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No.: **ICC-01/04-01/07**

Date: **27 June 2017**

**THE APPEALS CHAMBER**

**Before:** Judge Howard Morrison, Presiding Judge  
Judge Silvia Fernández de Gurmendi  
Judge Sanji Mmasenono Monageng  
Judge Christine Van den Wyngaert  
Judge Piotr Hofmański

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR v. GERMAIN KATANGA***

**Public Document**

**Document in Support of the Appeal against the Order for Reparations under  
Article 75 of the Statute with its Annex II**

**Source:** The Legal Representative of Victims

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

**Office of the Prosecutor**

**Counsel for the Defence of Germain  
Katanga**  
Mr David Hooper

**Legal Representatives of Victims**  
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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
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**Office of Public Counsel for Victims**  
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**Office of Public Counsel for the  
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**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Mr Pieter de Baan

## I. PURPOSE OF THE APPEAL

1. The Legal Representative sets out below his submissions in support of the appeal against the Order for Reparations pursuant to article 75 of the Statute (“Order for Reparations”)<sup>1</sup> only with regard to the part concerning the failure to make a finding of transgenerational harm in relation to five applicants for reparations (in paragraphs 132 to 134 of the Order for Reparations).
2. The Legal Representative takes issue with Trial Chamber II (“Chamber”) for determining that, owing to a lack of evidence, there is no causal link between transgenerational harm and the attack on Bogoro.
3. The Legal Representative submits that (1) the Chamber committed an error of law in its application of the relevant standard of proof to the applications claiming transgenerational harm and (2) failed to take into account all of the evidence pertaining to those applications and to sufficiently reason its decision.
4. In view of the errors committed in the Order for Reparations entailing a failure to make a finding of the above-mentioned harm, the Legal Representative hereby also appeals against those parts of Annex II relating to the five applicants concerned.<sup>2</sup>
5. The Legal Representative requests the Appeals Chamber to amend the Order for Reparations and its Annex II with regard only to the points raised in this document and to uphold the Order for Reparations and its Annex II with regard to all other points.

## II. PROCEDURAL HISTORY

6. On 7 March 2014, Mr Katanga was found guilty of crimes against humanity and war crimes committed during the attack on Bogoro on 24 February 2003.<sup>3</sup>

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<sup>1</sup> “Ordonnance de réparation en vertu de l'article 75 du Statut”, 24 March 2017, ICC-01/04-01/07-3728, with one public annex (Annex I) and one confidential annex *ex parte* the Common Legal Representative of the Victims, the Office of Public Counsel for Victims and the Defence team for Germain Katanga (Annex II).

<sup>2</sup> Applicants a/25094/16, a/25096/16, a/25097/16, a/25098 and a/25099/16.

<sup>3</sup> “Judgment pursuant to article 74 of the Statute”, ICC-01/04-01/07-3436-tENG.

7. On 23 May 2014, Trial Chamber II, ruling in the majority, sentenced G. Katanga to 12 years in prison.<sup>4</sup>
8. On 24 March 2017, the Chamber issued its Order for Reparations pursuant to article 75 of the Rome Statute. In the Order, for the purpose of reparations it accorded two hundred and ninety-seven (297) applicants for reparations the locus standi of victim – of whom two hundred and eighty-three (283) are represented by the Legal Representative<sup>5</sup> – and awarded them both individual and dedicated collective reparations<sup>6</sup> for the total harm suffered, which it reckoned at USD 3 752 620. The Chamber set Mr Katanga’s liability for reparations at USD 1 000 000.
9. The Order for Reparations includes one public Annex I<sup>7</sup> containing the procedural history and one *ex parte* confidential annex containing an individual analysis of applications for reparations (Annex II).<sup>8</sup>
10. Among other things, the Order for Reparations directs the Trust Fund for Victims (“TFV”) to prepare a draft implementation plan (“Draft Plan”) and to submit it by 27 June 2017.<sup>9</sup> The Chamber directs the parties to respond to the Draft Plan by 28 July 2017.<sup>10</sup>
11. The Order also directs the TFV to advise the Bench whether it is minded to use its “other resources” for the funding and implementation of individual and collective reparations, and to apprise it of the monetary amount in the Draft Plan.<sup>11</sup>
12. On 17 May 2017, the TFV Board of Directors notified the Chamber of its decision to fund the individual and collective awards for reparations in full, in the amount of USD 1 000 000. Having taken into account the views of the victims and

<sup>4</sup> “Decision on Sentence pursuant to article 76 of the Statute”, ICC-01/04-01/07-3484-tENG-Corr.

<sup>5</sup> In its decision of 15 March 2017, having stated that it had agreed to terminate the representation agreement of the Legal Representative with regard to some of the Applicants, the Chamber decided to appoint the Office of Public Counsel for Victims (“OPCV”) to represent them should they wish to appeal (*“Décision relative à la requête du Représentant légal commun des victimes du 2 mars 2017”*, ICC-01/04-01/07-3727, paras. 12 *et seq.*).

<sup>6</sup> Order for Reparations, disposition, pp. 119-121.

<sup>7</sup> ICC-01/04-01/07-3728-AnxI.

<sup>8</sup> ICC-01/04-01/07-3728-Conf-Exp-AnxII.

<sup>9</sup> The time limit was extended to 11 July 2017, in accordance with the *“Décision accordant une prorogation de délai au Fonds au profit des victimes afin de déposer le projet de plan de mise en œuvre des réparations”*, 22 June 2017, ICC-01/04-01/07-3744.

<sup>10</sup> The time limit was extended to 18 August 2017, ICC-01/04-01/07-3744.

