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**International
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Court**

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THE APPEALS CHAMBER

Before: Judge Sir 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 CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA***

**Public Redacted Version of the
Defence Response to the OPCV and Legal Representative of Victims' Documents in
Support of Appeal Against the Reparation Order**

Source: Defence for Mr Germain Katanga

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

to:

Legal Representatives of Victims

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REGISTRY

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INTRODUCTION

1. The defence for Mr Germain Katanga (the ‘defence’) respectfully submits its observations in response to the Office of Public Counsel for the Victims (“OPCV”) and the Legal Representative of Victims (“LRV”)’ Documents in Support of Appeal¹ against Trial Chamber II’s Order for Reparations pursuant to Article 75 of the Statute (thereafter the “Reparation Order”).²
2. These submissions are filed as confidential *ex parte* because they refer to confidential *ex parte* information related to applicants represented by the Legal Representative of Victims. A public redacted version will be filed shortly.

PROCEDURAL BACKGROUND

3. On 7 March 2014, Trial Chamber II issued its Judgment pursuant to article 74 of the Statute.³
4. On 23 May 2014, Trial Chamber II delivered its Decision on Sentence pursuant to article 76 of the Statute.⁴
5. On 16 March 2016, the LRV requested the Chamber to withdraw his mandate in respect of 96 victim applications, on the grounds that [REDACTED].⁵
6. On 18 May 2016, the Trial Chamber II issued its *Décision relative à la demande de retrait de mandat du Représentant légal des victimes*.⁶ The Chamber authorised the withdrawal of the mandate of the Legal Representative for victims [REDACTED]

[REDACTED]

¹ ICC-01/04-01/07-3745, *Document déposé à l'appui de l'appel relatif à l'Ordonnance de réparation en vertu de l'article 75 du Statut et son Annexe II* ; ICC-01/04-01/07-3746-Red, Document in Support of the Appeal against Trial Chamber II's "*Ordonnance de réparation en vertu de l'article 75 du Statut*".

² ICC-01/04-01/07-3728-tENG.

³ ICC-01/04-01/07-3436-tENG.

⁴ ICC-01/04-01/07-3484-tENG.

⁵ ICC-01/04-01/07-3670-Conf-Corr, *Rectificatif de la « Demande de retrait de mandat du Représentant légal relativement à certaines victimes ayant été autorisées à participer à la procédure »*.

⁶ ICC-01/04-01/07-3689-Conf.

[REDACTED]. Therefore, the Chamber ordered the SVPR to disclose to the Defence and to the Chamber the 42 applications in question and invited the LRV and the Defence to submit observations on these applications.

7. On 27 May 2016, the LRV filed his *Observations suivant la Décision n°3689 relative à la demande de retrait de mandat du Représentant légal*,⁷ by which he reiterated his request that the Chamber put an end to his mandate in respect of victims [REDACTED].
8. His main argument was that, [REDACTED].⁸ [REDACTED].⁹
9. On 31 May 2016, the Registry notified to the Trial Chamber¹⁰ and to the Defence¹¹ the files of 42 victim applicants.
10. On 31 May 2016, the Legal Representative filed his ‘*Transmission du «Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003 »*’.¹²
11. On 10 June 2016, the Legal Representative submitted an ‘*Addendum au document intitulé 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)*’ (the “Addendum”).¹³
12. On 1 July 2016, the Defence filed its Defence Observations in response to the *Transmission à la Défense des dossiers relatifs à 39 victimes participantes et 3*

⁷ICC-01/04-01/07-3694-Conf.

⁸*Ibid*, paras. 9-10.

⁹*Ibid*, paras. 11-16.

¹⁰ICC-01/04-01/07-3695-Conf, *Transmission à la Chambre des dossiers relatifs à 39 victimes participantes et 3 demandeurs à la réparation en application de la Décision du 18 mai 2016 (ICC-01/04-01/07-3689-Conf)*.

¹¹ICC-01/04-01/07-3696-Conf, *Transmission à la Défense des dossiers relatifs à 39 victimes participantes et 3 demandeurs à la réparation en application de la Décision du 18 mai 2016 (ICC-01/04-01/07-3689-Conf)*.

