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THE PRESIDENCY

Before: **Judge Silvia Fernández de Gurmendi, President**
Judge Joyce Aluoch, First Vice-President
Judge Kuniko Ozaki, Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public

Public Redacted Version of "Mr. Bemba's request for recusal of Trial Chamber III from the reparations proceedings"

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

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

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A. INTRODUCTION

1. Trial Chamber III's conduct of the reparations proceedings against Mr. Bemba discloses a pattern of rulings from which a reasonable perception of a pre-disposition against him necessarily arises.[1] In the considered view of Mr. Bemba, this apparent pre-disposition warrants the recusal of the bench in its present composition.[2]

2. Central to this pre-disposition, is Trial Chamber III's evident determination to render a reparations order **before** the adjudication of Mr. Bemba's appeal. There is no justification for a reparations order preceding conviction in this case, nor can this be reconciled with the prior practice of the ICC, or the right of all convicted persons to have a conviction reviewed by a higher tribunal in accordance with law.

3. Secondly, Trial Chamber III rejected Mr. Bemba's request to suspend the reparations proceedings until after his appeal judgment, stating that "all currently envisaged steps" were "preliminary" and "preparatory".[3] Relying on this reasoning, Mr. Bemba did not seek leave to appeal the decision rejecting his request to suspend. Subsequently, the Trial Chamber revealed its intention to render a reparations order prior to the judgment on appeal.[4] The Trial Chamber's initial ruling was accordingly misleading, and prejudicial.

4. Thirdly, on 21 and 22 December 2016, meetings were held at the ICC on the subject of reparations in the Bemba case. They were attended by:[5]

> staff and management of the Trust Fund Secretariat, OTP staff involved in the Bemba case, staff of the OPCV, **representatives of Chambers** (the head of Chambers and a visiting professional), and staff members of the team of the legal representatives of victims in the Bemba case.

5. In these meetings, discussed in detail below, representatives of the Trial Chamber met with the Prosecution, the TFV, the OPCV and the LRV, *ex parte* Mr. Bemba, to discuss matters directly relevant to his rights and interests in the reparations phase, including matters on which all parties had previously made submissions. The exclusion of the Defence from

[1] ICC-01/05-01/13-511-Anx, para. 38.
[2] ICC-01/05-01/13-511-Anx, para. 17.
[3] ICC-01/05-01/08-3522, paras. 13, 16.
[4] ICC-01/05-01/08-3532-Conf.
[5] ICC-01/05-01/08-3493-Conf-AnxA, p. 2.

meetings, the attendance by the Chamber at them, and the failure to order the disclosure of the report of these meetings within a reasonable period has undermined the fairness of the reparations proceedings, and gives rise to a reasonable apprehension of bias.

6. Fourthly, the Trial Chamber's determination to conclude the reparations process before the resolution of the appeal involves an impermissible procedural short-cut offensive to the rights of a convicted person.[6] The practice of the ICC has been to ensure that the convicted person has a right to make submissions on each of the applicants for reparations, specifically on the question of whether the harms suffered fall within the scope of the conviction. The Trial Chamber in the present case has expressly side-stepped this key process, depriving Mr. Bemba of the ability to ensure that reparations are not awarded to remedy harms which fall outside the crimes for which he was convicted.

7. Fifthly, the Chamber has permitted its experts effectively to act under the instruction of the LRV, whilst facially denying them access to any party or participant in the case. [REDACTED],[7] this was denied on the basis that the experts were to be denied contact to any party.[8] This was little more than a pretence. Subsequently, the LRV (and OPCV) enjoyed contact with the experts and influenced their reports.[9] Not only was such contact contrary to the rules of natural justice, it was also contemptuous of a court order.[10] Notwithstanding this, it has drawn no comment, let alone criticism, from the Chamber. This is a further indication of its pre-disposition against Mr. Bemba.

8. The Judges of international courts enjoy "a strong presumption of impartiality that is not easily rebutted." The ICC plenary of judges has previously found that: "the disqualification of a judge [is] not a step to be undertaken lightly, [and] a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office".[11] It is with this high standard in mind that Mr. Bemba makes the current application.

[6] ICC-01/04-01/06-3129, para. 184 (emphasis added).
[7] Email from Registry to Defence sent on 14 July 2017, at 10:23.
[8] Email from Registry to Defence sent on 17 July 2017, at 10:51.
[9] *See, for example*, ICC-01/05-01/08-3575-Conf-Anx-Red-Corr, para. 12; ICC-01/05-01/08-3575-Conf-Anx-Red-Corr, para. 41, fn.31.
[10] Email from Registry to Defence sent on 17 July 2017, at 10:51.
[11] ICC-01/05-01/13-511-Anx, para. 18.

