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THE PRESIDENCY

Before: Judge Chile Eboe-Osuji, President
Judge Robert Fremr, First Vice-President
Judge Marc Perrin de Brichambaut, Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public Redacted version of Filing ICC-01/05-01/08-3618

Response to the Defence Request for Trial Chamber III Recusal

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims (the “OPCV”), acting as legal representative of applicants for reparations submits that the Defence’s Request for recusal of Trial Chamber III (the “Chamber”)¹ amounts to yet another attempt to halt or suspend the reparations proceedings despite clear rulings from the Chamber in this regard.²

2. In addressing the requirements of the relevant provisions, the Principal Counsel contends that the Defence’s Request should be dismissed *in limine* based on a strict reading of article 41(2)(b) of the Rome Statute (the “Statute”) which appears to limit requests for disqualification to “persons being investigated or prosecuted” and not to convicted persons. She also posits that any request for disqualification must be approached from the principle that the impartiality of judges is presumed and that the threshold for overcoming said presumption is high.

3. Finally, in addressing the facts and circumstances forming the basis of the Request, the Principal Counsel argues that none of the submissions advanced by the Defence could have lead any reasonable observer, properly informed, to conclude for the existence of an appearance of bias against the convicted person on the part of

¹ See “Mr. Bemba’s request for recusal of Trial Chamber III from the reparations proceedings”, No. ICC-01/05-01/08-3611-Conf, 28 February 2018 (the “Defence’s Request”). A public redacted version of this submission was filed on 9 March 2018.

² See the “Decision on the Defence request for leave to appeal the decision appointing experts on reparations” (Trial Chamber III), No. ICC-01/05-01/08-3536, 29 June 2017; see also the “Decision on the Defence’s request to suspend the reparations proceedings” (Trial Chamber III), No. ICC-01/05-01/08-3522, 5 May 2017. See further the “Decision on requests for further amendments to the reparations timetable” (Trial Chamber III), No. ICC-01/05-01/08-3601-Red, 29 January 2018, in particular para. 9: “The Chamber considers that this aspect of the Defence Request [Adjournment sine die] represents an attempted re-litigation of the Chamber’s decision issued on 5 May 2017, in which it rejected the Defence’s request to suspend the reparations proceedings pending the outcome of the appeals proceedings.”; the “Decision on the Defence’s further request for a revision of the timetable for the filing of documents” (Trial Chamber III), No. ICC-01/05 01/08-3576, 22 November 2017; and the “Decision on the Defence request for an extension of time to file additional observations for reparations” (Trial Chamber III), No. ICC-01/05-01/08-3569, 8 November 2017.

the Chamber. Therefore, the Defence's Request is manifestly unfounded and should be dismissed.

II. PROCEDURAL BACKGROUND

4. On 11 July 2016, a newly composed Trial Chamber III was assigned to the Bemba case for the reparations proceedings.³

5. On 31 October 2016, the Prosecution,⁴ the Defence,⁵ the Trust Fund for Victims⁶ (the "TFV"), the Principal Counsel⁷ and the Legal Representative of Victims⁸ (jointly referred to as the "Legal Representatives") submitted their respective observations on reparations, as ordered by the Chamber.⁹

6. On 2 June 2017, the Chamber appointed four Experts to assist in the reparations proceedings and instructed them to file their report(s).¹⁰

³ See the "Decision replacing two judges in Trial Chamber III" (Presidency), No. ICC-01/05-01/08-3403 + AnxI and AnxII, 6 July 2016.

⁴ See the "Prosecution's Observations on Reparations", No. ICC-01/05-01/08-3454, 31 October 2016.

⁵ See the "Defence observations on reparations", No. ICC-01/05-01/08-3458-Red, 31 October 2016.

⁶ See the "Observations relevant to reparations", No. ICC-01/05-01/08-3457, 31 October 2016.

⁷ See the "Submissions relevant to reparations", No. ICC-01/05-01/08-3455, 31 October 2016, as well as the "Soumissions conjointes des Représentants légaux des victimes d'éléments d'informations supplémentaires en vue de l'Ordonnance en réparation", No. ICC-01/05-01/08-3581, 1st December 2017.