¹² ICC-01/04-01/07-3692-Red2 and annexes.

¹³ ICC-01/04-01/07-3698-Conf and annexes.

*demandeurs à la réparation en application de la Décision du 18 mai 2016.*¹⁴ The Defence deferred to the Trial Chamber's decision.

13. On 6 September 2016, the Trial Chamber issued its *Deuxième décision relative à la demande de retrait de mandat du Représentant légal des victimes*.¹⁵ It [REDACTED] and authorised the withdrawal of the mandate of the LRV for the 41 remaining applicants mentioned above. [REDACTED].¹⁶ It therefore ordered the Defence to file observations on these 41 applications and stated it would determine their merits in its order for reparations made pursuant to article 75 of the Statute.¹⁷ The Chamber did not consider it necessary to appoint new legal representation, given the advanced stage of the proceedings.
14. On 20 September 2016, the Defence filed its observations on the 41 victims applications notified on 31 May 2016.¹⁸
15. On 15 March 2017, the Chamber appointed the OPCV as legal representative for the concerned victims with a view to an eventual appeal against the Order for Reparations to be issued shortly.¹⁹
16. Following several submissions from the parties and participants, on 24th March 2017, Trial Chamber II rendered its Order for Reparations pursuant to Article 75 of the Statute (the "Reparation Order").²⁰ The Chamber notably ruled on the 41 requests mentioned above, and partially granted them. To the extent they were not granted, the Chamber explained that it was unable to determine their claims (in full) because of a lack of sufficient supporting evidence.²¹

¹⁴ ICC-01/04-01/07-3700-Conf.

¹⁵ ICC-01/04-01/07-3706-Conf.

¹⁶ Confidential Second decision on the Legal Representative of the Victims' request for termination of the representation agreement, ICC-01/04-01/07-3706-Conf-tENG 17-01-2017, para. 13.

¹⁷ *Ibid.*

¹⁸ ICC-01/04-01/07-3709-Conf, Observations on 41 victims' applications pursuant to the *Deuxième décision relative à la demande de retrait de mandat du Représentant légal des victimes*.

¹⁹ *Décision relative à la requête du Représentant légal commun des victimes du 2 mars 2017*, ICC-01/04-01/07-3727, 15 March 2017.

²⁰ ICC-01/04-01/07-3728-tENG.

²¹ *Ibid.*, paras. 168-180; as well as Annex II.

17. On 25 April 2017, the Legal Representative of Victims filed his *Acte d'appel relatif à l'Ordonnance de réparation en vertu de l'article 75 du Statut et son Annexe II*.²²
18. On 26 April 2017, the defence gave notice of its appeal against the Reparation Order issued on 24 March 2017.²³
19. On the same day, the OPCV filed a Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute on 24 March 2017, regarding the 37 applicants whom the OPCV represents.²⁴
20. On 17 May 2017, the Trust Fund for Victims notified the Trial Chamber of its decision to complement the payment of the individual and collective awards for reparations ordered in the Katanga case for the benefit of the 297 victims identified in the Trial Chamber's Reparation Order in the amount of \$1,000,000.²⁵
21. On 26 June 2017, the defence filed its Document in Support of Appeal against the Reparations Order.²⁶
22. On the same day, the Legal Representative of Victims filed his Document in Support of the Appeal against the Order for Reparations under Article 75 of the Statute with its Annex II²⁷ and the OPCV submitted its Document in Support of the Appeal against Trial Chamber II's "*Ordonnance de réparation en vertu de l'article 75 du Statut*".²⁸
23. On 25 July 2017, the Trust Fund for Victims ("TFV") filed its Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017 (ICC-01/04-01/07-3728).²⁹
24. On 23 August 2017, the Legal Representative of Victims submitted his *Observations sur le document déposé par le Bureau du conseil public pour les victimes à l'appui de*

²² ICC-01/04-01/07-3737.

²³ ICC-01/04-01/07-3738.

²⁴ ICC-01/04-01/07-3739.