B. RELEVANT PROCEDURAL BACKGROUND

9. On 21 March 2016, Trial Chamber III convicted Mr. Bemba of the charges against him.[12] Mr. Bemba appealed against this conviction.[13] On 11 July 2016, the Presidency assigned the present bench to the reparations proceedings.[14]

10. On 22 December 2016, the Registry filed its list of proposed experts.[15] On 21 February 2017, the Chamber filed an order inviting submissions on experts, considering the appointment of four experts and directing the LRV, OPCV and the Defence to file joint observations on the experts identified by 3 March 2017,[16] this deadline later being extended to 3 April 2017.[17]

11. On 3 April 2017, the Defence filed its "Observations on Trial Chamber III's order inviting submissions on experts" in which it asked the Chamber to refrain at this stage from the instruction of expert witnesses and to suspend the reparations process at the latest after the selection of any expert(s) and the finalisation of any letter of instruction.[18]

12. On 5 May 2017, the Chamber rejected the Defence request.[19] On 2 June 2017, the Chamber appointed four experts to assist in the reparations proceedings, and ordered them to submit their report(s) by 15 September 2017.[20] The deadline was later extended to 20 November 2017.[21]

13. On 12 June 2017, the Defence filed a request for leave to appeal the decision appointing experts on the basis that, *inter alia*, it was inconsistent with the earlier ruling that the Chamber was only taking "preparatory steps", and the Chamber had erred in requiring Mr. Bemba to file submissions on reparations prior to knowing the scope of his conviction.[22] The request was denied by the Chamber on 29 June 2017.[23]

[12] ICC-01/05/01/08-3343.
[13] ICC-01/05-01/08-3434-Conf.
[14] ICC-01/05-01/08-3403.
[15] ICC-01/05-01/08-3487 with 28 confidential annexes.
[16] ICC-01/05-01/08-3500-Conf.
[17] ICC-01/05-01/08-3505.
[18] ICC-01/05-01/08-3513.
[19] ICC-01/05-01/08-3522.
[20] ICC-01/05-01/08-3532-Red.
[21] ICC-01/05-01/08-3559-Red.
[22] ICC-01/05-01/08-3534.
[23] ICC-01/05-01/08-3536.

14. On 20 November 2017, the Registry filed the joint report of the appointed experts ("Expert Report"), in a version available to the Chamber only.[24] A confidential redacted version of the Expert Report available to the Defence, LRV, OPCV and TFV was filed on 21 November 2017.[25] A corrigendum was filed on 28 November 2017.[26]

15. On 22 December 2017, the Chamber filed its "Order regarding follow-up matters arising from Expert Report" whereby it ordered the experts to file an addendum to their report by 31 January 2018 in which "they calculate the scope of Mr Bemba's liability, including putting forward an amount for the sum-total of the harms caused by Mr Bemba and of the corresponding recommended reparations, or a range thereof."[27] On 31 January the Registry transmitted the addendum to the Expert Report.[28]

C. APPLICABLE LAW

1. The legal standard for recusal of a Judge

16. Article 41(2)(a) of the Rome Statute of the International Criminal Court ("the Statute") provides that "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground."

17. The Presidency has held that the "overriding purpose of article 41(2)(a) is to safeguard the integrity of proceedings of the Court by ensuring that no judge participates in a case in which his or her impartiality might reasonably be doubted on any ground".[29] The assessment of judicial impartiality requires not only that a judge be impartial in the sense of being subjectively free from bias, but also that there is no objective appearance of bias.[30]

18. In determining whether there is an objective appearance of bias, the Presidency has previously stated that this requires consideration "of whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[31] This test is

[24] ICC-01/05-01/08-3575-Conf-Exp-Anx.
[25] ICC-01/05-01/08-3575-Conf-Anx-Red. Quite what the purpose of the redactions was is unclear. Most of the information redacted related to persons introduced to the experts by the LRV in the CAR, thus the information was only effectively kept from the Defence.
[26] ICC-01/05-01/08-3575-Conf-Anx-Red-Corr.
[27] ICC-01/05-01/08-3588-Conf, para. 9.
[28] ICC-01/05-01/08-3607-Conf-Anx.
[29] ICC-02/05-01/09-76-Anx2, 19 March 2010, pp. 4-5.
[30] ICC-02/05-01/09-76-Anx2, 19 March 2010, pp. 4-5; *See also,* ICC-02/05-03/09-344-Anx, para. 11.
[31] ICC-02/05-01/09-76-Anx2, p. 5.

"concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension was objectively reasonable."[32]

19. It is therefore not necessary to prove actual bias, the question is whether the circumstances give rise to an appearance of bias.[33] It has been emphasized that the appearance of bias is equally important because of the principle that "[j]ustice must not only be done, but should manifestly and undoubtedly be seen to be done."[34] A judge who is found to be impartial in fact, but not in appearance, is not impartial.[35]

20. The opinion of the accused as to the impartiality or otherwise of a Judge is a relevant consideration. The objective test implies that "mere feeling or suspicion of bias by the accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances."[36]

21. As to demonstrating impartiality, "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law […] or to the assessment of the relevant facts."[37]

