

Annex 1

Legal framework and Registry's approach on common legal representation

1 Overview

1. This annex sets out by way of background information upon which the Registry has based its approach to organizing common legal representation in the present case. That approach has been informed by the following questions, which are covered in this annex:
 - the legal framework for the arrangement of common legal representation;
 - the practice undertaken in other cases regarding the organization of common legal representation;
 - the explanation of the new approach undertaken by the Registry when acting in accordance with rule 90 of the RPE.

2 Legal framework

2. The Registry's general mandate to assist victims with the organization of their legal representation is founded in rule 16(1)(b) of the RPE. In addition, under rule 90 of the RPE a Chamber may request that a "common legal representative" be chosen to represent victims or a group of victims. As indicated by rule 90(2), this is "for the purposes of ensuring the effectiveness of the proceedings." Trial Chamber II has explained that common legal representation is principally aimed at "reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible."¹
3. The Registry notes that rule 90 distinguishes between two avenues by which a common legal representative may be identified:

¹ ICC-01/04-01/07-1328, paragraph 11.

- (a) under rule 90(2) the Chamber may “request the victims or particular groups of victims” to choose a common legal representative or representatives, including if necessary with the assistance of the Registry;
 - (b) under rule 90(3) the Chamber may request the Registry to choose a common legal representative or representatives, if the victims have been unable to do so within a period of time determined by the Chamber as appropriate.
4. Under the rule 90 scheme, priority is given to the victims’ own proposal for organizing common legal representation. However, given logistical and security considerations, it is apparent that in practice a proposal is likely to be made by victims only rarely, and then only if the Registry is in a position to provide significant assistance. It is perhaps in recognition of this reality that rule 90 enables the Chamber to recognize that victims are unable to choose a common legal representative, and thus request the Registry to do so.
 5. With the current report, the Registry is proposing common legal representation following the instructions of Trial Chamber IV and in accordance with rule 90(3).²
 6. The Registry notes that the Court’s Regulations do not provide guidance regarding how rule 90(3) is to be implemented, other than requiring that consideration be given to the views of the victims, and the need to respect

² In the present case, Trial Chamber IV has instructed the following: “[...] [T]he Registry to finalise consultations and inform the Chamber of the common legal representative or representatives chosen by the victims by 16:00 on 8 August 2011; OR ALTERNATIVELY, if the victims are unable to choose a common legal representative or representatives, to submit to the Chamber a proposal on the organisation of common legal representation by 16:00 on 15 August 2011”. Email from Legal Officer, Trial Chamber IV to Associate Legal Officer, Division of Court Services, 22 June 2011

local traditions and to assist specific groups of victims.³ The Registry therefore considers it appropriate to provide the reasoning behind the adoption of the new approach.

3 Practice to date on common legal representation

7. Before August of this year, common legal representation before the Court had been organized on four occasions.⁴ Key features of the approach taken in those four instances are:

- Common legal representation has usually been arranged at a late stage in proceedings, with victims and applicants represented until that time by counsel appointed by them (usually without the Registry's involvement) or by the Office of Public Counsel for Victims (the "OPCV");
- The organization of common legal representation has tended to interfere minimally with the role of existing private counsel, either by enabling them to form teams and work together⁵ or by selecting one or more of the counsel already involved in the case to act as common legal representative.⁶

³ Regulation 79(2), Regulations of the Court.

⁴ Previous instances occurred immediately before trial hearings in the cases of *The Prosecutor v Thomas Lubanga Dyilo*, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* and *The Prosecutor v Jean-Pierre Bemba Gombo*, as well as prior to the confirmation of charges hearing in the case of *Prosecutor v Jean-Pierre Bemba Gombo*. During the present month two other arrangements of common legal representation have been made, namely in *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC-01/09-01/11-243 and ICC-01/09-01/11-249) and *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigau Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-214)

⁵ As occurred in the case of *The Prosecutor v Thomas Lubanga Dyilo*: ICC-01/04-01/06-T-105-ENG, pages 12-13.

⁶ As occurred in the cases of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07-1373-Conf-Exp) and *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-343

- In this process, no formal evaluation was made to determine whether such counsel meet – or still met - the criteria established for identifying common legal representatives in the particular case.
8. The Registry notes that the practice of simply selecting a common legal representative from among counsel already active in the case has meant that prior access to or contact with victims in the case has *per se* proved a more significant factor in this process than other criteria. In some cases, although not in the present one,⁷ this may tend to reward and encourage the practice among counsel of “fishing” for victim clients⁸ since solicitation enables a lawyer to enter the group of current counsel to be considered as common legal representative.
 9. Where counsel have already been active for some time in representing victims before the Court, they should therefore be assessed against the same criteria established for identifying common legal representatives in the particular case.

and ICC-01/05-01/08-1005, ICC-01/05-01/08-1025), although in the latter case one additional private counsel was introduced at the trial stage.

⁷ The Registry’s concerns in this regard have been set out in other contexts in which they pertained directly (see ICC-01/09-01/11-243-Anx1 and ICC-01/09-02/11-214-Anx1). They have provided one of a number of bases on which the Registry has designed its new approach on common legal representation, which for the sake of transparency, fairness and predictability it wishes to apply evenly in all cases before the Court.

⁸ As most victims do not know of a lawyer who might represent them at the ICC, they will usually appoint a lawyer who makes him or herself known proactively to the victims (either directly or through the intermediary who assists the victim to apply for participation). Questions may be raised as to whether the victims have had a real, informed choice about their representation. Furthermore, they are likely not aware of other options for legal representation and can be ill-equipped to assess the relative skill and professionalism of the lawyer contacting them as compared with others. While lawyers involved in this practice might sometimes have qualities which are desirable in a victims’ legal representative, this is not necessarily the case.