²⁵ ICC-01/04-01/07-3740.

²⁶ ICC-01/04-01/07-3747-Red.

²⁷ ICC-01/04-01/07-3745-tENG.

²⁸ ICC-01/04-01/07-3746-Red.

²⁹ ICC-01/04-01/07-3751-Red.

son appel (ICC-01/04-01/07-3746-Conf), by which he requested the Appeals Chamber to dismiss the OPCV appeal.³⁰

STANDARD OF REVIEW

25. Pursuant to Article 82 (4) of the Statute, a legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.
26. The Appeals Chamber, in the *Lubanga* Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012, stressed that, with respect to the errors alleged by the parties and participants against the Impugned Decision, the standard of review is the same for all appeals raised before the Appeals Chamber.³¹ The Appeals Chamber summarized the standard of review as follow:³²

41. Accordingly, the standard of review for alleged legal errors is:

[T]he Appeals Chamber will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.

[An Impugned Decision] is “materially affected by an error of law” if the Trial Chamber “would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error”.

42. With respect to alleged procedural errors, the Appeals Chamber held that

such errors may occur in the proceedings leading up to an impugned decision. [...] However, as with errors of law, the Appeals Chamber will only reverse [the Impugned Decision] if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the [Impugned Decision] would have substantially differed from the one rendered.

43. Regarding alleged errors in discretionary decisions, the Appeals Chamber held:

³⁰ ICC-01/04-01/07-3753-Conf.

³¹ ICC-01/04-01/06-3129, *Pros. v. Lubanga*, 3 March 2015, para. 40, with reference to ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 17.

³² ICC-01/04-01/06-3129, *Pros. v. Lubanga*, 3 March 2015, paras. 41-43 [Footnotes omitted].

79. The Appeals Chamber will not interfere with the [first-instance] Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the [first-instance] Chamber.

80. [...] [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the [first-instance] Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the [first-instance] Chamber's exercise of discretion [...], save where it is decision shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.

DISCUSSION

Defence observations on the Legal Representative of Victims' Document in Support of Appeal

27. The Legal Representative of Victims challenges the Reparation Order with regard to the part concerning the failure to make a finding of transgenerational harm in relation to five applicants, minors, born after the 24 February 2003 Bogoro attack:

- a/25094/16, born in [REDACTED],
- a/25096/16, born in [REDACTED],
- a/25098/16, born in [REDACTED],
- a/25097/16, born in [REDACTED] and
- a/25099/16, born in [REDACTED].³³

28. The Legal Representative of Victims raises two grounds of appeal, to which the defence objects in whole.

³³ Annex II to the Reparation Order.

Response to the Legal Representative's first ground of appeal: Misapplication of the standard of proof

29. Pursuant to his first ground of appeal, 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. »³⁴
30. The defence submits that the Legal Representative of Victims' first ground of appeal should be dismissed in its entirety and that the Appeals Chamber should confirm the Impugned Decision with regard to the exclusion of a finding of transgenerational harm in relation to the applicants born after the 24 February 2003 Bogoro attack.
31. The defence reiterates its previous submissions according to which children born after the 24 February 2003 should be capable of consideration for compensation only in the case of death of a parent during the Bogoro attack;³⁵

The application of persons born after the attack based on the fact that their village was once attacked before their birth and that it affected the life of their family themselves, should be dismissed. The prejudice alleged is not sufficiently proximate or personal, and not sufficiently linked to the crimes for which the accused was convicted. Otherwise, the Court would have to grant applications to too wide a class, effectively to nearly anyone currently living in Bogoro because the village and/or its inhabitants still face some difficulties which could be, in part, the result of the Bogoro attack.³⁶

32. The defence notes that the concept of transgenerational harm is neither clearly defined nor accepted before the International Criminal Court. In the *Bemba* case, the expert called, Dr Daryn REICHERTER, was inconclusive on the subject of transmission of trauma through generations, particularly in the excerpts quoted by the Legal

³⁴ ICC-01/04-01/06-3745-tENG, paras 3, 17.