⁸ See the "Version publique expurgée des observations de la Représentante légale des victimes relativement aux réparations", No. ICC-01/05-01/08-3459-Red, 31 October 2016.

⁹ See the "Ordonnance portant demande d'observations relativement aux réparations" (Trial Chamber III), No. ICC-01/05-01/08-3410-tFRA, 22 July 2016. See also the "Order on the Requests for extension of time to file submissions relevant to reparations" (Trial Chamber III), No. ICC-01/05-01/08-3429, 25 August 2016; as well as the "Order on the Trust Fund for Victims' request for an extension of the time limit" (Trial Chamber III), No. ICC-01/05-01/08-3442, 7 October 2016, p. 5.

¹⁰ See the "Decision appointing experts on reparations" (Trial Chamber III), No. ICC-01/05-01/08-3532-Red, 2 June 2017.

7. On 20 November 2017, the Experts submitted their Joint Report on Reparations (the “Experts’ Report”)¹¹; on 16 February 2018, three of the four Experts filed an *Addendum* to said Report,¹² in accordance with an Order from the Chamber.¹³

8. On 1 December 2017, the Legal Representatives filed their Joint Additional Submissions on Reparations.¹⁴

9. On 31 January 2018, the Registry, following an Order by the Chamber, filed an update on the security situation in the Central African Republic (“CAR”).¹⁵

10. On 1 February 2018, [REDACTED].¹⁶

11. On 28 February 2018, the Legal Representatives¹⁷ and the Defence¹⁸ filed their respective Consolidated Observations on Reparations.¹⁹ On 7 March 2018, the TFCV submitted its Consolidated Observations on Reparations.²⁰

¹¹ See the “Transmission of Experts’ Joint Report pursuant to Trial Chamber Decision ICC-01/05-01/08-3559-Red of 30 August 2017”, No. ICC-01/05-01/08-3575, 20 November 2017.

¹² See the “Transmission of Addendum to the Expert Report Pursuant to the Trial Chamber’s Decision ICC-01/05-01/08-3601-Conf of 29 January 2018”, No. ICC-01/05-01/08-3607-Conf + Conf-Anx, 16 February 2018.

¹³ See the “Order regarding follow-up matters arising from Expert Report ICC-01/05-01/08-3575-Anx-Corr2-Red” (Trial Chamber III), No. ICC-01/05-01/08-3588-Red, 22 December 2017.

¹⁴ See the “Soumissions conjointes des Représentants légaux des victimes d’éléments d’informations supplémentaires en vue de l’Ordonnance en réparation”, *supra* note 7.

¹⁵ See the “Registry Report on the Security Situation in the Central African Republic”, No. ICC-01/05-01/08-3604-Conf, 31 January 2018.

¹⁶ [REDACTED].

¹⁷ See the “Consolidated Final Submissions on Reparations”, No. ICC-01/05-01/08-3610-Conf + Conf-Anx, 28 February 2018; [REDACTED].

¹⁸ See the “Defence consolidated submissions on reparations”, No. ICC-01/05-01/08-3609-Conf, 28 February 2018.

¹⁹ See the email sent on behalf of Trial Chamber III on 25 January 2018 at 11:52. See also the “Decision on requests for further amendments to the reparations timetable” (Trial Chamber III), No. ICC-01/05-01/08-3601-Red, 29 January 2018.

²⁰ See the email sent on behalf of the Trial Chamber III on 27 February 2018 at 15:43. See also the “Decision on the Trust Fund for Victims request for extension of time” (Trial Chamber III), No. ICC-01/05-01/08-3608 + Conf-AnxA, 28 February 2018.

12. The same day, the Defence filed a Request for recusal of Trial Chamber III from the reparations proceedings.²¹

13. On 8 March 2018, the Presidency in its former composition - with the exception of Judge Aluoch who excused herself and was replaced by Judge Monageng - issued a Decision ordering the Defence to clarify whether the Presidency should transmit the Request to the Plenary of Judges pursuant to article 42(2)(b) and (c) of the Rome Statute, noting that said provision does not grant any function to the Presidency to be directly seized of the matter.²²

14. On 13 March 2018, the Defence filed its "Submissions in relation to "Presidency decision concerning "Mr. Bemba's request for recusal of Trial Chamber III from the reparations proceedings"",²³ clarifying that the Presidency should transmit its initial Request to the Plenary of Judges to be treated as a request for disqualification pursuant to article 42(2)(b) and (c) of the Rome Statute.