<sup>11</sup> Order for Reparations, disposition, p. 120.

the financial contribution of the Netherlands to individual reparations, it decided to pay in full the reparations ordered by the Chamber against Mr Katanga.<sup>12</sup>

13. On 25 April 2017, the Legal Representative filed a notice of appeal directed against part of the Order for Reparations and its Annex II.<sup>13</sup>

14. On 26 April 2017, the Defence filed a notice of appeal directed against part of the same Order.<sup>14</sup> According to the Defence:

- the Trial Chamber had applied a wrong standard of proof when assessing the harm suffered;
- the Trial Chamber had given too broad an interpretation of a parent whose death warrants reparations to the remaining children;
- the Trial Chamber had ruled *ultra petita* by allocating compensation exceeding several applicants' claims; and
- the Trial Chamber had erred in issuing an order for reparations of 1 000 000 USD against Mr Katanga because the award is not proportionate to and does not fairly reflect the part played by the convicted person in the commission of the crimes.

15. On the same day, the Office of Public Counsel for Victims also filed a notice of appeal against the entirety of the Order and its Annex II regarding the 37 applicants whom the OPCV represents.<sup>15</sup>

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<sup>12</sup> "Notification pursuant to regulation 56 of the TFV Regulations regarding the Trust Fund Board of Director's decision relevant to complementing the payment of the individual and collective reparations awards as requested by Trial Chamber II in its 24 March 2017 order for reparations", ICC-01/04-01/07-3740.

<sup>13</sup> "Notice of Appeal against the '*Ordonnance de réparation en vertu de l'article 75 du Statut*' and its Annex II", ICC-01/04-01/07-3737-tENG.

<sup>14</sup> "Defence Notice of Appeal against the *Ordonnance de réparation en vertu de l'article 75 du Statut*", ICC-01/04-01/07-3738.

<sup>15</sup> "Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute" on 24 March 2017, ICC-01/04-01/07-3739.

### III. STANDARD OF REVIEW

16. Pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence, a legal representative may appeal against an order issued under article 75 of the Statute not later than 30 days from the date on which he or she is notified of the order.

17. In the instant case, the Legal Representative submits that the Chamber misapplied the standard of proof which it had adopted and, moreover, failed to take all of the evidence into account in its reasoning concerning the demonstration of a certain type of harm, namely transgenerational harm. In addition, its decision was not sufficiently reasoned.

18. The standard of review in this case is the same as that which applies to any other appeal.

19. It will rest therefore with the Appeals Chamber will therefore have to arrive at its own conclusion as to the applicable law and to determine whether the Trial Chamber misinterpreted it. Should the Chamber be found to have erred, the Appeals Chamber will have to remedy the error insofar as it would materially affect the decision in question.

### IV. THE PRINCIPLES ADOPTED BY THE CHAMBER AS TO PROOF

20. The Chamber noted that the standard of proof for reparations cannot be the “beyond reasonable doubt” standard applicable in the trial phase, to accommodate more flexible criteria.

21. Citing the case-law of regional and special courts, and grounding itself on the Appeals Chamber’s decision in *Lubanga*, the Chamber adopted the “balance of probabilities” standard:

[TRANSLATION] Thus the Chamber must be satisfied that the facts alleged by an applicant in claiming reparations are established on a balance of probabilities. That standard means that the applicant must show that it is more probable than not that he or she suffered harm as a consequence of one of the crimes of which Mr Katanga was convicted.<sup>16</sup>

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<sup>16</sup> Order for Reparations, para. 50.

22. The Chamber also made clear that it would rely on presumptions and circumstantial evidence.

23. The Chamber cited in particular the case-law of the Inter-American Court of Human Rights and of the United Nations Claims Commission, which have relied on presumptions in cases where the applicants were hard put to establish the causal nexus between their loss and the crime, or the situation leading to the commission of crimes.<sup>17</sup>

24. With respect to circumstantial evidence, the Chamber noted that reliance on circumstantial evidence had not been barred by other Chambers of the Court, which considered that to do so did not contravene the “beyond reasonable doubt” standard of proof.<sup>18</sup> The Chamber considered that it was all the more justified therefore to rely on circumstantial evidence in this phase of the proceedings, during which a more flexible standard of proof is applicable.

25. Lastly, the Chamber emphasized that it would examine the applications and the evidence produced to support them on an individual basis and as a whole:

[TRANSLATION] The applicants’ statements and the evidence provided in support of the applications for reparations will be analysed by the Chamber on an individual basis, as a whole and in the light of the Defence’s observations. In its assessment the Chamber will also refer to the findings which Trial Chamber II, sitting in its previous composition, entered in the Judgment Handing Down Conviction and the Decision on Sentence. In addition, as mentioned above, where it sees fit, the Chamber will rely on presumptions and circumstantial evidence in making certain findings of facts in the case. In view of this analysis, the Chamber will determine whether, on a balance of probabilities, the applicants have established the existence of the harm alleged and the causal nexus between that harm and the crimes of which Mr Katanga was convicted. [Emphasis added].<sup>19</sup>

26. With respect to the standard applicable to a causal nexus (or standard of causation), the Chamber considered that the test adopted by the Appeals Chamber in the *The Prosecutor v. Thomas Lubanga Dyilo* should be applied, namely the “but-for” test.<sup>20</sup> This criterion was combined with the requirement to establish that

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<sup>17</sup> *Ibid.*, para. 57.

<sup>18</sup> *Ibid.*, para. 58.

<sup>19</sup> *Ibid.*, paras. 62 and 63.

<sup>20</sup> *Ibid.*, para. 162.

the crimes committed by Mr Katanga were the “proximate cause” of the harm for which reparation was requested.

