

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **27 June 2017**

THE APPEALS CHAMBER

Before:

**Judge Howard Morrison, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Sanji 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 ICC-01/04-01/07-3746-Conf

Public Redacted Version of Document in Support of the Appeal against Trial Chamber II's "Ordonnance de réparation en vertu de l'article 75 du Statut"

Source: Office of Public Counsel for Victims

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims - acting as Legal Representative of a number of victims (the “Legal Representative”) affected by the Order on Reparations issued by Trial Chamber II (the “Chamber”) on 24 March 2017 - submits that the “Ordonnance de réparation en vertu de l’article 75 du Statut” (the “Impugned Decision”)¹ should be reversed since the Chamber committed a procedural error by not appointing a lawyer for victims a/0016/08, a/0029/08, a/0033/08, a/0159/08, a/0167/08, a/0175/08, a/0176/08, a/0203/08, a/0214/08, a/0216/08, a/0231/08, a/0398/08, a/0401/08, a/0402/08, a/0527/08, a/0005/09, a/0067/09, a/0074/09, a/0083/09, a/0112/09, a/0115/09, a/0117/09, a/0156/09, a/0162/09, a/0218/09, a/0232/09, a/0308/09, a/0320/09, a/0321/09, a/0327/09, a/0385/09, and a/0387/09 (the “Concerned Victims”), immediately after having granted the request by the previous legal representative to terminate his mandate in respect of the above mentioned individuals.

2. Said procedural error or the Chamber’s failure to ensure continuous legal representation deprived the Concerned Victims of their right to effectively participate in the reparations proceedings leading to the issuance of the Impugned Decision, through their legal representative, in accordance with article 68(3) of the Rome Statute (the “Statute”) and resulted in unfairness towards them at a highly critical stage of the proceedings. The cumulative effects of said procedural error materially affected the Chamber’s factual findings and had a significant impact upon the outcome of the Impugned Decision relating to the Concerned Victims’ claims for reparations.

3. Consequently, the Legal Representative contends that it is incumbent upon the Appeals Chamber, pursuant to rule 153 of the Rules of Procedure and Evidence (the “Rules”), to fulfil the Court’s reparations responsibilities under article 75 of the

¹ See the “Ordonnance de réparation en vertu de l’article 75 du Statut (Trial Chamber II)”, No. ICC-01/04-01/07-3728, 24 March 2017 (the “Impugned Decision”).

Statute *in lieu* of the Trial Chamber. In this regard, the Appeals Chamber should allow the Concerned Victims to present additional evidence to complete their applications for reparations and subsequently rule anew on their claims.

II. PROCEDURAL HISTORY

4. On 10 June 2008 and 5 August 2009 respectively, the Concerned Victims were authorised to participate in the proceedings.²

5. On 7 March 2014, the Chamber in its previous composition issued, by majority, the “Judgment pursuant to article 74 of the Statute” (the “Judgement”).³ On 9 April 2014, the Prosecution and the Defence filed their respective notices of appeal against the Judgement.⁴

6. On 23 May 2014, the Chamber, by majority, issued its decision on the sentence pursuant to article 76 of the Statute.⁵ On 25 June 2014, the Prosecution and the Defence discontinued their appeals against the Judgement.⁶

² See the “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case” (Pre-Trial Chamber II), No. ICC-01/04-01/07-578-Conf, 10 June 2008, para. 76; and the “Corrigendum of Operative part of the Decision on the 345 applications for participation as victims in the proceedings” (Trial Chamber II), No. ICC-01/04-01/07-1347-Corr-tENG, 5 August 2009, pp. 5-6. See also the “Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims” (Trial Chamber II), No. ICC-01/04-01/07-1491-Conf-tENG, 23 September 2009.

³ See the “Judgment pursuant to article 74 of the Statute” (Trial Chamber II), No. ICC-01/04-01/07-3436, 7 March 2014, and the “Minority Opinion of Judge Christine Van den Wyngaert”, No. ICC-01/04-01/07-3436-Anx1 (the “Judgement”).

⁴ See the “Prosecution’s Appeal against Trial Chamber II’s ‘Jugement rendu en application de l’article 74 du Statut’”, No. ICC-01/04-01/07-3462, 9 April 2014 and “Defence Notice of Appeal against the decision of conviction ‘Jugement rendu en application de l’article 74 du Statut’ rendered by Trial Chamber II, 7 March 2014”, No. ICC-01/04-01/07-3459, 9 April 2014.