15. On 16 March 2018, the newly elected Presidency decided that as of 20 March 2018 the composition of Trial Chamber III should be as follows: Judge Henderson, Judge Chung and Judge Prost, having Judge Aluoch reached the end of her mandate.²⁴

16. The Principal Counsel notes that the Presidency in its former composition dismissed *in limine* the Defence's Request prior to the expiration of the deadline for

²¹ See the Defence's Request, *supra* note 1.

²² See the "Presidency decision concerning "Mr. Bemba's request for recusal of Trial Chamber III from the reparations proceedings"" (the Presidency), No. ICC-01/05-01/08-3615-Conf, reclassified as public on 9 March 2018 + confidential Annexes I and II, 8 March 2018.

²³ See the "Submissions in relation to "Presidency decision concerning "Mr. Bemba's request for recusal of Trial Chamber III from the reparations proceedings"", No. ICC-01/05-01/08-3616, 13 March 2018.

²⁴ See the "Decision assigning judges to divisions and recomposing Chambers" (Presidency), No. ICC-01/05-01/08-3617, 16 March 2018, p. 7.

filing responses. Therefore, she understands that her right to file a response has re-start running from the day of the notification of the Defence's submission in relation to the Presidency's decision. Consequently, she files hereby her submission in response to the Defence's Request should the Presidency decides to transmit the latter to the Plenary of the Judges.

III. CONFIDENTIALITY

17. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this submission is filed confidentially following the classification chosen by the Defence. A public redacted version will be filed in due course.

IV. OBSERVATIONS IN RESPONSE

18. As a preliminary matter, the Principal Counsel underlines that the Defence's Request constitutes but another attempt to delay and postpone the ongoing reparations' proceedings, reflecting its mere disagreement with the Chamber's approach on the matter. The Defence has indeed previously submitted arguments supporting a suspension of the reparations proceedings on three occasions between 2017 and 2018.²⁵ Said arguments were systematically dismissed by the Chamber.²⁶

19. The Principal Counsel will, firstly, address the requirements of the relevant provisions and she will, then, discuss the factual arguments on which the Defence bases its Request to conclude that it should be dismissed as unfounded.

²⁵ See the "Defence request for a further extension of time for Final Submissions on reparations", No. ICC-01/05-01/08-3595-Red, 16 January 2018; the "Mr. Bemba's request for leave to appeal the "Decision appointing experts on reparations", ICC-01/05-01/08-3532-Conf", No. ICC-01/05-01/08-3534, 12 June 2017; and the "Defence's Observations on Trial Chamber III's order inviting submissions on experts, ICC-01/05-01/08-3500-Conf", No. ICC-01/05-01/08-3513, 3 April 2017.

²⁶ See the Decisions of Trial Chamber III quoted *supra* in note 2.

1) The Defence's Request should be dismissed *in limine*

20. The Principal Counsel submits that the Defence's Request should be dismissed *in limine* based on a strict reading of article 41(2)(b) of the Statute which appears to limit requests for disqualification to "persons being investigated or prosecuted" and not to convicted persons.

21. In as much as the Principal Counsel appreciates that the impartiality principle established by the Statute should apply to all phases of a proceeding before the Court, she submits that the interest of fairness and the equality of arms rather plead in favour of such a strict reading in the current instance.²⁷ Indeed, despite the fact that at the reparations stage, the Legal Representatives of Victims are parties, so far they were not allowed to bring a request for disqualification in similar contexts.²⁸ Should this rule be uphold, the convicted person would be put in a more favourable position than his or her responding party in the procedure.

22. Additionally, the Principal Counsel notes that the time-period chosen by the Defence to enter such a request adequately (for the Defence) corresponded to the Presidency's change of composition. In this regard, the Principal Counsel notes that such an unfortunate timing already *de facto* prejudices the victims' interests and right to expeditious proceedings.