27. The Chamber also relied on the principle according to which the causal nexus between a crime and the harm must be determined on in view of the characteristics of the case.<sup>21</sup>

## V. FIRST GROUND OF APPEAL: MISAPPLICATION OF THE STANDARD OF PROOF

### A. The Chamber’s reasons for its determination of an absence of transgenerational harm with respect to the applicants who claimed such harm

28. In paragraphs 132-134 of the Order for Reparations, the Chamber examines transgenerational harm as part of its individual analysis of applications for reparations:

[TRANSLATION] 132. The Chamber notes that in their applications for reparations five Applicants born after the attack on Bogoro allege transgenerational psychological harm, which the “*Rapport d’expertise sur l’évaluation de l’état psychique des enfants victimes de l’attaque de Bogoro du 24 février 2003*” (“Report”) describes as a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter.

133. The Chamber notes the findings of the Report, which speaks of the psychological transgenerational trauma that presents in many children whose parents experienced the attack on Bogoro at first hand. The Chamber also has regard to the Defence Observations which argue that: “[the] children born after the 24 February 2003 should be authorised to claim compensation only because of the death of one parent during the Bogoro attack. [...] [T]he report remains extremely vague and hypothetical. It therefore insufficient to establish a sufficiently close link between the crimes for which Mr Katanga was convicted and any eventual harm which would be endured by the children born after the Bogoro attack.”

134. Even where those Applicants are, in all likelihood, suffering from transgenerational psychological harm, the point must be made, as the Defence has, that no evidence is laid before the Chamber to establish on a balance of probabilities the causal nexus between the trauma suffered and the attack on Bogoro.

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<sup>21</sup> *Ibid.*



29. This shows therefore that the Chamber has relied only on the expert report on the assessment of the psychological state of the child victims of the Bogoro attack of 24 February 2003 (“Expert Report”), submitted by the Legal Representative,<sup>22</sup> adding that although the Defence had contended that the report should not be admitted into evidence as, in its view, its source and content could not be authenticated, the Chamber did not need to entertain the Defence submission as it had ruled that the Expert Report did not contain any information allowing it to determine a causal nexus between the attack on Bogoro and the trauma suffered.<sup>23</sup>

30. Annex II, which contains the analysis of individual applications, sets out a similar argument with respect to the five applicants concerned, namely: whereas the personal psychological harm to the applicant has been established, the Chamber is not in a position to link it, in that specific case, to the attack.<sup>24</sup>

31. The Chamber noted that with respect to all five applicants it had relied on the medical certificates attached to the applications for reparations and on the Expert Report. It stated that, in the case of two of the applicants, it had taken into account the applications for reparations made by one or both parents.<sup>25</sup>

## **B. Misapplication of the standard of proof regarding the existence of transgenerational harm**

32. The Legal Representative intends to demonstrate that the Chamber misapplied the standard of proof; it did not apply it correctly to the constituent elements of the transgenerational harm argued by the Legal Representative.

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<sup>22</sup> “Transmission du ‘Rapport d’expertise sur l’évaluation de l’état psychique des enfants victimes de l’attaque de Bogoro du 24 février 2003’”, 26 May 2016, ICC-01/04-01/07-3692-Conf-Exp, with confidential annex *ex parte* the Legal Representative, ICC-01/04-01/07-3692-Conf-Exp-Anx1 (“Expert Report”), and one public annex, ICC-01/04-01/07-3692-Anx2. A redacted confidential version, ICC-01/04-01/07-3692-Conf-Red, was filed on 31 May 2016 with a redacted confidential annex (ICC-01/04-01/07-3692-Conf-Anx1-Red) and one public annex. A public redacted version was also filed on 31 May 2016 (ICC-01/04-01/07-3692-Red2) with one confidential redacted annex and one public annex.

<sup>23</sup> Order for Reparations, footnote 216.

<sup>24</sup> Annex II, paras. 2643, 2655, 2663, 2672, and 2677.

<sup>25</sup> These are a/25094/16 and a/25096/16.

33. To begin with, the Legal Representative will (1) recall the nature and source of the transgenerational trauma. Examining the trauma which accounts for the transgenerational harm and its link to the crime cannot be dissociated from examination of the harm which the parents suffered – for which the nexus with the crime is not in doubt – and which triggered the transgenerational trauma. (2) The Legal Representative will then consider the Chamber’s reasoning with regard to transgenerational harm in general and every piece of evidence presented in support of the applications which claim that form of harm and, lastly, (3) he will demonstrate the Chamber’s errors in reasoning.

1. Traumatization of parents as the trigger of transgenerational harm

34. As stated in the Expert Report, there is a transgenerational handing down of trauma owing to the fact that parents who are traumatized – and hence living in constant and unresolved fear – unconsciously adopt frightening behaviour that affects the child’s emotional behaviour, attachment and well-being.

35. The fact that the exposure of parents to traumatization heightens the risk of post-traumatic stress disorder, mood disorders and anxiety problems in their children, even where the children were themselves not exposed to the initial traumatic stress, is a well-established fact and the subject of extensive research.<sup>26</sup>

36. Research has also revealed that the exposure of parents to trauma affects the expression of children’s genetic code. In other words, the exposure of parents to trauma can reprogramme the genetic profile of an individual’s neurological and biological systems. It is therefore scientifically proven that, in addition to the psychological factor, stress-induced hormonal disorders present in children and are

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<sup>26</sup> See the documents cited in the report of the expert appointed by the Legal Representative as well as, in particular: Yehuda R, Bierer L. M., *Transgenerational Transmission of Cortisol and PTSD Risk*, *Prog Brain Res.* 2008;167:121-35. Review, Michelle Bosquet Enlow, Ph.D., Byron Egeland, Ph.D., Elizabeth Carlson, Ph.D.; Emily Blood, *Mother-Infant Attachment and the Intergenerational Transmission of Posttraumatic Stress Disorder*, *Dev Psychopathol*, February 2014; Rachel Yehuda, Stephanie Mulherin Engel, Sarah R. Brand, Jonathan Seckl, Sue M. Marcus, and Gertrud S. Berkowitz, “*Transgenerational Effects of Posttraumatic Stress Disorder in Babies of Mothers Exposed to the World Trade Center Attacks during Pregnancy*”, *Journal of Clinical Endocrinology and Metabolism*, 2005.