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[32] ICC-02/05-03/09-344-Anx, para. 13.
[33] *Prosecutor v. Brđanin*, IT-99-36-PT, Decision on Application by Momir Talić for Disqualification and Withdrawal of a Judge, 18 May 2000. *See also*, *Belilos v. Switzerland* (1989) 10 EHRR 466, paras. 8, 67.
[34] *R v Sussex Justice, Ex Parte McCarthy* (1923) 1 K.B. 256, p. 259. *See also*, *Prosecutor v. Sesay*, SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, para. 16; and Treschel, S., *Human Rights in Criminal Proceedings*, OUP 2005, p. 55.
[35] *See* Treschel, S., *Human Rights in Criminal Proceedings*, OUP 2005, p. 63.
[36] *Prosecutor v. Edouard Karemera et al*., ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004, para. 9; *See also*, *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189; *Prosecutor v. Karemera et al*., ICTR-98-44-T, Re. Application for the Disqualification Judge Mehmet Guney, 26 September 2000, paras. 8-9; *Prosecutor v. Nahimana et al*., ICTR-99-52-T, Oral Decision (TC), 19 September 2000, p. 10; *Prosecuror v. Nyiramasuhuko & Ntahobali*, ICTR-98-44-T, Determination of the Bureau in Terms of Rule 15(B), 7 June 2000, p. 5; *The Prosecutor v. Kabiligi*, ICTR-97-34-I, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection Based on Lack of Jurisdiction, 4 November 1999, p. 8.; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Motion for Disqualification of Judges, 28 May 2007, para. 7; *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, 14 June 2007, para. 10; *Prosecutor v. Karemera et al*., ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, 7 March 2008, para. 4; *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart); quoted in *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 195; *Prosecutor v. Brđanin & Talić*, IT-99-36-R 77, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, para. 9; *Prosecutor v. Sesay*, SCSL-2004-15-AR15, Decision on Defence motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, para. 16; *Incal v. Turkey*, (2000) 29 E.H.R.R. 449 (E Ct HR), para. 71.
[37] *Prosecutor v. Edouard Karemera et al.*, ICTR-98-44-T, Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, 14 June 2007, para 14, referring to *Prosecutor v. Athanase Seromba*, ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, 25 April 2006, para. 12; *Prosecutor v. Edouard Karemera et al*., ICTR-98-44T, Decision on Motion by Karemera for Disqualification

2. *Ex parte* Proceedings

22. Article 67(1) of the Statute provides an accused with a right to:

> […] **a fair hearing conducted impartially**, and to the following minimum guarantees, in full equality: […]
> (d) Subject to article 63, paragraph 2, **to be present at the trial** […];
> (e) […] to obtain the attendance and examination of witnesses on his or her behalf **under the same conditions as witnesses against him or her**.

23. *Ex parte* submissions on the substance of the issues under adjudication, or that may otherwise colour the decider of fact's assessment of the evidence, are antithetical to the fairness of proceedings. As stated in *Lubanga*:[38]

> Although Rule 83 of the Rules permits the prosecution to request a hearing on an *ex parte* basis for a determination of whether evidence in its possession is exculpatory under Article 67(2) of the Statute, excluding the defence from all of these stages, save for the last, would be unfair to the accused and would undermine the fundamental principle that the trial should be held in his presence (Article 63 of the Statute).

24. As such, *ex parte* procedures are only to be used exceptionally when they are truly necessary and when no other, lesser, procedures are available, and the Court must ensure that their use is proportionate given the potential prejudice to the accused.[39]

25. The same fair trial rights govern the reparations procedure. As noted by one academic, "[t]he Court will develop procedures to be applied to reparations which comply with the principles of a fair trial. The principles require that the Court 'ensure that a trial is fair and expeditious, and conducted with full respect for the rights of the accused' or the convicted person".[40]

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of Trial Judges, 17 May 2004, para. 13; Decision on Motion by Nzirorera for Disqualification of Judges, 17 May 2004, para. 14.; *See also* Decision on Joseph Nzirozera's Motion for Disqualification of Judges Byron, Kam and Joensen, 27 February 2008, para. 4.

[38] ICC-01/04-01/06-2434-Red2, para. 137.

[39] ICC-01/04-01/06-1058, para. 12.

[40] Kabalira, S., *The Right to Reparations under the Rome Statute of the International Criminal Court (ICC), The Content of the Right and its Implementation in the Light of the Early Case Law of the Court*, WLP 2016, p. 33.

26. This accords with the fact that the reparations phase is "an integral part of the proceedings – and the convicted person enjoys certain rights accordingly."[41] It is also consistent with the limitations which have been placed on the use of *ex parte* proceedings in the pre-trial phase (and thereby not in the trial phase, *stricto sensu*), whereby *ex parte* communications are only permitted subject to the Prosecution showing in its application that:[42] (i) it serves a sufficiently important objective; (ii) it is necessary in the sense that no lesser measure could suffice to achieve a similar result; and (iii) the prejudice to the Defence interest in playing a more active role in the proceedings must be proportional to the benefit derived from such a measure.

D. SUBMISSIONS

(i) The rendering of a reparations order prior to the Appeal Judgment gives rise to a reasonable apprehension of bias

27. The Trial Chamber in the Bemba case has indicated its intention to issue a monetary order for reparations against Mr. Bemba prior to his conviction being confirmed (or otherwise) on appeal,[43] despite consistent pleas from Mr. Bemba that any reparations order be linked to the conviction in his case.[44]

28. Mr. Bemba's first request for a suspension of the reparations proceedings was made on 3 April 2017.[45] Since that time, the resources that have been poured into the preparation of a monetary order against him, are nothing short of momentous. The process so far has involved the instruction of experts (including their fees and missions to the Central African Republic), and the preparation of a huge corpus of filings by the parties, LRV, OPCV, TFV and [REDACTED], and decisions by the Trial Chamber.

29. This means one of two things. Either the Trial Chamber is happy for these resources to be wasted in the event of a (partial or full) acquittal, or it is operating under the assumption that the conviction will be upheld. The first option is wildly irresponsible and cannot be correct. The second option exhibits demonstrable bias against Mr. Bemba.