³⁵ ICC-01/04-01/07-3699-Conf, Defence Observations on the Legal Representative of Victims' Transmission du « *Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003* » and its Addendum, para. 11 ; ICC-01/04-01/07-3681-Conf, Second Defence Observations on the Victims Applications for Reparation, para. 31.

³⁶ ICC-01/04-01/07-3605, Defence Consolidated Response to the Legal Representative of Victims' Request and the Registry's Observations, 2 October 2015, para. 11.

Representative of Victims in his Addendum to the Report.³⁷ In the *Lubanga* case, the Trial Chamber I and the Appeals Chamber, in their reparations decision and judgment,³⁸ did not retain the qualification of transgenerational harm.³⁹

33. The Legal Representative's reasoning relies mainly on the « *Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003* », which emanates from Dr. Espérance KASHALA ABOTNES (“the Report”),⁴⁰ and on the applicant's reparation forms themselves.

34. However, the defence reiterates that the Report should not be relied on or at least that it should be approached with caution for several reasons. It is not signed, nor stamped or dated; therefore its provenance and content cannot be authenticated. What is more, it has been submitted by a non neutral party, the Legal Representative of Victims, and the defence has not had the opportunity to cross-examine its author, contrary to what occurred in the Bemba case for instance. In addition, the Report remains extremely vague and hypothetical. It is therefore insufficient to establish a sufficiently close link between the crimes for which Mr Katanga was convicted and any eventual harm.⁴¹

35. More precisely, the Dr Espérance KASHALA ABOTNES does not draw any clear conclusions as to the transgenerational harm of the children born after the 2003 Bogoro attack but mentions some weak probabilities, insufficient to justify an order for reparations:

[REDACTED].⁴²

³⁷ ICC-01/04-01/07-3698-Conf, *Addendum au document intitulé 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), 10 June 2016, with Annex 1, ICC-01/05-01/08-T-368-FRA, and Annex 2, ICC-01/05-01/08-T-368-ENG; see for instance footnotes 11-12, referring to ICC-01/05-01/08-T-368-FRA, p. 85-lignes 4 à 6, p. 101-lignes 12 à 15, p.100-lignes 1 à 4.

³⁸ ICC-01/04-01/06-2904, (TCI) Decision establishing the principles and procedures to be applied to reparations, 7 August 2012; ICC-01/04-01/06-3129, (AC) Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A), 3 March 2015.

³⁹ Despite the submission of Ms Elisabeth Schauer's Report, mentioned by the Legal Representative in its Document in Support of Appeal, ICC-01/04-01/07-3745-tENG, para. 37, with reference to 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.

⁴⁰ ICC-01/04-01/06-3692-Conf-Anx1-Red.

⁴¹ ICC-01/04-01/07-3699-Conf, Defence Observations on the Legal Representative of Victims' Transmission du « *Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003* » and its Addendum, paras 9-10, 13.

⁴² ICC-01/04-01/07-3692-Conf-Anx1-Red, p. 24.

36. The defence stresses that the Legal Representative's previous submissions based on this Report were themselves not categorical ; he indicated that :

“Le rapport d’expertise relève que sur les 8 enfants examinés [born after the attack], 5 présentent des troubles de comportement qui pourraient être liés au traumatisme vécu par leurs parents, victimes de l’attaque. »⁴³

37. Therefore Trial Chamber II rightly concluded that 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 ». ⁴⁴

38. Contrary to the Legal Representative's submissions, Trial Chamber II applied the proper standard of proof and took into account all the relevant information available, including the fact that the parents of the five applicants were or may be victims of the 2003 Bogoro attack. Indeed, the Trial Chamber specified in its “*Analyse individuelle*” that some of the parents were themselves “*Demandeurs*”; it referred to the Report and to the medical certificates, which mentioned explicitly that some of the parents were victims. In addition, the five applicants, being minors, were represented by one of their parents, therefore their reparation forms contained an account describing what happened to their parents and to themselves.

39. However, as determined by the Trial Chamber, in the present case, the Report, the reparation forms and the medical certificates, read separately or jointly, were insufficient to demonstrate the existence of transgenerational harm for the five applicants born after the 2003 Bogoro attack.