⁵ See the “Decision on Sentence pursuant to article 76 of the Statute” (Trial Chamber II), No. ICC-01/04-01/07-3484-tENG, 23 May 2014, and the “Dissenting opinion of Judge Christine Van den Wyngaert”, No. ICC-01/04-01/07-3484-Anx1, 23 May 2014.

⁶ See the “Notice of Discontinuance of the Prosecution’s Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga”, No. ICC-01/04-01/07-3498, 25 June 2014, and the “Defence Notice of Discontinuance of Appeal against the ‘Jugement rendu en application de l’article 74 du Statut’ rendered by Trial Chamber II on 7 April 2014”, No. ICC-01/04-01/07-3497, 25 June 2014.

7. On 27 August 2014, following a request⁷ by the then appointed Legal Representative of Victims (“the Former Legal Representative”), the Chamber noted that “*in the victims’ application for participation and/or reparation received, there is limited information as to the harm suffered as a result of the crimes and the reparations measures sought by applicants. In addition, the large majority of these applications were received before April 2009*”.⁸ The Chamber thus considered it necessary to receive additional and up-to-date information in order to make a fully informed decision and ordered the Registry to contact the victims and submit a report, in close consultation with the Former Legal Representative, setting out detailed information with respect to the victims who requested reparations.⁹

8. On 16 December 2014, the Registry filed its report on the results of the consultations held with 305 victims, including a table containing information on the victims who were consulted and the reparations measures sought.¹⁰

9. On 8 January 2015, the Former Legal Representative filed *proprio moto* observations on reparations.¹¹

10. On 1 April 2015, the Chamber ordered the Defence, the Former Legal Representative, the Prosecutor, the Registry and the Trust Fund for Victims to submit their observations on (a) the principles for reparations; and (b) the scope and extent

⁷ See the “Requête sollicitant la fixation d’un calendrier en vue de permettre aux victimes de soumettre leurs observations sur les réparations (Articles 68, 75 et 76 du Statut)”, No. ICC-01/04-01/07-3507, 21 August 2014.

⁸ See the “Order instructing the Registry to report on applications for reparations” (Trial Chamber II), No. ICC-01/04-01/07-3508, 27 August 2014, para. 7 (Emphasis added).

⁹ *Idem*, para. 8 and p. 6.

¹⁰ See the “Registry Report on Applications for Reparations in accordance with Trial Chamber II’s Order of 27 August 2014”, No. ICC-01/04-01/07-3512-Anx1-Red2 and ICC-01/04-01/07-3512-Conf-Exp-Anx2-Corr, 16 December 2014 (a confidential redacted version was filed on 31 March 2015, see No. ICC-01/04-01/07-3512-Conf-Exp-Anx2-Corr-Red).

¹¹ See the “Observations des victimes sur les réparations (Article 68(3) et 75 du Statut; Règles 89 à 93 et 97 du Règlement de procédure et de preuve)”, No. ICC-01/04-01/07-3514-Conf, 8 January 2015 (a public redacted version was filed on 27 January 2015 and notified on 28 January 2015, see No. ICC-01/04-01/07-3514-Red).

of any damage, loss or injury to, or in respect of, victims, as well as the appropriate types and modalities of reparations.¹²

11. On 8 May 2015, the Chamber decided to order, *inter alia*, the Former Legal Representative, in consultation with the Registry, to file consolidated documents for all participating victims and any other information deemed necessary, including, in particular, information attesting the extent of the harm suffered from and the causal link between the alleged harm and the crime committed.¹³

12. On 24 March 2016, the Former Legal Representative filed an application seeking the Chamber's authorization to terminate his mandate of representation in respect of [REDACTED] (the "First Request for Withdrawal").¹⁴ [REDACTED].¹⁵ [REDACTED].¹⁶

13. On 18 May 2016, the Chamber rendered its decision on the First Request for Withdrawal and granted the Former Legal Representative's request in relation to [REDACTED] (the "First Decision on Withdrawal").¹⁷ As for the Concerned Victims, the Chamber indicated that [REDACTED].¹⁸ Consequently, the Chamber decided, *inter alia*, to not terminate the Former Legal Representative's mandate with regards to the Concerned Victims.¹⁹

¹² See the "Order instructing the parties and participants to file observations in respect of the reparations proceedings" (Trial Chamber II), No. ICC-01/04-01/07-3532-tENG, 1 April 2015, p. 6.