[41] ICC-01/04-01/06-3256-tENG, para. 15; ICC-01/05-01/08-3536; ICC-01/05-01/08-3601-Conf, para. 9.
[42] ICC-01/04-01/06-1058, para. 7.
[43] ICC-01/05-01/08-3532-Conf, paras. 15-16; ICC-01/05-01/08-3536, para. 13.
[44] ICC-01/05-01/08-3513; ICC-01/05-01/08-3525-Conf, para. 11; ICC-01/05-01/08-3534; ICC-01/05-01/08-3595-Conf.
[45] ICC-01/05-01/08-3513.

30. It is not the case that the advanced stage of the reparations phase is merely a result of protracted appellate proceedings. To the contrary. The Trial Chamber has rushed the reparations process, imposing a series of deadlines that the parties and participants have been unable to meet. Since the beginning of the reparations process on 22 June 2016,[46] 14 requests for extension of time have been filed by the Registry, TFV, the experts, the LRV, OPCV, [REDACTED], and Mr. Bemba.[47]

31. There is no basis for a reparations order being rendered against someone whose appeal is yet to be adjudicated. The Appeals Chamber has held that "an order for reparations depends upon there having been a conviction".[48] However, every accused convicted by the international criminal courts and tribunals has a right to a review of his conviction. That "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law" is protected by the major human rights instruments,[49] and is universally accepted under international law.[50]

32. Given that Mr. Bemba has filed appeals against both the Judgment,[51] and Sentencing Decision,[52] and given that "[r]eparation orders are intrinsically linked to the individual whose criminal responsibility is established in a conviction",[53] and that an accused should not have to remedy harms that are not the result of the crimes for which he was convicted,[54] there is an undeniable link between the scope of the conviction, and the reparations order against a convicted person.

[46] ICC-01/05-01/08-3410.
[47] ICC-01/05-01/08-3426; ICC-01/05-01/08-3427; ICC-01/05-01/08-3437; ICC-01/05-01/08-3452; ICC-01/05-01/08-3565; ICC-01/05-01/08-3570; ICC-01/05-01/08-3574; ICC-01/05-01/08-3580-Conf-AnxA; ICC-01/05-01/08-3583; ICC-01/05-01/08-3595-Red; ICC-01/05-01/08-3599; ICC-01/05-01/08-3600-Conf-Anx; and ICC-01/05-01/08-3602-Conf-Anx; Email TFV to Trial Chamber sent on 27 February 2018, at 08:43, entitled "Bemba [reparations] - TFV extension request".
[48] ICC-01/04-01/06-2953, para. 86.
[49] Article 14(5), International Covenant on Civil and Political Rights; Article 8(2)(h) of the American Covenant on Human Rights; Article 7(1)(a) African Charter of Human Rights.
[50] Roth, R., Henzelin, M., "The Appeal procedure at the ICC" in: Cassese, A., Gaeta, P., & Jones. J.R.W.D. (eds), *The Rome Statute of the International Criminal Court: A Commentary* OUP 2002; Morris, V., Scharf, M. P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers Inc. 1995, vol. 1, p. 294.
[51] ICC-01/05-01/08-3434-Conf.
[52] ICC-01/05-01/08-3450-Conf.
[53] ICC-01/04-01/06-3129, para. 65.
[54] ICC-01/04-01/06-3129, para. 8.

33. As such, making a reparations order against a convicted person whilst there is an extant live appeal against conviction is, in essence, undermining the appellate process.[55] The Trial Chamber is necessarily indicating that either the appeals process is irrelevant, or that it is so certain that the conviction will be upheld that the existence of an appeal need not be considered. Neither approach can be reconciled with the right of a convicted person, recognised under international law, to have his conviction reviewed by a higher tribunal.

34. Moreover, the Trial Chamber's basis for its apparent entitlement to render a monetary order against Mr. Bemba prior to his conviction being finalised is utterly misconceived. In response to Mr. Bemba's first request for a suspension of the reparations proceedings the Trial Chamber noted that "the issuance of a reparations order is not prejudicial to the rights of the convicted person irrespective of whether there is an appeal against the conviction decision".[56] Its footnote for this proposition reads as follows:

> In the *Lubanga* case, Trial Chamber I […] **issued its reparations order on 7 August 2012** (Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904), **well ahead** of the Appeals Chamber rendering its decision on the conviction and sentence on 1 December 2014**.**

35. The alleged *Lubanga* "reparations order" of 7 August 2012 was nothing of the sort. It was a decision establishing the principles and procedures to be applied to reparations, which did not make an order against Mr. Lubanga, but went only as far as finding that the TFV was "well placed to determine the appropriate form of reparations and to implement them".[57] This "reparations order" then approved a 5-point plan proposed by the TFV, which reveals the embryonic stage of the reparations process at that date. The Trial Chamber recommended "that a multidisciplinary team of experts [be] retained to provide assistance to the Court". Then, these experts, together with the TFV, OPCV and the Registry, were ordered to "establish which localities ought to be involved in the reparations process in the present case", after which the Chamber ordered that there should be "a process of consultation" and then an "assessment of harm". After these steps had been completed, the Trial Chamber then ordered there should be "public debates in order to explain the reparations principles and procedures", after which there should be "the collection of

[55] *See also* ICC-01/09-01/11-2038, paras. 6-7.
[56] ICC-01/05-01/08-3522, para. 15.
[57] ICC-01/04-01/06-2904, para. 266.

proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Trial Chamber for its approval".[58]

36. The *Lubanga* "reparations order" of 7 August 2012, demonstrates that reparations procedure was, at that stage, in its infancy. No meaningful steps had been taken.