²⁷ See the "Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of The Prosecutor v. Thomas Lubanga Dyilo", No. ICC-01/04-01/06-3154-AnxI (Plenary of the Judges), 3 August 2015, para. 34.

²⁸ See the "Annex to: Notification of the decision on the application of the legal representative for victims for the disqualification of a Judge in case ICC-01/04-01/07" (Plenary of the Judges), No. ICC-01/04-01/07-3504-Anx, 22 July 2014, para. 41.

2) The Defence's Request is unfounded and should be dismissed

a) Requirements of article 41 of the Rome Statute

23. In accordance with the practice of the Court, *"there is a strong presumption of impartiality attaching to a judge that is not easily rebutted"*²⁹ and according to which proceedings concerning the disqualification of a judge are exceptional in their nature.³⁰

24. Furthermore, *"each judge has a responsibility to consider whether his or her impartiality might reasonably be doubted"*³¹ in compliance with rule 35 of the Rules. Said provision clearly imposes to a judge to make a request to be excused should she or he has a reason to believe that a ground for disqualification exists.³² The Principal Counsel notes that none of the concerned judges made such a request;³³ and that in recomposing the Chambers, the newly elected Presidency maintained the designation of two of the three Judges formerly composing the Chamber (having Judge Aluoch completed her mandate), after consulting with the judges and taking into consideration the previous involvement of each judge in cases and situations, as well as the experience and expertise of each of them.³⁴

25. Therefore, any request for disqualification must be approached from the principle that the impartiality of judges is presumed and that the threshold for overcoming said presumption is high.

²⁹ *Idem*, para. 40.

³⁰ *Ibidem*, para. 45.

³¹ See the "Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of The Prosecutor v. Thomas Lubanga Dyilo", *supra* note 27, para. 35.

³² See the "Annex to: Notification of the decision on the application of the legal representative for victims for the disqualification of a Judge in case ICC-01/04-01/07", *supra* note 28, para. 45.

³³ See the "Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of The Prosecutor v. Thomas Lubanga Dyilo", *supra* note 27, para. 35.

³⁴ See the "Decision assigning judges to divisions and recomposing Chambers", *supra* note 24, p. 3.

26. In particular, article 41 of 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”. Although grounds for disqualification set forth in article 41 of the Statute and in rule 34 of the Rules appear to constitute a non-exhaustive list, the Defence did not even attempt in its Request to substantiate on any of the grounds mentioned therein.

27. The Defence does not argue in its Request the actual existence of bias from any of the Judges, but rather the existence of an appearance of bias. In this regard, the Plenary of the Judges has previously established that “it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the appearance of grounds to doubt his or her impartiality will be sufficient.”³⁵ According to the Court’s jurisprudence to date, in determining whether there is an objective appearance of bias, consideration “of whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias” is required.³⁶ Furthermore, 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.”” Differently worded, “the correct stand-point of appreciation of the matter is from the perspective of the average by-stander who is fully informed of the circumstances [...] not solely from the perspective of the complaining party.”³⁷ In accordance with various national jurisprudence, such a stand-point of appreciation

³⁵ See the “Annex to: Notification of the decision on the application of the legal representative for victims for the disqualification of a Judge in case ICC-01/04-01/07”, *supra* note 28, para. 38.

³⁶ *Idem*, para. 39 [Emphasis added].

³⁷ *Ibidem*, para. 59 (in Concurring Separate Opinion of Judge Eboe-Osuji) [Emphasis added].

describes “a fair-minded and informed member of the public”³⁸ or “reasonable and right minded persons”.³⁹

28. The Principal Counsel posits that the Defence appears to be properly informed and to have knowledge of all the relevant circumstances in as much as the latter form the basis of its Request. However, the Principal Counsel submits that the Defence’s reading or interpretation of the relevant circumstances clearly misapprehends the facts. Whether the Defence willingly distorts the facts presented in its Request or whether its position flows from a misunderstanding of the relevant circumstances, the Principal Counsel submits that the Request is unfounded and should be dismissed.

b) Grounds of bias alleged by the Defence

29. The Defence submits that the Chamber’s “conduct of the reparations proceedings [...] discloses a pattern of rulings from which a reasonable perception of a pre-disposition against [Mr. Bemba] necessarily arises”.⁴⁰ In this regard, the Defence alleges five grounds which - it purports - cast doubt as to the existence of bias in the part of the three (now two) Judges formerly composing the Chamber.