¹³ See the "Decision on the 'Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve' and future stages of the proceedings" (Trial Chamber II), No. ICC-01/04-01/07-3546-tENG, 8 May 2015, paras. 17-18, and p. 9.

¹⁴ See the "Rectificatif de la Demande de retrait de mandat du Représentant légal relativement à certaines victimes ayant été autorisées à participer à la procédure", No. ICC-01/04-01/07-3670-Conf-Corr, 24 March 2016 (the "First Request for Withdrawal").

¹⁵ *Idem*, paras. 16-26.

¹⁶ *Ibidem*, paras. 27-31.

¹⁷ See the "Décision relative à la demande de retrait de mandat du Représentant légal des Victimes" (Trial Chamber II), No. ICC-01/04-01/07-3689-Conf, 18 May 2016 (the "First Decision on Withdrawal").

¹⁸ *Idem*, paras. 13-20.

¹⁹ *Ibidem*, para. 22.

14. On 27 May 2016, the Former Legal Representative filed his second request to terminate his mandate (the “Second Request for Withdrawal”) in respect of the Concerned Victims, [REDACTED].²⁰ In addition, [REDACTED].²¹

15. On 31 May 2016, the applications for reparations of the Concerned Victims were transmitted to the Chamber and the Defence.²²

16. On 9 August 2016, the Chamber issued the “Order instructing the parties and the Trust Fund for Victims to file observations on the monetary value of the alleged harm” in order to establish Mr Katanga’s responsibility.²³

²⁰ See the “Observations suivant la Décision n°3689 relative à la demande de retrait de mandat du Représentant légal”, No. ICC-01/04-01/07-3694-Conf, 27 May 2016 paras. 8-10 (the “Second Request for Withdrawal”).

²¹ *Idem*, paras. 11-16.

²² See the “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”, No. ICC-01/04-01/07-3695-Conf-Exp-Anx1 and ICC-01/04-01/07-3695-Conf-Anx1-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx2 and ICC-01/04-01/07-3695-Conf-Anx2-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx3 and ICC-01/04-01/07-3695-Conf-Anx3-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx4 and ICC-01/04-01/07-3695-Conf-Anx4-Red, 31 May 2016, No. ICC-01/04-01/07-3695-Conf-Exp-Anx6 and ICC-01/04-01/07-3695-Conf-Anx6-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx7 and ICC-01/04-01/07-3695-Conf-Anx7-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx9 and ICC-01/04-01/07-3695-Conf-Anx9-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx10 and ICC-01/04-01/07-3695-Conf-Anx10-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx11 and ICC-01/04-01/07-3695-Conf-Anx11-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx12 and ICC-01/04-01/07-3695-Conf-Anx12-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx17 and ICC-01/04-01/07-3695-Conf-Anx17-Red, 31 May 2016, No. ICC-01/04-01/07-3695-Conf-Exp-Anx18 and ICC-01/04-01/07-3695-Conf-Anx18-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx19 and ICC-01/04-01/07-3695-Conf-Anx19-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx20 and ICC-01/04-01/07-3695-Conf-Anx20-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx22 and ICC-01/04-01/07-3695-Conf-Anx22-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx23 and ICC-01/04-01/07-3695-Conf-Anx23-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx25 and ICC-01/04-01/07-3695-Conf-Anx25-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx29 and ICC-01/04-01/07-3695-Conf-Anx29-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx39 and ICC-01/04-01/07-3695-Conf-Anx39-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx40 and ICC-01/04-01/07-3695-Conf-Anx40-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx41 and ICC-01/04-01/07-3695-Conf-Anx41-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx42 and ICC-01/04-01/07-3695-Conf-Anx42-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx13 and ICC-01/04-01/07-3695-Conf-Anx13-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx1 and ICC-01/04-01/07-3695-Conf-Anx16-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx24 and ICC-01/04-01/07-3695-Conf-Anx24-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx26 and ICC-01/04-01/07-3695-Conf-Anx26-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx30 and ICC-01/04-01/07-3695-Conf-Anx30-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx31 and ICC-01/04-01/07-3695-Conf-Anx31-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx32 and ICC-01/04-01/07-3695-Conf-Anx32-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx37 and ICC-01/04-01/07-3695-Conf-Anx37-Red, No. ICC-01/04-01/07-3695-Conf-Exp-Anx38 and ICC-01/04-01/07-3695-Conf-Anx38-Red, 31 May 2016.