37. In reality, the reparations order in Lubanga was only issued on 3 March 2015,[59] **after** the Appeal Judgment on 1 December 2014.[60] No monetary order was imposed on Mr. Lubanga prior to the confirmation of his conviction. The *Bemba* Trial Chamber's attempt to justify its imposition of a monetary order on Mr. Bemba prior to the Appeals Judgment on the basis of incorrectly characterizing the Lubanga decision of 7 August 2012 as a "reparations order" is an error. The Trial Chamber also ignores the practice in the *Katanga* case, whereby the reparations process only commenced after the parties withdrew their appeals, and the conviction became final.[61]

38. This Trial Chamber is rushing to render a reparations order before the conviction can be altered, and has utterly mischaracterized the reparations process in the *Lubanga* case to find a justification for doing so. This alone would lead a reasonable observer, properly informed, to apprehend bias. However, as discussed below, many other indicia of a pre-disposition against Mr. Bemba exist.

(ii) The misleading utterances of the Trial Chamber concerning allegedly "preparatory" and "preliminary" steps give rise to a reasonable apprehension of bias

39. In his first request to suspend the reparations process, filed on 3 April 2017, Mr. Bemba argued that (i) if he were to be acquitted on appeal, or if the Appeals Chamber modified the extent of his conviction (by, for example determining that Mr. Bemba had no knowledge of the commission of murder, or that MLC soldiers committed no offences in a particular location), any work carried out up till that point would have been wasted;[62] (ii) the Chambers and Appeals Chamber of this Court have previously taken into account a pending appeal and reserved their orders or decisions until after the conviction decision;[63] and (iii)

[58] ICC-01/04-01/06-2904, para. 282.
[59] ICC-01/04-01/06-3129-AnxA.
[60] ICC-01/04-01/06-3121-Red.
[61] ICC-01/04-01/07-3497; ICC-01/04-01/07-3498; ICC-01/04-01/07-3507.
[62] ICC-01/05-01/08-3513, paras. 22, 24.
[63] ICC-01/05-01/08-3513, paras. 27-29.

there was no reason to suppose that any period of suspension would be lengthy or prejudicial to victims claiming reparations in particular.[64]

40. On 5 May 2017, the Trial Chamber rejected Mr. Bemba's request. Its decision emphasised the "preparatory" and "preliminary" nature of the steps it intended to take prior to an Appeal Judgment being rendered, stating that:[65]

> In order to be able to address these elements adequately in its reparations order, the Chamber needs to take a number of **preparatory steps…** The reparations proceedings in the present case are, in contrast, **at a preliminary stage**. All currently envisaged steps in these proceedings, such as the appointment of experts, **are of a preparatory nature**

41. Relying on its ruling that the Trial Chamber would take only preliminary and preparatory steps prior to an Appeals Chamber judgment being rendered, Mr. Bemba did not seek leave to appeal this decision.

42. However, on 2 June 2017, the Trial Chamber appointed experts on reparations, who were ordered to file their final reports by 15 September 2017. The parties, including Mr. Bemba were ordered to make submissions on these expert reports, and "**any other last arguments** they wish for the Chamber to consider **before rendering its reparations order**, on **16 October 2017."**[66]

43. Mr. Bemba sought leave to appeal this order,[67] on the basis that (i) taking all steps up and unto the issuance of a reparations order could not be considered "preliminary" or "preparatory"; (ii) Mr. Bemba was being required to file submissions on the reparations order without knowing the scope of his conviction; and (iii) the Chamber's timetable prevented Mr. Bemba from filing meaningful submissions on reparations by, for example, instructing experts of his own.[68]

[64] ICC-01/05-01/08-3513, para. 30.
[65] ICC-01/05-01/08-3522, paras. 13, 16.
[66] ICC-01/05-01/08-3532-Conf.
[67] ICC-01/05-01/08-3534.
[68] ICC-01/05-01/08-3534, para. 29.

44. On 29 June 2017, the Trial Chamber rejected the Defence request for leave to appeal. It attempted to circumvent its previous undertaking as to "preliminary" and "preparatory" steps with the following logic:[69]

> The terms "preparatory" and "preliminary" in the Suspension Decision **simply constitute references to the stages of the reparations proceedings leading up to the issuance of a reparations order**. The Chamber therefore reiterates its position set out in the Suspension Decision and stresses that any steps taken during the reparation stage up until the issuance of a reparations order are of "preparatory" nature. This includes the order in the Impugned Decision to make submissions on the expert reports, the submissions of other participants or **any other last arguments** the Defence wishes the Chamber to consider before rendering its reparations order.

45. This reasoning defies logic. "Preliminary" in its plain meaning is synonymous with "rudimentary" or "initial" or "prefatory" or "opening". It does not mean "every step up to the issuance of the final product". Nor can this reasoning be reconciled with the language of the Suspension Decision itself, which was clear that "all **currently envisaged steps** in these proceedings, such as the **appointment** of experts, are of a preparatory nature."[70] "Currently envisaged steps" necessarily implies the existence of other steps which are not "currently envisaged". Had the Trial Chamber intended to say that "we consider ourselves entitled not only to take all steps prior to the issuance of a reparations order, but also to issue a reparations order prior to the finalisation of Mr. Bemba's conviction", it could (and should) have said so. It did not. It made explicit reference to "preparatory steps" such as the "**appointment** of experts".[71] In light of what was to follow, this was misleading, and would lead a reasonable observer, properly informed, to apprehend bias against Mr. Bemba on the part of a Trial Chamber determined to conclude the reparations process regardless of the disingenuous logic it would need to employ to do so.