40. Indeed, contrary to the Legal Representative's assertions, the fact that some of the applicants' parents may have been victims of the 24 February 2003 Bogoro attack is insufficient to determine that the psychological harm of their children born several months or even years after the attack is linked to the trauma suffered by their parents during the 24 February 2003 Bogoro attack itself, and in particular to the crimes for which Mr Katanga was convicted.

⁴³ ICC-01/04-01/07-3692-Red2, para. 31.

⁴⁴ Reparation Order, para. 134

41. Such a presumption cannot be established, even on the basis of a balance of probabilities. This is particularly so when both the Report and medical certificates issued by Dr Espérance KASHALA ABOTNES are so inconclusive regarding the existence of a transgenerational harm linked to the 2003 Bogoro attack. As noted earlier by the defence about the five minors:

- [REDACTED].⁴⁵ [REDACTED]
- [REDACTED].⁴⁶
- [REDACTED].⁴⁷
- [REDACTED].⁴⁸
- [REDACTED].⁴⁹

42. In addition, as noted previously by the defence, Ituri, and the DRC more generally, have been the object of ongoing conflicts since 1997; Both Bogoro and Kasenyi, [REDACTED], have been the objects of several attacks before and after the 24 February 2003 attack. Thus, even if some of the applicants did suffer from a transgenerational harm, it could be linked to another attack.

43. Therefore the defence strongly disagrees with the Legal Representative' statement according to which "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."⁵⁰

44. The defence respectfully requests the Appeals Chamber to dismiss the Legal Representative's first ground of appeal and to confirm the Impugned Decision to the extent that it determined 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.

⁴⁵ ICC-01/04-01/07-3681-Conf-Exp-AnxA, Annex A to the Second Defence Observations on the Victims Applications for Reparation, 11 April 2016, p. 175, with reference to 3661-Conf-Anx73-Red.

⁴⁶ ICC-01/04-01/07-3681-Conf-Exp-AnxA, p. 176, with reference to 3661-Conf-Anx75-Red.

⁴⁷ ICC-01/04-01/07-3681-Conf-Exp-AnxA, p. 177, with reference to 3661-Conf-Anx76-Red.

⁴⁸ ICC-01/04-01/07-3681-Conf-Exp-AnxA, p. 178, with reference to 3661-Conf-Anx77-Red.

⁴⁹ ICC-01/04-01/07-3681-Conf-Exp-AnxA, p. 179, with reference to 3661-Conf-Anx78-Red.

⁵⁰ ICC-01/04-01/07-3745-tENG, para. 50.

Response to the Legal Representative's second ground of appeal: Failure to take into account all of the evidence and failure to provide reasoning

45. Pursuant to his second ground of appeal, the Legal Representative of Victims argues that the Trial Chamber failed to take into account the corroborative evidence accompanying the applications for reparations and the Report, in particular the evidence quoted in his '*Addendum au document intitulé Transmission du « Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003 »*',⁵¹ i.e. the transcripts of the testimony of the expert called by the prosecution in the *Bemba* case, Dr Daryn REICHERTER, and his confidential report⁵² (the "*Bemba* transcripts" and the "*Bemba* report"). In addition, he submits that the Trial Chamber failed to state why it discarded such evidence.⁵³
46. The defence objects to this ground of appeal for the following reasons.
47. The defence submits that the Legal Representative's Addendum was not properly formulated and therefore did not justify any answer from the Chamber. The defence notes that the Legal Representative simply stated in his introduction that he "*sollicite par la présente l'admission des deux transcriptions au dossier. Il relève par ailleurs que la communication du rapport même du témoin expert présenterait très certainement un intérêt pour la Chambre et les parties.*" (para. 4) However he did not specify whether he wanted that those documents be admitted as evidence, i.e. be provided with an EVD number, and he did not submit any legal basis for his request. He concluded his filing by simply asking the Trial Chamber to "*recevoir la présente soumission et ses annexes*", without reiterating his previous request.
48. In this context, the defence submits that Trial Chamber II did not have to issue any formal decision in response to the Legal Representative's Addendum. The defence recalls that any filings and annexes submitted by the parties are automatically part of the record of the case, therefore the Trial Chamber does not need to indicate that it "receives" them in the record of the case. Nor does it need to comment upon each

⁵¹ ICC-01/04-01/07-3698-Conf.