17. On 6 September 2016, the Chamber issued the “Second decision on the Legal Representative of the Victims’ request for termination of the representation agreement” (the “Second Decision on Withdrawal”),²⁴ [REDACTED].²⁵ As regard the legal representation of the Concerned Victims, the Chamber considered that [REDACTED].²⁶

18. On 30 September 2016, the Former Legal Representative²⁷, the Defence²⁸ and the Trust Fund for Victims²⁹ submitted their observations on the monetary value of the harm suffered from by the victims.

19. On 8 December 2016, the Former Legal Representative submitted his observations on the modalities of reparations and requested the Chamber to hold a hearing on the matter.³⁰ On 30 December 2016, the Defence filed a response to said observations.³¹

²³ See the “Order instructing the parties and the Trust Fund for Victims to file observations on the monetary value of the alleged harm” (Trial Chamber II), No. ICC-01/04-01/07-3702-tENG, 9 August 2016, paras. 6 and 9.

²⁴ See the “Second decision on the Legal Representative of the Victims’ request for termination of the representation agreement” (Trial Chamber II), No. ICC-01/04-01/07-3706-Conf-tENG, 6 September 2016 (the “Second Decision on Withdrawal”).

²⁵ *Idem*, para. 11.

²⁶ *Ibidem*, para. 14.

²⁷ See the “Observations des victimes sur la valeur monétaire des préjudices allégués (Ordonnances ICC-01/04-01/07-3702 et ICC-01/04-01/07-3705)”, No. ICC-01/04-01/07-3713, 30 September 2016.

²⁸ See the “Defence Observations on the Monetary Value of the Alleged Harm”, No. ICC-01/04-01/07-3711, 30 September 2016.

²⁹ See the “Observations in response to the Trial Chamber’s order of 15 July 2016”, No. ICC-01/04-01/07-3714-Conf-Exp, 30 September 2016 (This filing is mentioned in the Impugned Decision. However, the Legal Representative does not have access to this document).

³⁰ See the “Propositions des victimes sur des modalités de réparation dans la présente affaire (Article 75 du Statut et norme 38-1-f du Règlement de la Cour)”, No. ICC-01/04-01/07-3720, 8 December 2016.

³¹ See the “Defence Response to the Propositions des victimes sur des modalités de réparation dans la présente affaire”, No. ICC-01/04-01/07-3722, 30 December 2016.

20. On 22 February 2017, the Chamber rejected the Former Legal Representative's request to hold a hearing on reparations.³² On the same day, the Chamber set the date for the delivery of the Impugned Decision.³³

21. On 15 March 2017, the Chamber decided, *inter alia*, to appoint the Legal Representative for the Concerned Victims (the "Appointment Decision").³⁴ In particular, the Chamber indicated that, due to the fact that the Impugned Decision is appealable by the victims pursuant to article 82(4) of the Statute and the Concerned Victims remain unrepresented, it was appropriate to designate a lawyer in accordance with regulations 80 and 81 of the Regulations of the Court.³⁵

22. On 24 March 2017, the Chamber issued the Impugned Decision partially granting and not granting reparations to the Concerned Victims.³⁶ In its assessment, the Chamber indicated that it was unable to determine their claims or grant full reparations because of the lack of sufficient evidence supporting the applications for reparations.³⁷

³² See the "Décision relative à la requête du représentant légal commun des victimes sollicitant la tenue d'une audience" (Trial Chamber II), No. ICC-01/04-01/07-3723, 22 February 2017.

³³ See the "Ordonnance fixant la date du prononcé de l'ordonnance de réparation" (Trial Chamber II), No. ICC-01/0401/07-3724, 22 February 2017.

³⁴ See the "Décision relative à la requête du Représentant légal commun des victimes du 2 mars 2017" (Trial Chamber II), No. ICC-01/04-01/07-3727, 15 March 2017 (the "Appointment Decision").

³⁵ *Idem*, paras. 13- 14.

³⁶ See the Impugned Decision, *supra* note 1, paras. 168-180.