30. The Defence **firstly** argues that the Chamber’s “evident determination” to issue a reparations order before the adjudication of Mr. Bemba’s appeal gives rise to a reasonable apprehension of bias.⁴¹ In particular, the Defence submits that there is no basis for issuing a reparations order until a person is finally convicted⁴² and

³⁸ *Ibid*, para. 59, footnote 67 referring to Lord Denning notes in *Metropolitan Properties Co (FGC) Ltd v. Lannon* [1969] 1 QB 577 at 599 (UK) (in Concurring Separate Opinion of Judge Eboe-Osuji).

³⁹ *Ibid*, para. 59, footnote 67 referring to *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369, 394 (Canada) (in Concurring Separate Opinion of Judge Eboe-Osuji).

⁴⁰ See the Defence’s Request, *supra* note 1, para. 1.

⁴¹ *Idem*, para. 2 and paras. 27-38.

⁴² *Ibidem*, para. 31.

opposes the example of the *Lubanga* jurisprudence, arguing that the order issued in said case on 7 August 2012 was not a reparations order.⁴³

31. In this regard, the Principal Counsel submits that Mr. Bemba is convicted and sentenced despite any pending appeal against said conviction and sentencing.⁴⁴ Moreover, contrary to the Defence's assertion,⁴⁵ the reparations proceedings in the current case did not reach any advanced stage because the Chamber so far only took preparatory steps.⁴⁶ There is no information yet⁴⁷ about whether the victims who were granted the right to participate throughout the trial proceedings will be automatically considered for reparations; no information about how the Chamber will address the pending applications for reparations filed in the record of the case throughout the trial proceedings; no information as to whether new applicants will be allowed to file an application for reparations; no indication as to the types and modalities of reparations that will be eventually ordered in this case. Therefore, the stage reached at this point in time is still very embryonic - contrary to the views of the Defence.

32. The Defence also misrepresents the ruling in the *Lubanga* case which in fact was a reparations order as subsequently clarified by the Appeals Chamber in its Judgement rendered on 14 December 2012.⁴⁸

⁴³ *Ibid*, paras. 34-37.

⁴⁴ See the "Decision on the Defence's request to suspend the reparations proceedings", *supra* note 2, para. 20.

⁴⁵ See the Defence's Request, *supra* note 1, para. 30.

⁴⁶ See the "Decision on the Defence's request to suspend the reparations proceedings", *supra* note 2, paras. 15-16; see also the "Decision on the Defence request for leave to appeal the decision appointing experts on reparations", *supra* note 2, para. 9.

⁴⁷ See the Defence's Request, *supra* note 1, para. 50: "No decision or order has been rendered on the eligibility of victims to reparations in this case".

⁴⁸ See the "Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings" (Appeals Chamber), No. ICC-01/04-01/06-2953, 14 December 2012.

33. Finally, whether or not the Chamber would issue any reparations order before the adjudication of the pending appeals, as shown in the *Lubanga* case, and contrary to what the Defence suggests, does not entail that such order would be implemented just yet. In fact, to the contrary and quite explicitly, the Chamber already confirmed that “[t]he 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. The execution of a reparations order on the other hand depends upon a conviction. Therefore, a reparations order can only be implemented once the conviction decision itself becomes executable, i.e. when it has been confirmed on appeal”.⁴⁹ Victims have been waiting for a very long time - 10 years - to see any steps being taken in concretely recognising their sufferings and harms suffered from the crimes for which Mr Bemba has been convicted and it appears only legitimate to make all efforts to ensure that the implementation of reparations could start as soon as possible once the appeals will be adjudicated. In fact, the almost two years spent in starting the reparations process shows how slow and cumbersome such a process is, leaving no doubt as to the duty of the Chamber to launch the process in order to uphold its obligations to comply and protect the paramount principle of “*efficient and expeditious proceedings, taking into account the ultimate goal of reparations proceedings and victims’ rights.*”⁵⁰

34. **Secondly**, the Defence argues that the misleading utterances of the Chamber concerning allegedly “preparatory” or “preliminary” steps give rise to a reasonable apprehension of bias. In particular, the Defence contends that the initial ruling of the Chamber on the Defence’s application for suspension of the reparations proceedings was misleading, which in turn would explain the reason why the

⁴⁹ See the “Decision on the Defence’s request to suspend the reparations proceedings”, *supra* note 2, para. 15; see also the “Decision on the Defence request for leave to appeal the decision appointing experts on reparations”, *supra* note 2, para. 13.