triggered by trauma in parents which affects the foetus and impairs its brain development, “[TRANSLATION] hence highlighting the contribution of *in utero* factors to presumed biological risks of post-traumatic stress disorder.”<sup>27</sup>

37. This issue had already been addressed before the Court in *The Prosecutor v. Thomas Lubanga Dyilo*, namely by Ms Elisabeth Schauer in her expert report of 25 February 2009.<sup>28</sup> In her report, she describes the intergenerational cycle of dysfunction that traumatized parents set in motion.<sup>29</sup>

38. In conclusion, where the transgenerational nature of harm observed in children is raised, as did the five applicants mentioned above, the harm suffered by the parents must first be assessed. As the Legal Representative stated before the Chamber,<sup>30</sup> such an assessment is indispensable to evaluate the link argued the applicants, between the harm observed in the children and the crime that allegedly traumatized the parents.

## 2. Evidence of the traumatization of parents among the applicants concerned and its consideration by the Chamber

39. In the instant case, all the applicants concerned have parents who were victims of the attack. With respect to three of them, a finding of emotional harm caused by the attack was made by the Chamber in the case of at least one parent:

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<sup>27</sup> Expert Report, p. 21.

<sup>28</sup> Annex 1 to: “Report of Ms. Elisabeth Schauer following the 6 February 2009 ‘Instructions to the Court’s expert on child soldiers and trauma’”, ICC-01/04-01/06-1729-Anx1.

<sup>29</sup> *Ibid.*, p. 26.

<sup>30</sup> In the cover document for the transmission of the Expert Report, the Legal Representative stated that: “[TRANSLATION] Two factors should hence be taken into account when determining the likelihood of a link between these disorders and those the parents have experienced ever since:

- All affected children have parents or guardians who experienced the attack.
- With the exception of the parents of a/25099/16 and a/25097/16, who are not applicants for reparations, they all claim emotional harm in the instant proceedings in relation to the crimes of which Mr Katanga has been convicted. The harm results from the suffering endured during the attack, the loss of loved ones, the disappearance of dwelling place and everything that ensured the victims’ livelihood;

The parents report suffering which they have endured ever since, and the interviews with both the children and the parents clearly reveal that this has become routine. (...) In the light of these findings, the Legal Representative considers that, once the parent’s trauma and the conditions necessary for it to be handed down have been established, the nexus with the crimes has to be established in like manner for both the people who were handed down the trauma and those who initially suffered from it before handing it down,” ICC-01/04-01/07-3692-Red2, paras. 35 and 36.

- 1) a/205094/16: the Chamber made a finding of general psychological harm linked in particular with the experience of attack,<sup>31</sup> in the case of the applicant's mother, a/30478/15. It should be noted that the Chamber made a finding of the same harm in the case of a/25094/16's sister (a/25082/16).<sup>32</sup>
- 2) a/25096/16: in the Order for Reparations both of the applicant's parents (a/0187/08 and a/0198/08) were awarded reparations. The Chamber made a finding of general psychological harm linked to witnessing the attack. It should be added that for each of them a finding of psychological harm was made in connection with the loss of near relatives.<sup>33</sup>
- 3) a/25098/16: for both of the applicant's parents, a/0464/09 and a/0266/09, a finding was made of general psychological harm linked to the experience of the attack.<sup>34</sup> The applicant's mother was also found to have suffered psychological harm because of the death of her close relatives.

40. In the case of three of the applicants, therefore, psychological harm linked to the fact that at least one of the parents experienced the attack is demonstrated and determined in Annex II to the Order for Reparations itself. The Chamber's finding of such harm is a result of its determining the fact alone of having been in Bogoro on 24 February 2003 and having seen or fled from the massacres and atrocities perpetrated had major ramifications on the health of the victims who were present in Bogoro on that day. The Chamber presumes repercussions of the attack on the mental health of any applicant who has demonstrated psychological, physical or material harm in connection with the attack.

41. With regard to the fourth applicant, a/25099/16, the Chamber ought to have taken into account the mother's trauma and the link between it and the child's

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<sup>31</sup> Annex II, para. 138.

<sup>32</sup> Annex II, para. 2521.

<sup>33</sup> Annex II, paras. 1515 and 1524.

<sup>34</sup> Annex II, paras. 2162 and 785. It should be noted that with respect to this applicant, unlike a/25094/16 and a/25096/16, whereas the Chamber was aware of the family relationship, it did not state that it had taken into account the applications for reparations made by the parents.

trauma. These factors are apparent from the medical certificate attached to a/25099/16's application for reparations.<sup>35</sup>

42. Although this applicant's mother is not an applicant herself – and hence the Chamber did not need to rule on the harm for the purposes of awarding reparations – nevertheless, on the basis of the aforementioned medical certificate, it could have acknowledged that there was evidence of harm suffered by the mother because of the attack and its link to the suffering claimed by the applicant. On the basis of that evidence the Chamber would have been able to apply the balance of probabilities standard of proof to make a determination the existence of a link between the harm claimed by the young applicant and the attack.

43. Lastly, with respect to the fifth applicant, a/25097/16, the medical certificate establishes that the applicant's mother was a victim of the attack and mentions her psychological state.<sup>36</sup> This piece of evidence should have been taken into account in the manner set out below in paragraph 46 *et seq.* The Legal Representative wishes to point out that the young applicant's adoptive father is a victim beneficiary for whom a finding of general psychological harm has been made.<sup>37</sup> However, the link between him and the young applicant does not appear in the latter's application for reparations and accordingly the Chamber could not have taken this evidence into account, save by comparing the names under the heading "parents" on the application forms, with the names of the applicants themselves.

44. Once the harm to the parents has been determined, the factors noticed in the child should be taken into consideration to determine harm proper to the child and the link between such harm and that of the parents.