[69] ICC-01/05-01/08-3536, para. 9.
[70] ICC-01/05-01/08-3522, paras. 13, 16.
[71] ICC-01/05-01/08-3522, paras. 13, 16.

(iii) The failure of the Trial Chamber to include Mr. Bemba in *ex parte* meetings concerning reparations and/or disclose the report of these meetings within a reasonable period gives rise to a reasonable apprehension of bias

46. On 21 and 22 December 2016, meetings were held between the TFV, [REDACTED], and the parties to the reparations proceedings in the present case, including "representatives of Chambers", the LRV and "OTP staff involved in the Bemba case".[72] The Defence was neither invited nor informed.[73]

47. According to a summary of the meeting, it "provided the forum for an intense exchange" and "allowed all participants to discuss the opportunities and constraints in administering reparations in the Bemba case" in light of factors including "the prevailing contextual and operational circumstances in the CAR".[74]

48. In plain terms, this was a meeting between the parties and participants in the Bemba case and the Chamber, in the absence of Mr. Bemba, to discuss matters directly relevant to his rights and interests in the reparations phase, including matters on which all parties had previously made submissions.

49. For example, Mr. Bemba has made submissions in front of the Trial Chamber concerning the appropriate scope of potential reparations.[75] At the 21 December meeting, the parties discussed, in front of the Chamber, "factual elements emanating from the criminal trial that will define certain aspects of the scope of reparations". They also had an opportunity to discuss "the geographical scope for reparations", arguing that they should be set "wide and flexible", directly countering Mr. Bemba's prior submissions on the appropriate geographical scope.[76] "Several meeting participants" were reported as agreeing that there seems to be "a clear awareness in the CAR whether someone was a victim of the MLC troops, as opposed to being a victim of any of the other forces involved in the 2002-2003 conflict".[77] This submission runs directly counter to Mr. Bemba's position at trial,[78] and on appeal.[79]

[72] ICC-01/05-01/08-3493-Conf, para. 2.
[73] ICC-01/05-01/08-3493-Conf-AnxA, p. 2.
[74] ICC-01/05-01/08-3493-Conf-AnxA, p. 2.
[75] ICC-01/05-01/08-3458-Conf, paras. 43-74.
[76] ICC-01/05-01/08-3458-Conf, paras. 81-83, 94.
[77] ICC-01/05-01/08-3493-Conf-AnxA, p. 7.
[78] ICC-01/05-01/08-3121-Conf, paras. 521-593.
[79] ICC-01/05-01/08-3434-Conf, paras. 462-493.

50. Perhaps, however, the most contentious and pressing issue in these reparations proceedings is the question of eligibility of victims. Governed by Article 75 of the Statute, Rule 94 of the Rules, and informed by Principle 8 of the *Lubanga* Principles, the designation of an individual as an eligible victim for the purpose of reparations is a precise exercise. Mr. Bemba has previously made submissions on the application of the relevant statutory framework to the reparations proceedings in his case, emphasising the distinction in the Rules and Regulations between victims participating in the proceedings under Rule 89, and those requesting reparations under Rule 94.[80] Mr. Bemba submitted that "[t]he statutory distinction could not be clearer, and precludes any argument that the 5,229 people authorised to participate in the present proceedings are also participating for the purposes of reparations."[81] No decision or order has been rendered on the eligibility of victims to reparations in this case.

51. During the 21 December meeting, it is recorded that the participants noted that "a particular feature of the Bemba case was the high number of more than 5000 participating victims." Further, "**meeting participants also agreed** that victims who had been granted the status of "participating victims" were not the totality of all potentially eligible victims who may have a rightful access to reparations." Most extraordinary, was the request from the representative of Chambers to [REDACTED] to "**estimate of a total number of all potentially eligible victims in the Bemba case**".[82]

52. Few procedures could be more antithetical to fair proceedings than denying one party the opportunity to comment on submissions by the other party to the decider of fact. The Prosecution, LRV, TFV, and OPCV had an opportunity to make further arguments and engage in discussions in front of the Chamber on critical issues, behind the back of the Defence, making an utter mockery of Mr. Bemba's public inclusion in the process thus far.

53. There is no indication that the Chamber's representatives sat silently during this process. The TFV Reports refers to "all participants" and "meeting participants" participating in discussions.[83] If the TFV Report is accurate, the LRV and Prosecution would

[80] ICC-01/05-01/08-3458-Conf, paras. 51-59.
[81] ICC-01/05-01/08-3458-Conf, para. 54.
[82] ICC-01/05-01/08-3493-Conf-AnxA, p. 10.
[83] ICC-01/05-01/08-3493-Conf-AnxA, pp. 1, 6.

have been given an insight into the current thinking of the Chamber on issues that are yet to be adjudicated, further undermining the fairness of the reparations process. Mr. Bemba has no way of assessing the accuracy of the TFV Report, or if other discussions were conducted but not recorded.

54. The parties also had an opportunity to discuss the state of Mr. Bemba's personal finances with the Chamber. It is recorded that "meeting participants worried that the financial assets of Mr. Bemba could be significantly less significant than anticipated **and hoped for**."[84]

55. None of these discussions should have been conducted *ex parte*. There was no basis to keep this material from Mr. Bemba, as illustrated by its (eventual) disclosure to the Defence six months later. No argument can be made, given this re-classification, that this is information to which the Defence should not have had access. Clearly, it should have.

