

**Annex 1**

**Legal framework and experience to date 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.

## 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."<sup>1</sup>
3. The Registry notes that rule 90 distinguishes between two avenues by which a common legal representative may be identified:
  - (a) under rule 90(2) the Chamber may "request the victims or particular groups of victims" to choose a common legal representative or

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<sup>1</sup> ICC-01/04-01/07-1328, paragraph 11.

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 consideration, 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. In the present case the Single Judge did not request the victims to identify common legal representatives, but rather instructed the Registry to organize common legal representation. The Registry therefore understands that it is acting under rule 90(3). Indeed, such an approach appears necessary in the present case. This is not only because of practical difficulties (for example the timeframe available, the geographical dispersal of potential victims, and the potential security risks faced by them in communicating with each other and/or the Court) but also because no applicants have yet been granted the status of victim by the Single Judge. The identities of participating victims therefore remain unclear.
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

local traditions and to assist specific groups of victims.<sup>2</sup> The Registry therefore considers it appropriate to provide details of its approach.

### 3 Practice to date on common legal representation

7. The present case marks the fifth instance in which common legal representation has been organized.<sup>3</sup> Key features of the approach taken previously 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 together<sup>4</sup> or by selecting one or more of the counsel already involved in the case to act as common legal representative.<sup>5</sup>

8. The Registry notes that this approach has had certain consequences. In particular, the practice of selecting a common legal representative from among counsel already active in the case has tended to reward and encourage

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<sup>2</sup> Regulation 79(2), Regulations of the Court.

<sup>3</sup> 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*.

<sup>4</sup> As occurred in the case of *The Prosecutor v Thomas Lubanga Dyilo*: ICC-01/04-01/06-T-105-ENG, pages 12-13.

<sup>5</sup> 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 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.

the practice among counsel of “fishing” for victim clients. 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). It has thus become usual for counsel to identify victim communities and approach them (directly or through an intermediary), explaining that if the victims wish to participate in ICC proceedings the counsel will be willing to represent them.

9. This practice of actively soliciting victim clients is not expressly prohibited by the Code of Professional Conduct for counsel or any other text of the Court, although it may be prohibited under the rules of professional conduct in certain states. While the Registry notes that the practice does not of itself suggest *male fides*, it can result in some undesirable consequences:
  - Questions may be raised as to whether the victims have had a real, informed choice about their representation. 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. An approach to rule 90(3) which prioritizes counsel already representing victims in the case risks unduly rewarding the practice of “fishing” by making an ability and willingness to engage in client solicitation a more significant factor in selection as a common legal representative than other criteria.

11. Until now the Registry has often prioritized existing legal representatives when proposing a common legal representative because this enables continuity of legal representation. This has been all the more important because the Court has usually not invoked rule 90 until late in proceedings, by which time relationships between victims and their lawyers have often been long-established. The imposition of new counsel at this point thus disrupts the continuity of representation, which can be disorienting and upsetting for the victims.
12. However, the Registry notes the complaints often received from lawyers on the Registry's list of counsel that aside from solicitation, there are no clear avenues available for being appointed to represent victims before the Court. This has meant that many appropriately skilled counsel who refuse to solicit victim clients (including because their national rules forbid this) have not become involved in representing victims at the ICC.
13. Noting the difficulties identified above, the Registry has sought to introduce a new approach in order to improve the way it implements its rule 90 mandate. The details of that approach are set out in the report to which the present document is annexed, at paragraphs 2 *et seq.*