

Annex 2

Summary of information relevant to the grouping of victims

1 Background

1. As set out in paragraphs 9 to 11 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 exists 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 bases for conflicting or distinct interest

3. Most of the obvious categories of difference among the victims do not appear to suggest the likely existence of conflicting or substantially distinct interests in terms of the proceedings. For example it does not appear that victims who suffered from different crimes (murder, forcible transfer or persecution) or different kinds of harm (for example physical injury, psychological trauma, or loss or damage of property) have substantially different in the proceedings. Indeed many persons experienced more than one of these crimes and/or suffered multiple forms of harm. Similarly, the Registry has found no basis for believing that victims who resided in or now reside in different areas have significantly distinct interests such as to justify separate groupings.
4. Given the centrality of political affiliation in the crimes and circumstances alleged by the Prosecutor, it is relevant to note that there does not appear to

be any clear division among the current victim applicants on this basis. For example, the Registry is not aware of any victim applicants currently before the Chamber who have indicated an allegiance to the Orange Democratic Movement.

5. The one basis on which the Registry considers that there are some grounds for suspecting the possible existence of conflicting or substantially distinct interests is in relation to ethnicity.
6. The Registry notes that the great majority of applicants in the present case are of Kikuyu ethnicity. Of 394 applications considered complete and transmitted to the Chamber, 49 were presented by persons not of Kikuyu ethnicity. Applicants of other ethnicities were included in the following numbers: Kalenjin (14), Kamba (4), Kisii (3), Luhya (26), Luo (1) and Maasai (1). The Registry has considered carefully the question of whether applicants in the present case who are members of these ethnic groups may have interests which are distinct from, or even in conflict with, those of the Kikuyu victims. In considering the question of distinct interests among victim groups, the Registry has taken into account, as well as the views expressed by victims, community leaders and intermediaries, the contents of two expert reports commissioned by it: a victim mapping report in January 2010 ahead of the Article 15 process and a follow-up status report on victims of the post-election violence in June 2011.

3 Ethnicity as a possible basis for separate groups

3.1 Issues of ethnicity in the proceedings

7. The Registry notes firstly the terms in which the scope of the present case is currently defined, ahead of the issue of the Document Containing the

Charges. The Registry has had regard to the Chamber's Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang¹ (the "Summons Decision") and in some respects to the Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (the "Article 58 Application")² where it further elaborates on those parts of the counts accepted by the Chamber in its Summons Decision. Both the Summons Decision and the Article 58 Application define the attacks which are the subject of the case as having been committed against persons perceived to be supports of the PNU, rather than as having been directed against members of particular ethnic groups *per se*.³ In this sense, the case is framed in terms of political alignment, with ethnicity being a presumptive (but not determinative) marker of the latter. The Registry notes that, despite their differing ethnic origins, the applicants for victim participation in the present case are united by their status as persons targeted by virtue of their perceived political affiliation, regardless of ethnicity. This applies also to those applicants of Kalenjin ethnicity who were targeted because they were known or perceived to be supporters of the PNU, and were therefore accused of disloyalty to their tribe.⁴ Neither the Summons Decision nor the Prosecutor's Article 58 Application make ethnicity *per se* an issue in the proceedings. They do not suggest on their face any basis for differing interests of victims in the proceedings based on their ethnicity.

¹ ICC-01/09-01/11-1.

² ICC-01/09-30-Conf-Exp and ICC-01/09-30-Red2.

³ ICC-01/09-01/11-1, paragraphs 17, 19, 23, 28, 31, 32, 41, 46; ICC-01/09-30-Red2, paragraphs 1, 3, 18, 20, 21, 23, 25.

⁴ The Registry notes that this phenomenon is also alluded to in the Prosecutor's Article 58 Application, which alleges that members of the Kalenjin network who refused to participate in the planning of attacks were described as "traitors" to their community: ICC-01/09-30-Red, paragraph 85.