⁵² This report is mentioned in ICC-01/05-01/08-3368, *Pros. v. Bemba*, Prosecution's Submission of Additional Information regarding its Proposed Expert Witness, 15 April 2016, para. 2.

⁵³ ICC-01/04-01/07-3745-tENG, paras 64-65.

annex filed in the record of the case. Thus, Trial Chamber II was not bound to refer to the *Bemba* transcripts in its Reparation Order; the reference, in the footnote 212 of Reparation Order, to the Addendum, was sufficient to indicate that the Trial Chamber was aware of the Legal Representative's submissions and annexes.

49. In addition, regarding the confidential *Bemba* report, the defence notes that the Legal Representative only indicated that its disclosure may be of interest (“*présenterait un intérêt*”) for the Chamber and the parties, but he did not formally request such disclosure. In any event, to tender it in the *Katanga* case, he should have first requested its disclosure through an application before the *Bemba* Trial Chamber.⁵⁴ The lack of formal reaction from Trial Chamber II following the Legal Representative's Addendum simply means that it decided not to follow the Legal Representative “suggestions”, having probably considered that the *Bemba* transcripts and report were not sufficiently relevant for the *Katanga* case.

50. Furthermore, the defence reiterates that such material was neither appropriate nor relevant for Trial Chamber II's findings regarding the transgenerational harm alleged by the applicants in the *Katanga* case:

16. The defence submits that, while the Legal Representative of Victims is obviously entitled to refer to these transcripts in his submissions, the admission into the *Katanga* case of the entire *Bemba* transcripts is inappropriate at this stage. The transcripts are a lengthy document— around 100 pages – and most of it being irrelevant to the present case. It deals with crimes committed in the CAR and not the DRC rendering any conclusions not necessarily applicable *mutatis mutandis* to the situation in the DRC. It concerns different crimes to that in the *Katanga* case, and in particular the crime of rape for which Mr Katanga was acquitted. Also, as observed above, the expert called in the *Bemba* case was inconclusive on the subject of transmission of trauma through generations, particularly in the excerpts quoted by the Legal Representative of Victims in support of his submissions. The admission of such testimony in the *Katanga* case would not bring any new or significant information. Last, but not least, the *Katanga* defence were not provided an opportunity to question the expert or to challenge her credibility or to present its own expert on the matter.

17. Alternatively, and in any event, given the circumstances referred to above, the Report and Transcripts cannot, it is submitted, be given significant weight.⁵⁵

⁵⁴ For instance, the defence itself used to file request for disclosure of transcripts in the *Lubanga* case before the *Lubanga* Trial Chamber I. See for instance ICC-01/04-01/06-2471, *Pros. v. Lubanga*, Decision on the request from the defence in the *Katanga* and *Ngudjolo* case for disclosure of transcripts in the *Lubanga* case, 11 June 2010.

⁵⁵ ICC-01/04-01/07-3699-Conf, paras 16-17.

51. For these reasons, the defence respectfully requests the Appeals Chamber to dismiss the Legal Representative' second ground of appeal and to confirm the Impugned Decision to the extent that it determined 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.

Defence observations on the OPCV's Document in Support of Appeal

52. The OPCV's Document in Support of its Appeal of the Order for Reparations contains the following ground:

The Trial Chamber made a procedural error by not appointing a new lawyer for victims immediately after authorising the Former Legal Representative to terminate his mandate in respect of the Concerned Victims:

53. According to the OPCV, the lack of representation for over six months would have caused them prejudice in completing their applications.⁵⁶

54. The defence objects to the OPCV's ground of appeal and submits that it should be dismissed in its entirety for the following reasons.

55. On 16 March 2017, when the LRV first asked to withdraw his mandate in respect of the above victim applications, three years had elapsed since the conviction of Mr Katanga. Accordingly, these victims had been granted ample time to submit evidence in support of their reparation claims.