56. Moreover, it appears that this *ex parte* access to the Trial Chamber is part of a more generalised practice in these proceedings. The Defence has, to date, identified 16 other filings missing from the case file since the delivery of the Trial Judgment on 21 March 2016, that have been presumably filed as *ex parte* to the Chamber in the reparations process.[85] This is an extraordinary number. The Defence has repeatedly raised its concerns with the Trial Chamber.[86] It has received no response.

57. Between the 21 December meeting, and the reclassification of the TFV Report in June 2017, Mr. Bemba filed further submissions on reparations. As noted above, on 3 April 2017, for example, he asked the Trial Chamber to suspend the reparations proceedings pending the issuance of the Appeal Judgment.[87] Mr. Bemba argued, *inter alia*, that the designation of experts could have budgetary implications for the Court, and the expenditure of this money was premature and unnecessarily costly if, for example, his conviction was overturned on appeal.[88] He was unable to make submissions on the cost of convening two-day meetings

[84] ICC-01/05-01/08-3493-Conf-AnxA, p. 8.
[85] ICC-01/05-01/08-3394; ICC-01/05-01/08-3492; ICC-01/05-01/08-3504; ICC-01/05-01/08-3510; ICC-01/05-01/08-3515; ICC-01/05-01/08-3521; ICC-01/05-01/08-3550; ICC-01/05-01/08-3552; ICC-01/05-01/08-3555; ICC-01/05-01/08-3556; ICC-01/05-01/08-3561; ICC-01/05-01/08-3562; ICC-01/05-01/08-3563; ICC-01/05-01/08-3566; ICC-01/05-01/08-3577; and ICC-01/05-01/08-3606.
[86] ICC-01/05-01/08-3538-Conf, para. 8; ICC-01/05-01/08-3525-Conf, fn. 19.
[87] ICC-01/05-01/08-3513.
[88] ICC-01/05-01/08-3513, paras. 25-26.

with external third parties such as [REDACTED], because the TFV Report was still improperly classified as "*ex parte*".

58. The failure of the Trial Chamber to ensure the fairness of the reparations proceedings by including the Defence in the 21 December meetings or – at a minimum – immediately disclosing the TFV Report when it was filed with the Trial Chamber in February 2017, gives rise to a reasonable perception of a pre-disposition against Mr. Bemba. More significantly, the reparations process in the *Bemba* case is fundamentally flawed as a result of the Trial Chamber's entertainment of *ex parte* submissions from a third party that were directly relevant to *sub judice* issues.

(iv) The design of the reparations procedure to preclude the Defence from being heard on the eligibility of the applicants demonstrates bias

59. The Defence has a right to make observations on each of the applicants for reparations, and whether they fall within the scope of Mr. Bemba's conviction, and thus can properly fall within an award for reparations in the present case.

60. In the *Katanga* case, the Trial Chamber recognised that the satisfaction of the five elements laid down by the Appeals Chamber in *Lubanga* required that each of the applicants for reparations be analysed individually, in light of the conviction against Mr. Katanga.[89] The Defence was afforded the opportunity to make observations, general and specific, on each of the applications filed for reparations.[90] These observations necessarily addressed whether the applicants fell within the scope of the conviction against Mr. Katanga.

61. Having analysed each of the applicants for reparations, and having taken into account the observations of the Defence on each, the Trial Chamber assessed that some of the applicants had "shown on a balance of probabilities that they are victims of the crimes of which Mr Katanga was convicted and accordingly, are entitled to reparations ordered by the Chamber in the case."[91] Others, had not, and were excluded from the reparations process.

[89] ICC-01/04-01/07-3728-tENG, para. 33.
[90] ICC-01/04-01/07-3728-tENG, para. 32.
[91] ICC-01/04-01/07-3728-tENG, para. 168.

62. The same rights were afforded to Mr. Al Mahdi. In that case, the Trial Chamber ordered the TFV to perform assessments of eligibility, but noted that "the Defence must be given an opportunity to make representations before the TFV assesses any applicant's eligibility. In assessing eligibility, the TFV may base itself only on information made available and to which the Defence has had an opportunity to access and respond."[92] The Chamber "considered it appropriate that Mr Al Mahdi be afforded an opportunity to present informed views and concerns regarding the individuals claiming to be owed individual reparations from him."[93]

63. By contrast, the Trial Chamber in the present case has deliberately excluded this central step from the reparations proceedings. Rather than providing Mr. Bemba with an opportunity to comment on whether the applicants for reparations fall within the scope of the conviction, the Trial Chamber has skipped this step entirely, notifying Mr. Bemba that he can file "a**ny other last arguments**" he wishes "**before rendering its reparations order**",[94] without him even being informed of who are the applicants for reparations in his case. As such, the Trial Chamber has circumvented this central step, and prevented Mr. Bemba from making submissions on eligibility; a right afforded to the other convicted persons before this Court. This is an error which not only demonstrates a pre-disposition against Mr. Bemba, but also a fundamental misapprehension of the reparations procedure.