45. It should be recalled that the Chamber has made a finding of personal psychological harm suffered by each of the five applicants.<sup>38</sup>

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<sup>35</sup> ICC-01/04-01/07-3661-Conf-Exp-Anx78, pp. 9-10.

<sup>36</sup> ICC-01/04-01/07-3661-Conf-Exp-Anx76, pp. 9-10.

<sup>37</sup> This is Applicant a/0060/08, ICC-01/04-01/07-3661-Conf-Exp-Anx76, p. 1.

<sup>38</sup> Annex II, paras. 2643, 2655, 2663, 2672 and 2677.

### 3. The error committed by the Chamber

46. Just as it presumed that livestock had been rustled once the destruction of a dwelling and the fact that most inhabitants of Bogoro owned livestock had been established, in the part of the Order for Reparations concerning individual analysis of the applications for reparations the Chamber should, on a balance of probabilities, have ascertained whether transgenerational harm linked to the attack could be established in the event that harm to one or more parents was itself established and found to be linked to the attack. Yet, when the Chamber states that: “[TRANSLATION] no evidence is laid before the Chamber to establish on a balance of probabilities the causal nexus between the trauma suffered and the attack on Bogoro”,<sup>39</sup> in its reasoning it does not take into account the key element of harm to one or more parents.

47. A parallel could be drawn with the reasoning, predominantly accepted at the Court, that the death of a close person to the indirect victim causes the victim harm provided a close relationship is established with the direct victim – whose death has to be proven. Suffering is presumed to be established by virtue of such a relationship. In the instant case, the same reasoning should enable a finding of harm to the child to be made on the basis of the establishment of family relationship and the harm suffered by the direct victim – who is the child’s parent – whose psychological harm, and not death, has been established. Indeed, the close relationship between the two victims leads to the presumption in this case not that the child’s suffering is linked to the death of the parent but that there is a link between the child’s trauma and that of the parent (both of them having been previously established).

48. In accordance with the requirements of the standard of proof it laid down in the Order for Reparations, the Chamber should have ascertained whether, on a balance of probabilities, it could be established that the harm suffered by the children could have been caused by the harm suffered by the parents and in respect

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<sup>39</sup> Order for Reparations, para. 134.

of which a link had been established with the attack, hence qualifying the children as indirect victims of the attack.

49. In Annex II, in its analysis of each of the five cases, the Chamber should have proceeded on the basis of a balance of probabilities (relying on circumstantial evidence and presumptions if necessary) to assess whether the transgenerational nature of the harm and its link to the attack have been established, taking into consideration the prior finding of harm linked to the attack suffered by the parents and personal harm suffered by the children. In other words, it should have considered whether, on a balance of probabilities, the harm suffered by the children was connected to that of the parents and hence linked to the crimes.

50. In the instant case, the Legal Representative contends that, on the strength of the reasoning above, with respect to all the applicants concerned the Chamber should have found as follows: in the light of all the evidence in the application (see below for the error consisting of not taking into account all of the evidence), it has been established that it was more probable than not that the harm suffered by the children is rooted in the harm suffered by the parents, which is indisputably linked to the attack.

51. With respect to three of these applications,<sup>40</sup> the conclusion is quite obvious, considering the finding made in Annex II itself of harm suffered by the parents in connection with the attack. With respect to the other two applications,<sup>41</sup> the conclusions drawn from the medical certificates attached to the applications for reparations forms should, even in the absence of applications for reparations by the parents themselves, have led to the conclusion that the child suffered trauma that was probably linked to the attack since that trauma had been presented in at least one parent.

52. With respect to the medical certificates specifically, the Legal Representative contends that the absence of any indication or confirmation of the causal nexus between the children's suffering and the experience of living with parents suffering

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<sup>40</sup> These are Applicants a/25094/16, a/25096/16, and a/25098/16.

<sup>41</sup> These are Applicants a/25097/16 and a/25099/16.

from trauma linked to the attack is no justification for the Chamber to rule out the likelihood of such a link. In fact, a complete scientific diagnosis would have required testing the blood of the victims' children for cortisol levels in comparison with those in control children (from a region which was not attacked), or a clinical examination of the children in comparison with those in unaffected areas.

53. The reasoning the Chamber must give is not subjected to the same requirements. It is accepted that scientific certainty is not a requirement for proving the origin of an illness and that a high degree of probability should suffice as long as other causes of the harm can reasonably be excluded.<sup>42</sup> The evidence provided by the Legal Representative establishes, with sufficient probability, the cause of the harm and allows other causes to be reasonably excluded.

54. Similarly, with respect to two of the five applications mentioned above, the Chamber's statement that it relied on the application for reparations ("AR") by one or both parents of the applicants who claimed transgenerational harm in no way invalidates the reasoning above. Indeed, the fact that this consideration formed part of its assessment is a further reason why the Chamber should have assessed the close relationship between and the impact of the harm stated in the parent's AR and that stated in the child's. It did not even seek to assess whether there was evidence in support of the relationship's existence as confirmed by the reasoning set out in the Order for Reparations itself, which cites only the Expert Report.

55. Lastly, the Legal Representative wishes to point out the contradiction in the Chamber's finding cited above, namely that even if the applicants "[TRANSLATION] in all likelihood are suffering from transgenerational psychological harm [Emphasis added] ,[...] as the Defence has [pointed out]"<sup>43</sup>, the Chamber does not have enough evidence to establish the causal nexus between the trauma and the attack.

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<sup>42</sup> See, for example, *Cour d'appel de Liège* [Court of Appeal hearing appeals from civil and criminal courts of first instance], Decision on appeal of 18 September 2014, 2013/RG/57 - 2013/RG/1379, [https://lex.be/fr/doc/be/jurisprudence-liege/cour-d-appel-arret-18-septembre-2014-bejc\\_201409181\\_fr](https://lex.be/fr/doc/be/jurisprudence-liege/cour-d-appel-arret-18-septembre-2014-bejc_201409181_fr)

<sup>43</sup> Order for Reparations, para. 134.