⁵⁰ See the “Decision on the Defence’s request to suspend the reparations proceedings”, *supra* note 2, paras. 15, 19 and 22.

Defence did not appeal it.⁵¹ The Principal Counsel submits that the Defence is simply attempting to justify now why it should not be considered foreclosed to use a right it previously chose not to use, based on a fallacious reading of the Chamber's order.⁵²

35. Indeed, nothing in the Chamber's position was either unclear or was modified in subsequent rulings, contrary to what the Defence alleges.

36. Furthermore, the Defence argued, in its first application to suspend the reparations proceedings, that there was no reason to suppose that any period of suspension would be lengthy or prejudicial to victims claiming reparations in particular.⁵³ The Principal Counsel can only observe that such an assertion was made almost one year ago, which to all accounts from the victim's perspective undoubtedly is lengthy and prejudicial. As far as the arguments on the appointment of experts are concerned,⁵⁴ in its ruling, the Chamber did not state that the preparatory steps undertaken will not lead to the issuance of a reparations order. To the contrary, the Chamber, entertaining the Defence's argument, carefully explained the following: *"In order to be able to address these elements adequately in its reparations order, the Chamber needs to take a number of preparatory steps";*⁵⁵ *"[t]he 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. The execution of a reparations order on the other hand depends upon a conviction. Therefore, a reparations order can only be implemented once the conviction decision itself becomes executable, i.e. when it has been confirmed on appeal."*⁵⁶

⁵¹ See the Defence's Request, *supra* note 1, para. 41.

⁵² *Idem*, para. 2 and paras. 39-45.

⁵³ *Ibidem*, para. 39. See also the "Defence's Observations on Trial Chamber III's order inviting submissions on experts, ICC-01/05-01/08-3500-Conf", *supra* note 25, para. 30.

⁵⁴ See the Defence's Request, *supra* note 1, para. 42.

⁵⁵ See the "Decision on the Defence's request to suspend the reparations proceedings", *supra* note 2, para. 13.

⁵⁶ *Idem*, para. 15.

37. It appears, therefore, that the Chamber clearly distinguished between the issuance of a reparations order and its execution and implementation, consequently indicating to the parties that the preliminary steps to be undertaken may lead to the issuance of such an order prior to the adjudication of the appeals.

38. It is consequently with great surprise that the Principal Counsel reads the Defence's allegation that "[h]ad 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'".⁵⁷ The Principal Counsel submits that the Chamber's initial ruling was crystal clear and that its subsequent decisions, simply reiterating the same position,⁵⁸ could in no way be read as misleading.

39. **Thirdly**, the Defence argues that the Chamber's failure to include Mr Bemba in *ex parte* meetings concerning reparations and/or to disclose the report of these meetings within a reasonable period gives rise to a reasonable apprehension of bias. In particular, the Defence indicates that meetings were held between representatives of the Chamber, the TFV, [REDACTED], the Legal Representatives and OTP staff involved in the case in the absence of the Defence in order to discuss matters directly relevant to Mr. Bemba's rights and interests in the reparations phase.⁵⁹

40. The Principal Counsel submits that this assertion is incorrect, and easily verifiable by the Defence and any other objective observer, by reading the report of these meetings. Contrary to what the Defence alleges, the TFV organised informal meetings between the persons mentioned herein and [REDACTED] only to share

⁵⁷ See the Defence's Request, *supra* note 1, para. 45.

⁵⁸ See the "Decision on the Defence request for leave to appeal the decision appointing experts on reparations", *supra* note 2, para. 9.