(v) The Trial Chamber's experts have been permitted to act under the effective instruction of the LRV further giving rise to a reasonable apprehension of bias

64. On 14 July 2017, the Defence received an email from VPRS indicating that the experts had asked to meet with the Defence. They transmitted the following request from the experts to Mr. Bemba's Lead Counsel: "[REDACTED]."[95]

65. A meeting was scheduled, and Defence counsel arranged to be in The Hague to meet with the experts, as requested. On 17 July 2017, the VPRS sent a second email:[96]

[92] ICC-01/12-01/15-236, para. 146 (iii).
[93] ICC-01/12-01/15-236, para. 14 (iv).
[94] ICC-01/05-01/08-3532-Conf.
[95] Email from VPRS to the Defence sent on 14 July 2017, at 10:23.
[96] Email from VPRS to the Defence sent on 17 July 2017, at 10:51.

> Today Trial Chamber III informed the Registry that it does not authorise any meeting between the experts and the Chamber, parties and/or participants in the case.
>
> For this reason we regret to inform you that the below mentioned appointment for a meeting with the experts has to be cancelled. We apologise for any inconvenience this may have caused.

66. Despite this unequivocal injunction, the expert report filed in November 2017 revealed that the LRV had met the experts in breach of the Trial Chamber's order.[97] Indeed, it appears from the limited information available to the Defence, that the LRV accompanied the experts in Bangui, during their mission in the CAR.[98] The experts relied on their "discussions" with the LRV to form their conclusions on central issues, such as [REDACTED].[99] The *Addendum to the Expert Report*, filed on 16 February 2018, revealed that this contact had continued, with the experts relying on information provided "[REDACTED]", for example.[100]

67. Not being copied on any of this correspondence, the Defence cannot know whether the Trial Chamber was also in the loop. Regardless, it is clear that the Trial Chamber was aware of this contact at the latest by the date of the expert report in November 2017. The Trial Chamber then issued an "Order regarding follow-up matters arising from the expert report". in which it asked for more information (for example, a monetary amount reflecting Mr. Bemba's personal liability), and said nothing about the LRV's contempt of court, and took no steps to rectify the inherent unfairness resulting from one-sided contact with the experts in this case.[101]

68. Any reasonable outside observer would understand that a Trial Chamber who blocks the Defence from meeting with experts appointed to provide a report on reparations, and turns a blind eye to the opposing party's breach of its order and continued contact with the same experts, to have a pre-disposition against the Defence.

[97] ICC-01/05-01/08-3575-Conf-Anx-Red-Corr, para. 12.
[98] ICC-01/05-01/08-3575-Conf-Anx-Red-Corr, paras. 12, [REDACTED].
[99] ICC-01/05-01/08-3575-Conf-Anx-Red-Corr, para. [REDACTED].
[100] ICC-01/05-01/08-3607-Conf-Anx, p. 29.
[101] ICC-01/05-01/08-3588-Conf.

E. CONCLUSION

69. As noted above, the opinion of the accused as to the impartiality or otherwise of a Judge is a relevant consideration. The test provides that "mere feeling or suspicion of bias by the accused is insufficient; what is required is an objectively justified apprehension of bias, based on knowledge of all the relevant circumstances."[102]

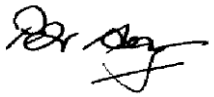
70. Mr. Bemba has a reasonably objective apprehension of bias on the part of the Trial Chamber. Being aware of all relevant circumstances, including the Trial Chamber's willingness to engage in *ex parte* discussions with all parties and stakeholders on the question of his personal liability for reparations, Mr. Bemba has a justifiable concern that a reparations order rendered by the Trial Chamber, particularly one which pre-dates the execution of his conviction, will be unfair. The circumstances outlined above mean that his overall apprehension as to an unfair reparations process is manifestly and objectively reasonable. He does not anticipate getting a fair hearing. Any reasonable observer would have the same apprehension.

71. As such, the Defence seises the Presidency with the present application to:

> **ORDER** the recusal of Trial Chamber III in its present composition from any further involvement in the reparations proceedings in his case.

The whole respectfully submitted.

[102] *Prosecutor v. Edouard Karemera et al*., ICTR-98-44-T, Decision on Motion by Karemera for Disqualification of Trial Judges, 17 May 2004, para. 9; *See also, Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189; *Prosecutor v. Karemera et al*., ICTR-98-44-T, Re. Application for the Disqualification Judge Mehmet Guney, 26 September 2000, paras. 8-9; *Prosecutor v. Nahimana et al*., ICTR-99-52-T, Oral Decision (TC), 19 September 2000, p. 10; *Prosecuror v. Nyiramasuhuko & Ntahobali*, ICTR-98-44-T, Determination of the Bureau in Terms of Rule 15(B), 7 June 2000, p. 5; *The Prosecutor v. Kabiligi*, ICTR-97-34-I, Decision on the Defence's Extremely Urgent Motion for Disqualification and Objection Based on Lack of Jurisdiction, 4 November 1999, p. 8.; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Motion for Disqualification of Judges, 28 May 2007, para. 7; *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, 14 June 2007, para. 10; *Prosecutor v. Karemera et al*., ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, 7 March 2008, para. 4; *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart); quoted in *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 195; *Prosecutor v. Brđanin & Talić*, IT-99-36-R 77, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, para. 9; *Prosecutor v. Sesay*, SCSL-2004-15-AR15, Decision on Defence motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 2004, para. 16; *Incal v. Turkey*, (2000) 29 E.H.R.R. 449 (E Ct HR), para. 71.



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Done at The Hague, The Netherlands, 9 March 2018