56. The Legal Representative notes, therefore, that the Chamber does not dismiss the transgenerational nature of the personal harm which it considers to be established in the case of each of the five young applicants, although it considers that there is no evidence of a nexus between it and the attack.

57. Nevertheless, the admission of the transgenerational nature of the trauma itself is sufficient to establish such a nexus where the harm to the parent is considered to be linked to the attack.

58. To conclude, having thrice made a finding of personal psychological harm to the children, the same harm to the parents and the causal nexus between it and the attack, the Trial Chamber nonetheless refrains from applying its own standard of proof to its findings.

59. The causal nexus established for the harm to the parents should have affected the harm suffered by the children. This harm – which is specific to the children – should therefore be considered to be linked to the attack. The indirect nature of this link is in no way an obstacle to such a determination since indirect harm is admissible so long as it satisfies the other conditions laid down in the Court’s case-law and, in particular, that the harm be personal– which is the case here.

60. The Chamber’s misapplication of the balance of probabilities “standard of proof” led it, for absence of evidence of such a nexus, to a blanket rejection of any causal nexus between the transgenerational harm and the attack. It hence committed errors of both law and fact which led it from the outset to rule out a finding of any transgenerational harm linked to the attack, whereas proper application of the same standard of proof to each of the applicants concerned would have led to other conclusions.

## VI. SECOND GROUND OF APPEAL: FAILURE TO TAKE INTO ACCOUNT ALL OF THE EVIDENCE AND FAILURE TO PROVIDE REASONING

### A. Background: the principle of assessing evidence in relation to the whole record

61. As stated above, in accordance with the principles set out by the Appeals Chamber, the Chamber considered that it was incumbent upon it to assess all the evidence available in the light of the application for reparations as a whole. It stated that it must take into account not only victims' applications for reparations and the supporting documents but also specific pieces of evidence or specific facts, bearing in mind the application as a whole and the existence of other corroborative evidence.<sup>44</sup>

62. With respect to presumptions, the Chamber cited a decision which had admitted evidence to prove departure on the mere production of a document bearing a date corresponding to the period of occupation which allegedly justified the departure.<sup>45</sup>

63. The Chamber also stated that it could rely on circumstantial evidence.<sup>46</sup>

### B. The error committed by the Chamber

64. The Chamber failed, however, to consider all of the evidence in its reasoning on the assessment of transgenerational harm. Moreover, its findings were insufficiently reasoned in its decision.

65. In particular, the Chamber failed to take into account the corroborative evidence accompanying the applications for reparations and the Expert Report.<sup>47</sup> Likewise, its decision to do so was not reasoned.

66. The Legal Representative notes that on 10 June 2016 he submitted an addendum to the document entitled: *"Transmission du 'Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février*

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<sup>44</sup> *Ibid.*, para. 62.

<sup>45</sup> *Ibid.*, para. 57.

<sup>46</sup> *Ibid.*, para. 58.

<sup>47</sup> ICC-01/04-01/07-3692-Red2 and its annex, ICC-01/04-01/07-3692-Conf-Anx1-Red.

2003", ICC-01/04-01/07-3692-Conf-Red ("Addendum to the Expert Report").<sup>48</sup> When he became aware of the testimony of an expert before the Court, in *The Prosecutor v. Jean-Pierre Bemba Gombo*, about the intergenerational impact of mass crimes, he requested the witness's testimony to be entered into the record, and for leave to have access to the expert's report. The expert made his contribution in the above-cited proceedings during the sentencing hearing, having been called by the Prosecution. The expert was asked to testify on:

the longitudinal and intergenerational impact of crimes such as (mass) rape and sexual violence, on the mental health of individual victims, their families, and the affected population. For instance, the lasting effects on the brain structure and functioning which results in cognitive, emotional, and behavioral difficulties results in various mental health disorders, as well as how the lasting changes in the nervous system affect human psychology and result in the long-term broader sociological consequences such as intergenerational trauma.<sup>49</sup>

The Prosecution's aim was to submit to the Chamber evidence to enable it to assess the future impact of crimes committed rather than restrict itself to the immediate impact of crimes on which witnesses had testified thus far.

67. On 16 April 2016, the Expert Report was submitted with its annexes.<sup>50</sup> The Expert Report addresses the issue of harm caused to direct and indirect victims of traumatizing experiences, such as rape, from an interdisciplinary scientific perspective that highlights the scope of mental disorders caused and their intergenerational impact. The Legal Representative requested access to the document.<sup>51</sup>

68. The expert's testimony confirmed that there is an intergenerational handing down of harm suffered and a community impact of the trauma investigated.<sup>52</sup> This finding is backed up by studies and observations similar to those made by the expert in the instant case. Like the expert appointed by the Legal Representative,<sup>53</sup>

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<sup>48</sup> "Addendum to the document entitled '*Transmission du "Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003"*', ICC-01/04-01/07-3692-Conf-Red.

<sup>49</sup> "Prosecution's Application to Submit Additional Evidence and Present Final Oral Submissions on Sentencing", 11 April 2016, ICC-01/05-01/08-3362, para. 4.

<sup>50</sup> "Prosecution's Submission of Additional Information regarding its Proposed Expert Witness", ICC-01/05-01/08-3368, and confidential annexes 1 to 8, including CAR-OTP-0094-0493.

<sup>51</sup> ICC-01/04-01/07-3698-Conf, para. 4.

<sup>52</sup> ICC-01/04-01/07-3698-Conf, para. 4, p. 85, lines 4-6.