³⁷ See the Impugned Decision, *supra* note 1, paras. 129, 168-180. See also, Annex II to the Impugned Decision, No. ICC-01/04-01/07-3728-Conf-Exp-AnxII. For a/0016/08 (paras. 2839-2845), a/0029/08 (paras. 2846-2853), a/0033/08 (paras. 2854-2861), a/0159/08 (paras. 2942-2948), a/0167/08 (paras. 2956-2962), a/0175/08, (paras. 2963-2972), a/0176/08 (paras. 2973-2979), a/0203/08 (paras. 2982-2984), a/0214/08 (paras. 2996-3002), a/0216/08 (paras. 3003-3010), a/0231/08 (paras. 3018-3024), a/0398/08 (paras. 3096-3103), a/0401/08 (paras. 3104-3110), a/0402/08 (paras. 3111-3118), a/0527/08 (paras. 3119-3125), a/0005/09 (paras. 2829-2831, 2832-2834), a/0067/09 (paras. 2874-2876), a/0074/09 (paras. 2883-2885), a/0083/09 (paras. 2898-2900), a/0112/09 (paras. 2907-2909, 2910-2912), a/0115/09 (paras. 2919-2921), a/0117/09 (paras. 2917-2919), a/0156/09 (paras. 2934-2940), a/0162/09 (paras. 2949-2955), a/0218/09 (paras. 3011-3017), a/0232/09, a/0308/09 (paras. 3048-3050) a/0320/09 (paras. 3051-3057), a/0321/09 (paras. 3058-3065), a/0327/09 (paras. 3066-3072), a/0385/09 (paras. 3080-3087) and a/0387/09 (paras. 3088-3095).

23. On 24 April 2017, the Former Legal Representative filed his notice of appeal against the Impugned Decision.³⁸ On 25 April 2017, the Legal Representative and the Defence filed their notices of appeal against the Impugned Decision.³⁹

24. Pursuant to Regulation 23bis(2) of the Regulations of the Court, this document is filed confidentially since it refers to documents currently classified as confidential. A public redacted version is filed simultaneously.

III. SUBMISSIONS ON THE GROUND OF APPEAL

Ground of appeal:

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

25. The Legal Representative addresses, first, the legal standard to be met in order to put forward a procedural error and, subsequently, argues how said procedural error affected the outcome of the proceedings and had a prejudicial impact on the rights of the Concerned Victims.

A. *Legal Standard on Procedural Error*

26. The Appeals Chamber has held that procedural errors “*may occur in the proceedings leading up to an impugned decision. Therefore, [...] an allegation of a procedural error may be based on events which occurred during the trial proceedings and pre-trial proceedings. However, [...] the Appeals Chamber will only reverse a conviction decision if it is materially affected by the procedural error. In that respect, the appellant needs to*

³⁸ See the “Acte d’appel relatif à l’Ordonnance de réparation en vertu de l’article 75 du Statut et son Annexe II”, No. ICC-01/04-01/07-3737, 24 April 2017.

³⁹ See the “Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute on 24 March 2017”, No. ICC-01/04-01/07-3739, 25 April 2017 and the “Defence Notice of Appeal against the Ordonnance de réparation en vertu de l’article 75 du Statut”, No. ICC-01/04-01/07-3738, 25 April 2017.

*demonstrate that, in the absence of the procedural error, the judgment would have substantially differed from the one rendered.”*⁴⁰

27. Since procedural errors may be raised in relation to rulings issued in the proceedings leading up to the impugned decision,⁴¹ the review of the Appeals Chamber should extend over the relevant proceedings as a whole.⁴² Moreover, procedural errors may arise from the procedural fairness of the impugned decision;⁴³ and from the exercise of the discretionary powers of Chambers.⁴⁴

28. When alleging a procedural error, an appellant has not only to identify the error, but also to indicate, with sufficient precision, how said error would have materially affected the impugned decision.⁴⁵

⁴⁰ See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 20. See also the “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009” (Appeals Chamber)”, No. ICC-02/04-01/05-408 OA3, 16 September 2009, paras. 46-48. The legal standard for reviewing procedural errors in reparation orders is the same. See the “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” (Appeals Chamber)”, No. ICC-01/04-01/06-3129 A2 A3, 03 March 2015, paras. 40 and 42.

⁴¹ See the “Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’” (Appeals Chamber), No. ICC-01/05-01/08-962-Corr OA3, 26 October 2010, para. 101. See also the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), No. ICC-01/04-02/12-271-Corr A, 07 April 2015, para. 247.

⁴² See ECCC, *Co-Prosecutors v. Nuon Chea, Khieu Samphan*, Appeal Judgement, Case File/Dossier No. 002/19-09-2007-ECCC/SC, 23 November 2016, para. 100.