⁵⁹ See the Defence's Request, *supra* note 1, paras. 4-5 and 46-58.

information about their respective mandates. The Principal Counsel underlines that no *ex parte* meetings were held by the Chamber with any of the relevant parties or [REDACTED] on the issue of reparations in the course of these meetings. As mentioned in the Chamber's Decision: "*These meetings were held, at the initiative of the TFV, in the context of the ongoing reparations proceedings, [REDACTED]*."⁶⁰

41. Moreover, the Principal Counsel notes that the Report of said meetings prepared by the TFV was disclosed by the latter on 1 February 2017, reclassified by the Chamber - from *ex parte* to confidential - on 23 June 2017, and finally made public (in redacted version) on 16 August 2017 following a request made by the Defence. The Legal Representatives were given access to this Report the same day as the Defence and were not aware until then of the extent of all the meetings. For having attended such a meeting, the Principal Counsel can only confirm that the aim of it appeared to be an introduction into – in her case – the OPCV [REDACTED] respective mandates, in general terms, in the context of reparations proceedings notably. The Principal Counsel understood from the meeting that the TFV was rather attempting to [REDACTED] than anything else substantial. She believes that the assertion of the Defence according to which the other parties [REDACTED] were given in this context "*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*"⁶¹ not only is incorrect, but also constitutes an obvious misapprehension by the Defence of the information conveyed in the Report, willingly, or not.

42. The Principal Counsel underlines that, not only said informal meeting was not a forum to legally argue anything nor to engage in discussions before the

⁶⁰ See the "Decision on the Defence's Request for reclassification of ICC-01/05-01/08-3493-Conf and its annexes" (Trial Chamber III), No. ICC-01/05-01/08-3547-Red, 26 July 2017, para. 1 [Emphasis added].

⁶¹ See the Defence's Request, *supra* note 1, para. 52.

Chamber - since representatives of the Chamber were not present in such meetings as already stated – but also further notes that the information shared was not of a confidential nature, as illustrated by the Report. She consequently fails to understand why and how the mention of these elements – examples of which are given by the Defence in its Request and are reproduced as follows - could have infringed any of Mr. Bemba's rights: *"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";*⁶² *"a particular feature of the Bemba case was the high number of more than 5000 participating victims";*⁶³ *"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";*⁶⁴ *"meeting participants worried that the financial assets of Mr. Bemba could be significantly less significant than anticipated and hoped for."*⁶⁵

43. In fact, from the Defence's own admission, the fact that it did not participate in these meetings in itself did not constitute an issue with regard to the fairness of the reparations proceedings, but rather the late disclosure of the Report could have.⁶⁶ To the contrary, the Principal Counsel notes that, if the TFV's intention was different than [REDACTED] and rather to start *ex parte* discussions with the Chamber on core reparations issues, the Fund would not have filed a subsequent Report, as agreed by the Defence in its own Request.⁶⁷ Finally, and additionally, the Principal Counsel emphasises that the existence of *ex parte* meetings does not *per se* automatically constitute an issue which violates the fair trial rights of a convicted person.⁶⁸ She

⁶² See the Defence's Request, *supra* note 1, para. 49. [REDACTED].

⁶³ See the Defence's Request, *supra* note 1, para. 51. [REDACTED].

⁶⁴ *Idem*.

⁶⁵ See the Defence's Request, *supra* note 1, para. 54. [REDACTED].

⁶⁶ See the Defence's Request, *supra* note 1, para. 58.

⁶⁷ *Idem*, para. 55.

⁶⁸ *Ibidem*, paras. 22-26, 56 and 58.

highlights that *ex parte* proceedings are exceptional in nature and limited to circumstances which find a legal basis in the ICC's legal framework.⁶⁹ The party or participant using such level of classification for its communication with the Chamber ought to justify its legal basis and factual explanation clearly and the Chamber retains a strict control of it and must ensure its proportionality and assess any potential prejudice to the Defence.⁷⁰ The Principal Counsel notes that the Chamber ensured the proportionality of the classification requested by the TFV by making accessible to the parties the Report of the relevant proceedings at a later stage. The Principal Counsel submits that, by so doing, the Chamber limited the duration and impact of the concerned *ex parte* proceedings in order to ensure that the latter would not undermine the fairness of the proceedings.