<sup>53</sup> ICC-01/04-01/07-3692-Conf-Anx1-Red, p. 21.

the expert witness linked the phenomenon to biological factors among others.<sup>54</sup> The expert confirmed that victims react to stress by producing hormones which have a negative impact on the development of the foetus. Possible genetic modification was also discussed. The expert witness therefore confirmed the existence of an intergenerational transmission of trauma, on the premise that: “[W]hen you look at a sample of people with post-traumatic stress disorder, their children do much worse and have a much higher rate of mental health disorders than people who do not have post-traumatic stress. [Emphasis added].”<sup>55</sup> The expert witness further noted that reliance on the usual tools to make a finding of absence of post-traumatic stress disorder (PTSD) does not exclude all situations of intense mental distress and that, in situations of trauma such as those under discussion here, “practically in all cases, the psychological sequelae are truly serious.”<sup>56</sup> In his Addendum to the Expert Report, the Legal Representative outlined all of the evidence as presented in the witness’s testimony.

69. To conclude, it has emerged from the evidence available to the Legal Representative that the testimony and the confidential report of that expert are of direct interest to the instant case as the expert witness’s analysis and conclusions are rooted in exactly the same methodology as that outlined by the expert appointed by the Legal Representative (i.e. his observation methods, his views transmission and his approach to treatment are the same as those of the expert appointed by the Legal Representative).<sup>57</sup>

70. The Legal Representative notes that, in granting the Prosecution leave to call the expert to testify, Trial Chamber III considered, in *The Prosecutor v. Jean-Pierre Bemba Gombo*, that in the light of the expert’s experience and qualifications

<sup>54</sup> ICC-01/05-01/08-T-368-ENG, p. 100, line 16, to p. 101, line 19.

<sup>55</sup> *Ibid.*, p. 100, lines 7-10. See also p. 98, lines 13-16.

<sup>56</sup> ICC-01/05-01/08-T-368-FRA, p. 91, lines 21-22.

<sup>57</sup> Both the expert witness and the expert appointed by the Legal Representative use the same tools: they applied the DSM and ICD criteria for diagnosing PTSD. The criteria’s internationally acknowledged character was set out by the expert witness, whose description of the task of identifying mental disorders is concordant with the existence of a key criterion that cuts across all types of PTSD, namely: exposure to a particularly severe traumatic event which creates a sense of horror, of terror. The findings are therefore similar, irrespective of whether the causal event is mass rape or a one-off attack of the level of gravity of the Bogoro attack in 2003.

the evidence that he or she would provide could avail it of “a unique perspective in relation to the impact of the crimes on the victims”. The testimony would cover areas “which have not previously featured in the evidentiary record thus far, for example, the effect of trauma on parenting, intergenerational transmission of trauma, and healing prospects”.<sup>58</sup>

71. However, the Chamber did not rule on the Legal Representative’s request concerning this factor, which is central to the assessment of the transgenerational harm which he raised in respect of five applicants.

72. The Order for Reparations does not offset this shortcoming, as neither the arguments drawn from the expert witness’s testimony nor reference to them appear in the Chamber’s reasons.<sup>59</sup> Also not mentioned is the report which is yet to be disclosed to the Legal Representative as he is yet to receive an answer to his request.

73. The Legal Representative notes that, in this respect, the Order for Reparations can be challenged on two grounds: (1) it fails to take all of the evidence into account, hence seriously vitiating the Chamber’s findings as to the existence of transgenerational harm linked to the attack and (2) it amounts to a *de facto* unreasoned refusal to take into account the Legal Representative’s arguments and to grant his request for the expert witness’s report to be disclosed to him.

(1) Failure to take into account all of the evidence

74. The evidence whose relevance to the instant case is highlighted by the Legal Representative in his above-mentioned Addendum is evidence that has been tendered and admitted into the record in another case before the Court. It is therefore extremely reliable and its probative value is very high.

75. The Chamber’s decision not to take reliable and relevant evidence into account was therefore not sufficiently reasoned. The Court’s case-law on the determination of

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<sup>58</sup> “Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing”, 4 May 2016, ICC-01/05-01/08-3384, para. 12.

<sup>59</sup> The Chamber appears to have taken into account only the expert’s report in its reasoning on the determination of transgenerational harm during the individual analysis of applications for reparations.

guilt is worth recalling here because, whereas they concern separate proceedings, the principles governing the requirement for the Chamber's decisions to be reasoned with sufficient clarity remain applicable to the proceedings in question. These reasons should also extend to the Chamber's assessment of evidence. In other words, the Trial Chamber must identify which evidence was admitted to establish which fact and what evidence was rejected for being irrelevant or insufficient.<sup>60</sup>

76. There is little doubt that the Court's consideration of transgenerational (or intergenerational) trauma, especially with respect to reparations, is now the subject of much attention on the part of all parties and participants, as well as for those who play a role in connection with the rights of the victims, that it has been raised in all cases in the reparations phase.

77. Indeed, as stated above, this issue was raised in *The Prosecutor v. Jean-Pierre Bemba Gombo*. With respect to the same case, the following observations by the Office of Public Counsel for Victims ("OPVC") are worth citing:

Moreover, and like the proposition put forward by the Trust Fund in the *Lubanga* proceedings, the Principal Counsel wishes to suggest the adoption of two fundamental presumptions with regards to all the victims of the case: a presumption of psychological harm, on the one hand, and a presumption of trans-generational harm, on the other hand.<sup>61</sup>

78. Lastly, in *The Prosecutor v. Thomas Lubanga Dyilo*, the OPCV also addressed the subject in the same manner, stating in its "Observations on the Draft Implementation Plan for Reparations Filed by the Trust Fund for Victims on 3 November 2015" that: "[n]ot only does personal exposure to violence leave individual psychological scars, it seriously ruptures the social fabric. The intergenerational handing down of trauma,

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<sup>60</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773, para. 20; *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-774, para. 30; *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", 3 May 2011, ICC-01/05-01/08-1386, para. 59; *The Prosecutor v. Laurent Koudou Gbagbo*, "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"'"', 26 October 2012, ICC-02/11-01/11-278-Red, para. 46.