56. The first deadline for the submission of any new reparation request was 1 October 2015. The Chamber subsequently granted requests from the LRV for extensions of this deadline until 29 February 2016.⁵⁷ During that period, by his own submission, the LRV and his team spent a significant amount of time in and around Bogoro investigating and collecting evidence, to the extent possible, in support of all old and

⁵⁶ICC-01/04-01/07-3746-Conf 27-06-2017, paras. 47-49.

⁵⁷Décision relative aux requêtes du Représentant légal commun des victimes et du Greffe aux fins de prorogation de délai fixé pour la transmission et le dépôt des demandes en réparation, 25 septembre 2015, ICC-01/04-01/07-3599; Décision accordant une nouvelle prorogation de délai au Représentant légal commun des victimes pour le dépôt des demandes en réparation, 8 décembre 2015, ICC-01/04-01/07-3628.

new victim reparation claims, including those in respect of which the LRV was granted permission to withdraw his mandate. A detailed description of the work method applied by the LRV was provided in his *Rapport sur la mise en œuvre de la Décision n°3546, en ce compris l'identification des préjudices subis par les victimes suite aux crimes commis par G. Katanga*.⁵⁸ From this report, it appears their work was completed in the main by 29th February 2017. The LRV and his team had made all efforts to collect identifying and other relevant information about the applicants and their claims. There is no reason to assume that the applications concerned were treated differently from any of the other applications.

57. From the LRV Observations of 23 August 2017,⁵⁹ as well as previous filings on this issue, it would appear that these applicants, [REDACTED]. The defence stresses anew the particular context of the DRC, a place of great poverty and consequent temptation to make false or exaggerated claims.⁶⁰ The Defence submits that the LRV is in the best position to determine whether the victims he represents meet the minimum requirements for eligibility for reparations. [REDACTED]. The lack of legal representation for over six months has had no bearing on the lack of such evidence, [REDACTED]. It is difficult to imagine how the Office of Public Council for Victims would have been able to find credible evidence within half a year, which the LRV did not manage to find throughout all these years [REDACTED].

58. The LRV submissions explain a number of observations previously made by the Defence in respect of the 41 applicants concerned. The Defence previously noted⁶¹ that there were [REDACTED].

59. In conclusion, it appears there are legitimate reasons to doubt the eligibility of the victim applicants concerned. Earlier appointment of legal representation would not

⁵⁸ *Rapport sur la mise en œuvre de la Décision n°3546, en ce compris l'identification des préjudices subis par les victimes suite aux crimes commis par G. Katanga* (Article 75-1 du Statut et Norme 38-1-f) du Règlement de la Cour), 13 mai 2016, ICC-01/04-01/07-3687.

⁵⁹ ICC-01/04-01/07-3753-Conf 23-08-2017.

⁶⁰ ICC-01/04-01/07-3549, Defence Observations on Reparations, 15 May 2015, paras 43-44 ; ICC-01/04-01/07-3564, Defence Consolidated Response to the Parties, Participants and Other Interested Persons' Observations on Reparation, 16 June 2015, para. 64 ; ICC-01/04-01/07-3681-Conf , Second Defence Observations on the Victims Applications for Reparation paras 38-40.


⁶¹ ICC-01/04-01/07-3709-Conf-Exp-AnxA, annexed to ICC-01/04-01/07-3709-Conf, Observations on 41 victims' applications pursuant to the *Deuxième décision relative à la demande de retrait de mandat du Représentant légal des victimes*.

have altered this fact. The absence of supporting evidence in respect of some of their claims has not been caused by the lack of legal representation for over a year. Accordingly, this ground of appeal does not hold ground and should be dismissed.

CONCLUSION

60. For the foregoing reasons, the defence respectfully requests the Appeals Chamber to dismiss the OPCV and the Legal Representative of Victims' Appeals on all grounds.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D Hooper', with a long horizontal line extending to the right from the end of the signature.

David Hooper Q.C.

Dated this 5 September 2017,
London.