44. **Fourthly**, the Defence contends that the design of the reparations procedure to preclude the Defence from being heard on the eligibility of the applicants demonstrates bias. In particular, the Defence indicates that the Chamber did not safeguard its right to make submissions on each of the applicants for reparations and thus made impermissible procedural short-cut offensive to the rights of a convicted person.⁷¹ Such an assertion is again plainly incorrect. Contrary to what the Defence alleges, and as confirmed in its most recent Consolidated Submissions on reparations,⁷² the Chamber has not yet given any indication as to the methodology that will be put in place in order to determine the eligibility of victims for reparations. Therefore, the Principal Counsel fails to see how the Defence, who is well aware of these circumstances, can still argue in good-faith that not only it was not given an opportunity to comment on this issue, but also that the Chamber's

⁶⁹ See article 72 of the Rome Statute; rules 74, 81, 83 and 88 of the Rules of Procedures and Evidence; and Regulations 23*bis* and 24*bis* of the Regulations of the Court.

⁷⁰ See *inter alia*, the "Decision on Defence request for stay of proceedings with prejudice to the Prosecution" (Trial Chamber VI), No. ICC-01/04-02/06-1883, 28 April 2017; and the "Decision on the Procedure to be Adopted for *Ex Parte* Proceedings" (Trial Chamber I), No. ICC-01/04-01/06-1058, 6 December 2007.

⁷¹ See the Defence's Request, *supra* note 1, paras. 6 and 59-63.

⁷² See the "Defence consolidated submissions on reparations", *supra* note 18, paras. 40 *et seq.*

decisions in the process already preclude it from doing so. Moreover, the Principal Counsel notes that the Defence already did provide observations on each of the 5229 victims' applications of victims so far participating at trial.

45. **Fifthly, and finally,** the Defence contends that the Experts have been permitted to act under the instruction of the Legal Representatives further giving rise to a reasonable apprehension of bias. In particular, the Defence contends that the Legal Representatives accompanied the Experts in Bangui and maintained contact with them in violation of a Chamber's order; and infer that they influenced the Report – placing them in contempt of court, while Mr. Bemba was denied access to the same Experts.⁷³

46. The Principal Counsel strongly refutes such serious allegations. In accordance with the Chamber's order to the Registry to assist the Experts in discharging their mandate, the Legal Representatives were contacted by the Registry in order to facilitate meetings between their clients and the Experts. Said meetings could not have occurred in the absence of the respective legal representative and it is only in this specific and limited context that the Legal Representatives "met" with the Experts. The role of the Legal Representatives was limited to contact their clients and secure their consent to meet with the Experts. After the submission of the Report, and having the Chamber requested an *Addendum* to said Report, the Registry contacted the Legal Representatives again in order to relay some questions the Experts had regarding the situation of their respective clients. As shown by the exchange of correspondence available to the Defence, the Legal Representative could not answer the Experts' questions.

47. In any case, the Defence's arguments in this regard are plainly specious. Indeed, as apparent from both Legal Representatives' Consolidated Submissions on

⁷³ See the Defence's Request, *supra* note 1, paras. 7 and 64-68.

Reparations,⁷⁴ the latter strongly believe that many of the Experts' recommendations are ill-conceived and inappropriate in the context of this case – confirming once more, if necessary, that the Experts did not rely on any of their submissions – provided, not as the Defence alleges via any direct forbidden contacts, but contained in their previous submissions to the Chamber.

48. Based on the information discussed above, the Principal Counsel submits that no reasonable observer would or even could have the same apprehension as purported by the Defence – in good or bad faith – and that no appearances of bias existed against any of the Judges currently composing the Chamber.

49. The Principal Counsel respectfully requests the Presidency to consider the paramount principle of expeditious proceedings and the correlative rights of the victims of this case in relation to the reparations proceedings in entertaining promptly the Defence's Request.

Respectfully submitted.



Paolina Massidda
Principal Counsel

Dated this 1st day of June 2018

At The Hague, The Netherlands

⁷⁴ See the "Consolidated Final Submissions on Reparations" [REDACTED], *supra* note 17.