<sup>61</sup> "Submissions relevant to reparations", 31 October 2016, ICC-01/05-01/08-3455.

therefore, must also be addressed by the reparations programmes implemented.”<sup>62</sup>  
 The Queen’s University Belfast Human Rights Centre also raised the point clearly in its observations on reparations in the same case.<sup>63</sup>

79. The failure to take into account documents (transcripts and a confidential report) whose relevance was highlighted and extensively reasoned by the Legal Representative and the failure to take into account the submissions he set out in the above-mentioned Addendum to the Expert Report are at variance with the methodology adopted by the Chamber itself, according to which the Chamber has said that it must not only assess the evidence as a whole, taking into account presumptions and circumstantial evidence, but also assess the evidence both on an individual basis and in its entirety.

80. In conclusion, the Chamber erred, both in law and in fact, by failing to take all of the evidence into account in its analysis.

81. In doing so, the Chamber has made findings of fact which a reasonable trier of fact would not have made.

2) Lack of reasoning for discarding relevant evidence cited by the Legal Representative in his Addendum to the Expert Report

82. The Chamber did not state why, in its view, the evidence cited by the Legal Representative in his Addendum to the Expert Report was irrelevant and by failing to do so it gave insufficient reasons why it did not make a finding of transgenerational harm in connection with the attack. The duty to provide reasoned decisions is recognised by all national jurisdictions and before all international and regional courts. That duty is recognised at the national level, rooted in international human rights law and part of the settled case-law of the European Court of Human

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<sup>62</sup> “Observations on the Draft Implementation Plan for Reparations Filed by the Trust Fund for Victims on 3 November 2015”, 1 February 2016, ICC-01/04-01/06-3193, para. 47.

<sup>63</sup> “Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute”, 17 October 2016, ICC-01/05-01/08-3444.

Rights (ECtHR). In addition, it has been included in the statutes of international criminal tribunals. It can, therefore, be considered to be a general principle of international criminal law.

83. The Appeals Chamber has made a clear ruling in this regard. In a decision cited earlier, it ruled on the Pre-Trial Chamber's lack of reasoning.<sup>64</sup> It stated that the importance of sufficient reasoning is emphasized in various places in the Statute and the Rules of Procedure and Evidence. It also cited ECtHR case-law and that of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia to uphold the principle whereby when issuing decisions chambers must as a minimum provide reasoning to support their findings regarding the evidence or substantive considerations relevant to their decisions.<sup>65</sup> The Appeals Chamber has also reiterated those principles in several decisions on other matters.<sup>66</sup>

84. The Appeals Chamber further stated that, irrespective of the phase of the proceedings, the reasoning provided must itself be sufficient vis-à-vis the criteria chosen and the substantive considerations of the decision.<sup>67</sup>

85. This case-law is consistent with the principle that the extent of the duty to provide reasoning may vary according to the nature of the decision and must be considered in the light of the circumstances of the case.<sup>68</sup> Whereas courts are not required to provide a detailed answer to every argument raised, the decision must show that the key issues in the case have been considered.<sup>69</sup> Indeed, it may be accepted that the nature of the case before the court will determine the extent of the duty to give reasons; said duty must be assessed in the light of the facts of the case.<sup>70</sup>

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<sup>64</sup> ICC-01/04-01/06-773.

<sup>65</sup> ICC-01/04-01/06-773, para. 20: this reasoning is expressly cited by the Appeal Chamber: "The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion."

<sup>66</sup> ICC-01/05-01/08-1386; ICC-02/11-01/11-278-Red, para. 46.

<sup>67</sup> ICC-01/04-01/06-773, para. 23.

<sup>68</sup> ECtHR, *Ruiz Torija v. Spain*, 9 December 1994, 18390/91, para. 29.

<sup>69</sup> ECtHR, *Van de Hurk v. The Netherlands*, 19 April 1994, 16034/90, para. 61; *Boldea v. Romania*, 15 February 2007, 19997/02, para. 30.

<sup>70</sup> ECtHR, *Ruiz Torija v. Spain*, para. 29.



86. In the instant case, the matter submitted by the Legal Representative to the Chamber is particularly important. The Legal Representative contended that regarding reparations, the transmission of trauma is a phenomenon with peculiar challenges which are sufficiently serious to have warranted submission to the Chamber, which approved the Legal Representative's motion.<sup>71</sup> With respect to the findings of the appointed expert, the Legal Representative found it important to point out findings similar to the expert's, and requested to be granted access to the report containing the said findings. It is difficult to challenge the relevance of that report. As stated above, the issue pointed out by the Legal Representative has been raised in other cases in the reparations phase.

87. This evidence should have been examined and subjected to substantive examination in the Order for Reparations. Instead, it was omitted and the Chamber did not give reasons for the omission or the rejection.

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<sup>71</sup> "Decision on the request of the common legal representative of victims for assistance from the Victims and Witnesses Unit," 9 October 2015, ICC-01/04-01/07-3608-tENG.

## VII. RELIEF SOUGHT

88. The Legal Representative requests the Appeals Chamber to correctly apply the standard of proof to the applications which raise the issue of transgenerational harm, by proceeding on a balance of probabilities in a manner that takes into account the harm suffered by one or more parents when determining the causal nexus between the harm claimed by the child and the attack.

89. The Legal Representative also requests the Chamber's findings in Annex II regarding the five applicants concerned to be amended to the extent that the correct application of the standard of proof requires. The Legal Representative contends that, if the standard is correctly applied, a finding of the harm to each of the five applicants will be made.

[signed]

Mr Fidel Nsita Luvengika

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Legal Representative of Victims

Dated this 27 June 2017

At Gilly/Charleroi, Belgium