10. The Registry also recognizes that in past arrangements of common legal representation insufficient recognition has been given to the need for consultation with the victims themselves. In this regard the Registry notes that the Court's texts give clear importance to victims' views in the appointment of their counsel, including where common legal representation is arranged,⁹ and this has also been recognized by Chambers.¹⁰ The Registry recognizes that in many instances the extent of consultation able to be undertaken may be restricted by resource and time limitations. However, whenever common legal representation is arranged under rule 90(3), victims' views should, as much as possible and to the extent feasible, be considered when deciding procedural questions (the steps to be followed and criteria to be used) as well as on the substantive questions of victim grouping and the selection of counsel.

4 The Registry's new approach to common legal representation

11. For these reasons, the Registry has recently developed an approach to implement its responsibilities under rule 90(3) in a fair, transparent and systematic way, and to promote the best quality of victim representation before the Court. This approach has been applied for the first time in the case *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*,¹¹ and soon thereafter in *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.¹²

⁹ Rule 90(1) and (2), rule 79(2).

¹⁰ ICC-01/04-01/06-1119, paragraph 126; ICC-01/05-01/08-322, paragraph 9; ICC-01/05-01/08-1005, paragraph 14.

¹¹ ICC-01/09-01/11-243.

¹² ICC-01/09-02/11-214.

12. According to the approach adopted, the Registry will first develop recommendations, in accordance with rule 90(4), regarding the number and composition of victim groupings. Thereafter a selection process will be undertaken for the lawyer or lawyers to be recommended for appointment as common legal representative. This process will include consideration of both the current legal representatives in a case, as well as other interested and qualified counsel, and will be conducted in a transparent and objective manner according to identified selection criteria. This approach is based not only on the premise that a larger pool of candidates is more likely to yield good candidates, but also on the understanding that all counsel capable and competent to represent victims should be provided with a fair and equal opportunity to seek involvement in the representation of victims at the Court
13. Accordingly, in a given case the Registry will finalize selection criteria which are appropriately adapted to the case in question (taking into account the views expressed by victims, intermediaries and others) and then issue a call for expressions of interest in the representation of victims. While the precise manner in which a selection process is undertaken may vary slightly depending on the case involved, any such process should be transparent, objective and fair. In the present process (and ones undertaken recently in the Kenya cases) the following procedures have been adopted.
- Beyond considering the minimum requirements set out in the Court's texts,¹³ the Registry also specified in its call for interest the criteria to be used and the particular expertise or skills that were sought from among the qualified and interested counsel, taking into account the particularities

¹³ Rule 22, RPE; regulation 67, Regulations of the Court.

of the case and the views expressed by the victims. Counsel who were interested and available, and who considered themselves qualified to take on the role of common legal representative, were required to provide their CV as well as a statement of how their involvement would meet the identified criteria.

- Counsel who expressed interest were then shortlisted, based on the criteria identified for legal representation in the case. The individuals shortlisted were asked to provide their reflections on a set of questions. The answers provided by the lawyers were reviewed and marked, and, based on the results, a selected number of candidates were asked for an interview.
- The interview panel was composed of appropriate members of Registry Staff; namely in this instance the Chief of the VPRS, the Associate Legal Officer who serves as VPRS focal point for the case, and a staff member delegated by the Chief of the Counsel Support Section.
- Interviews were conducted using standardized questions. Members of the panel then evaluated the potential of each candidate to represent victims in the case by reference to the pre-identified criteria.
- Agreement was reached among the panel regarding recommendations, and a confidential panel report was prepared which sets out these recommendations and details the process followed and provides a summary of the candidates' respective strengths.

14. The Registry considers that in undertaking this process special care is needed in those instances where counsel have already established relationships with their clients. There is at once a need to recognize the value of the relationship

of trust which may have developed between counsel and client, but also to ensure that the existence of such relationships does not receive undue weight to the detriment of other important and desirable characteristics.

15. The Registry therefore considers it appropriate that where counsel have already been active in representing victims before the Court for some time, steps should be taken to objectively evaluate the representation provided to date as a part of assessing such counsel against the criteria established for identifying common legal representatives in the particular case. As part of this process, the Registry will take into account the extent to which the counsel may be better placed than others to undertake the role of common legal representative owing to an established relationship of trust with some of the participating victims and/or an established familiarity with the proceedings in the case. Such factors will be assessed and appropriately weighed up along with factors relating to other criteria.
16. The process used in evaluating the work undertaken to date includes looking at certain information in respect of the selection criteria. This includes information related to the counsel's interventions in proceedings to date, including compliance with ICC procedures, communication with their clients, communications with the Court, submissions filed, appearances at hearings, as indicated in the Registry Report.¹⁴ As far as possible from the information available, the extent and nature of interactions with represented victims should also be assessed. Ideally this should also involve the receipt of victims' views regarding their representation to date, however it is recognized that

¹⁴ ICC-02/05-03/09-164-Red, paragraph 22

such views are difficult to obtain without direct and private interactions between the Registry and victims, which may not always be possible.

17. The Registry emphasizes that this process of evaluation is not intended to interfere with the independence of counsel regarding case strategy or the substance of legal and factual arguments. Rather it is designed to assess the effectiveness of counsel's representation of victims in the case by reference to the identified selection criteria.