the participating victims. At least in the case of the Nigerian victims, access to whom would be within the control of

state authorities, cooperation obligations could be relied upon to secure access for appointed counsel. Furthermore, it has been confirmed by Frank Adaka, through the purported transfer of his representation to Mr Akin Akinbote, that a lawyer who is not also a member of the Nigerian army can be given sufficient access to the victims who are currently serving in the Nigerian Army.

12. More significant difficulties may arise in Sudan, not a state party to the Rome Statute, however no information has so far been provided to the Registry which would explain why it has been possible for current counsel (Sir Geoffrey Nice QC and Rodney Dixon) to access Sudan while others may not be permitted to do so. Should common legal representative(s) be appointed to replace the current counsel of the Darfuri victims, the Registry expects the cooperation of the current counsel to ease the transition of legal representation, notably by facilitating contacts with the intermediary who has arranged access to the victims they represented so far. Regarding the possibility that difficulties could arise in the issuance of visas by Sudanese authorities the Registry [REDACTED].² Furthermore, the Registry also recalls the current legal representatives' suggestions of alternative ways to meet with their clients outside Sudan [REDACTED] by telephone or video link. Should access to Sudan ultimately be denied to any new legal representative(s), similar means could be made available to them. The Registry would be in a position to offer some technical assistance and legal aid finances to facilitate such interactions between the common legal representative and the Sudanese victims, if needed.

² [REDACTED]

13. The Registry's view therefore is that contentions regarding restrictions of access to victims should not generally influence decisions on common legal representation, and in any event would first need to be justified clearly. In the present case the information provided to date by the legal representatives does not appear to justify separate representation on this basis.
14. Finally, and in addition, the Registry notes that in the present case the participating victims (as well potential further applicants for participation) are geographically dispersed throughout various countries in Africa. However the Registry has concluded that this factor in itself is not a sufficient reason for constituting multiple victim groups. Rather, an adequately structured legal team could provide the effective means to effectively reach and maintain contact with the various victims as well as to represent their interests at the Court.

5 Conclusions

15. Based on the reasoning above and the information available to the Registry at this date, the Registry concludes that the victim participants in the present case should not be separated into multiple groups for the purpose of common legal representation. Rather, it would be preferable to arrange one team with sufficient and appropriate members to represent the entire group of victims.
16. Should the Chamber be of a different view, and prefer to separate the victims into multiple groups, the Registry respectfully proposes that it would then be prepared to make a proposal to the Chamber regarding the representation of any separate groups of victims. Such a proposal could be prepared rapidly, based on the selection process.