⁴³ See the “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, *supra* note 40, para. 46. See also SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Judgment (Appeals Chamber), Case No. SCSL-04-15-A, 26 October 2009, para. 34. SCSL, *Prosecutor v. Moinina Fofana, Allieu Kondewa*, Judgment (Appeals Chamber), Case No. SCSL-04-14-A, 28 May 2008, para. 35.

⁴⁴ See SCSL, *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, the “Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone (Appeals Chamber)”, Case No. SCSL-2004-14-T, 11 September 2006, para. 5.

⁴⁵ See the “Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 (1) of the Statute” of 10 March 2009”, *supra* note 40, para. 48. See also, the “Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’”, *supra* note 41, para. 103.

B. *The procedural error made in the proceedings leading to the Impugned Decision*

29. The Legal Representative challenges the final outcome of the Impugned Decision which resulted in the total or partial rejection of the applications for reparations of the Concerned Victims, due, principally, to the lack of sufficient evidence to substantiate their claims.⁴⁶

30. Said outcome is erroneous because the Impugned Decision, as well as the proceedings leading up to the issuance of said ruling, was vitiated by the procedural error made by the Chamber when deciding not to appoint a new legal representative immediately after allowing the Former Legal Representative to terminate his mandate in respect of the Concerned Victims. In addition, said procedural error was not retrospectively rectified by the designation of the Legal Representative whose appointment was made at a late stage in the proceedings where the submission of evidence to substantiate the applications for reparations was not possible anymore. Such late appointment of counsel and the related absence of effective legal representation constitute a ground of appeal.⁴⁷

31. Indeed, the appointment of legal representative and the continuity of legal representation is the primary procedural mechanism allowing victims to participate in the proceedings pursuant to the legal framework of the Court. In particular, article 68(3) of the Statute and rules 90 to 93 of the Rules indicate that victims participate in the proceedings *through* their legal representative. Accordingly, Chambers are expected to make timely appointments of legal representatives to ensure the respect and the effectiveness of the rights of participating victims. In this sense, it is noteworthy that in the present case, Trial Chamber II, in its previous composition, held that “[...] *the participation of victims, through their legal representatives, must be*

⁴⁶ See para. 22 and footnote 37.

⁴⁷ See ICTY, *Prosecutor v. Nikola Šainovic et al.*, Judgement, (Appeals Chamber), Case No. IT-05-87-A, 23 January 2014, paras. 74-80 and ICTY, *Prosecutor v. Milan Lukic and Sredoje Lukic*, Judgement, Case No. IT-98-32/1-A, 4 December 2012, para. 24.

as meaningful as possible as opposed to being purely symbolic. To that end, the Chamber considers it of utmost importance that there is a steady and reliable flow of information about the proceedings to the victims and that there is real involvement by the victims in terms of instructing the legal representatives on how their interests should be represented” and “victims’ legal representatives must always be available to participate fully, even on short notice, in all stages of the proceedings when their clients’ interests are engaged” .⁴⁸

32. Ensuring continuity is extremely important in setting up systems of legal representation throughout the proceedings before the Court, equally for the suspects/accused⁴⁹ and the victims.⁵⁰ As Judge Ozaki stressed, the continuity of legal representation of victims should exist from the very commencement of proceedings before the Pre-Trial Chamber through the entire process and until the completion of any reparations phase.⁵¹ In this regard, the Appeals Chamber already ruled that there should be “no gaps” in the legal representation of victims as they must remain represented throughout the proceedings.⁵²

33. However, as recalled *supra*,⁵³ the Concerned Victims were left without any legal representation since the Second Decision on Withdrawal issued on 6 September 2016 until the time the Legal Representative was appointed on 15 March 2017. During the elapsed period of time between these two decisions, the Concerned Victims were unaware of the progress of the reparations proceedings and the procedural decisions affecting their personal interests. Moreover, and most

⁴⁸ See the “Order on the organisation of common legal representation of victims” (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2009, para. 10.

⁴⁹ See the “Decision on the ‘Demande d’autorisation de se retirer de la présente affaire en ma qualité de conseil de monsieur Aimé Kilolo Musamba’” (Pre-Trial Chamber II), No. ICC-01/05-01/13-110, 20 January 2014, p. 3.