3.2 Contextual information relating to possible ethnicity-based interests

8. According to public reports concerning the violence in the North Rift Valley which is the subject of the present case, victims were targeted by virtue of a combination of ethnic and political factors, which are themselves interrelated. Such reports support the Prosecutor's contention that ethnicity was used as a marker for political affiliation, with Kikuyus, Kisiis and others targeted as perceived PNU supporters.⁵ This targeting based on political affiliation is able to explain the presence of Kalenjins among the victim-applicants in the present case, with numerous reports citing violence carried out against Kalenjins known or believed to be PNU supporters, who were identified as "traitors".⁶ Such information may strengthen the view that the victims in the present case are likely to share common interests despite different ethnic identities. However it is also reported that the inter-ethnic nature of the violence resulted as well from other inter-related historical factors, with land disputes, for example, playing a significant role.⁷ From this angle, attacks against non-Kalenjin communities were not only intended as acts of political retribution or influence against real or perceived PNU supporters, but were also motivated by historical grievances and established inter-ethnic antipathy *per se*.⁸ To some extent such hostilities might be expected to broadly pit

⁵ United Nations Office of the High Commissioner for Human Rights (OHCHR), "Report from OHCHR Fact-finding Mission to Kenya 6-28 February 2008", pages 9-10; Commission of Inquiry into the Post Election Violence, Final Report (the "Waki Commission Report"), pages 46, 76-77; Kenya National Commission on Human Rights, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence, Final Report", 15 August 2008, (the "KNCHR Report"), paragraphs 251, 254-255.

⁶ Waki Commission Report, page 68; KNCHR Report, paragraph 246, 256.

⁷ Waki Commission Report, page 41; Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance", March 2008, page 36; International Crisis Group, "Kenya in Crisis", Africa Report No.137, 21 February 2008, pages 12-13.

⁸ International Crisis Group, "Kenya in Crisis", Africa Report No.137, 21 February 2008, pages 12-13; Waki Commission Report, pages 75-76.

“indigenous” tribes (in this region those identified as Kalenjin) against more recent “immigrant” tribes who have tended to be stigmatised as outsiders. However earlier periods of violence have also demonstrated slightly different lines of division and allegiance⁹ and past enmities between the “immigrant” groups (as well as their alliances at times with the Kalenjin) are also documented, although these appear to have been marked by fluidity and fluctuation over time, most notably in connection with the changing political allegiances of the communities in question and their leaders.¹⁰

9. Regarding the current political context in Kenya and its impact on possible conflicting or distinct interests among victims, the Registry notes the observations included in the report commissioned by it in June 2011. It drew attention to changing political allegiances in the Rift Valley since, and indeed because of, the intervention of the ICC. In particular, it is noted that new alliances have been formed between Kikuyu and Kalenjin leaderships. This has had the result of somewhat improving relations between Kikuyu and Kalenjin communities, although established enmities within communities have merely been eased, not eliminated. This new alliance, combined with the absence of any Luo suspect in the Court’s summonses has contributed to an isolation of the Luo community. Among ODM supporters there is a perception that the Kalenjin community is being made the scapegoat for the violence. On this point the report commissioned by the Registry explained:

⁹ Africa Watch, “Divide and Rule: State-Sponsored Ethnic Violence in Kenya”, November 2003, pages 25-36.

¹⁰ KNCHR Report, paragraphs 234, 236; Peter Kagwanja and Rother Southall, “Introduction: Kenya – A democracy in retreat?”, *Journal of Contemporary African Studies*, vol.27, no.3, July 2009, at pages 266-267; Sebastian Elischer, “Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya”, GIGA Working Papers, February 2008.

Consequently, the Luo community in the Rift Valley now faces hostility from both the Kalenjin and the Kikuyu. Although there have been no instances of violence or overt threats against the Luo, the silent hostility is widespread and is likely to result in some members of the Luo community leaving the Rift Valley Province, particularly as the 2012 general elections advance.

4 Conclusions

10. The Registry takes note of these complexities. Some of them might suggest that distinct interests or may arise among victims in the present case. However the Registry has not been convinced that clear and significant distinct interests can be identified at the present time.
11. The Registry also notes that it has not been in a position to discuss this issue with the applicants themselves. It has, however, sought the views of intermediaries, the applicants' legal representatives, and others working with victim populations in Kenya. None of those whose input was sought considered that a conflict of interest or material divergence of interests existed among the population of potential victim participants in the present case. Indeed, they tended to emphasize the dangers in re-asserting or over-emphasizing tribal divisions by proposing separate legal representation unless a need for such separate representation could be clearly justified.
12. For these reasons the Registry recommends that at the current time rule 90(4) not be invoked as a justification for creating separately represented victim groups in the present case. However it will be important for this question to remain under review, in particular by the common legal representative and the Registry.