⁵⁰ See the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber II), No. ICC-01/09-02/11-267, 26 August 2011, para. 81.

⁵¹ See the “Partly Dissenting Opinion of Judge Ozaki” to the “Second decision on victims’ participation in trial proceedings” (Trial Chamber VI), No. ICC-01/04-02/06-650-Anx, 16 June 2015, para. 1.

⁵² See the “Decision on the Notification regarding the Legal Representation of Participating Victims in the Appeal Proceedings” (Appeals Chamber), No. ICC-01/09-02/11-416 OA4, 23 April 2012, para. 17 (Emphasis added).

⁵³ See paras. 17 and 21.

importantly in the context of this appeal, the Concerned Victims were not able to meet with a counsel, to explain their situation and be advised on how eventually to provide sufficient evidence to support their applications for reparations. Indeed, as indicated by the Chamber in the Impugned Decision, the burden of proof rests upon the victims seeking reparations to submit sufficient evidence of their identities, the harm they suffered from and the causal link between the harm and the crime(s) for which the accused was found guilty.⁵⁴

34. The period of time preceding the issuance of the Impugned Decision, during which the Concerned Victims remained unrepresented, was particularly significant because during said period they could have still been in a position to complete their applications for reparations. At the time the Chamber issued its Second Decision on Withdrawal, it was aware of and acknowledged the fact that it was not in possession of adequate evidence supporting the claims for reparations of the Concerned Victims⁵⁵ and therefore it should have immediately appointed a new lawyer in order to allow them to complete their applications for reparation with sufficient evidence.

35. Indeed, as recalled *supra*,⁵⁶ the Former Legal Representative had clearly stated in his First and Second Requests for Withdrawal that [REDACTED]. Consequently, the Concerned Victims were *de facto* not represented since the First Request for Withdrawal in March 2016. Moreover, the Former Legal Representative reiterated [REDACTED].⁵⁷ In these circumstances, the Chamber should have been even more inclined to instantly appoint a new counsel in order for the Concerned Victims to be able to exercise their rights throughout the reparations proceedings.

36. As acknowledged by the Appeals Chamber, victims often encounter enormous difficulties in providing sufficient proof of the causal link between the

⁵⁴ See the Impugned Decision, *supra* note 1, para. 45.

⁵⁵ See paras. 7, 11, 14 and 17.

⁵⁶ See paras. 12 and 14.

⁵⁷ See the Second Request for Withdrawal, *supra* note 20, paras. 8-16.

crime and the harm they suffered from and thus Chambers must take into account said difficulties.⁵⁸ In this case, the Concerned Victims were clearly not in a position to submit all necessary materials regarding their applications for reparations after the Chamber terminated the Former Legal Representative's mandate. Indeed, when the latter was authorised to withdraw, the Chamber must have been aware of these shortcomings since it did *not* receive, as it had ordered, the additional or consolidated documents relating to the Concerned Victims' applications for reparations.⁵⁹

37. Moreover, while remaining unrepresented, the Concerned Victims were not informed about the progress of the reparations proceedings and, most importantly, they were unable to provide their counsel with information which could allow him or her to advise and help them in eventually completing their applications for reparations. Needless to say, victims are mostly lay-persons who are, by themselves, unable to access the Court due to obvious financial, logistical and linguistic reasons and they lack the professional expertise to navigate through complex legal, technical and factual matters related to reparations proceedings. This is especially true in the context of the present case. In the Impugned Decision, the Chamber itself acknowledged that, in determining the standard of proof applicable to the reparations proceedings, it took into account the difficulties faced by the victims in obtaining evidence in support of their claims for reparations, and even the destruction or unavailability of such evidence of an event which took place fourteen years ago.⁶⁰

38. In criminal proceedings, the replacement of counsel inevitably causes delay since it may prove difficult for a new counsel to proceed with his or her predecessor's strategy or even the new counsel may not be able to plead the case as

⁵⁸ See the "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", *supra* note 40, para. 81.

⁵⁹ See paras. 7, 11, 14 and 17.

⁶⁰ See the Impugned Decision, *supra* note 1, para. 47.

he or she might have done if appointed from the start.⁶¹ Therefore, a new legal representative for the Concerned Victims should have been appointed as soon as the Former Legal Representative was allowed to withdraw, or at least the Chamber should have indicated that the withdrawal of the Former Legal Representative would take effect only once a new legal representative is designated⁶² in order to avoid leaving the victims without any legal representation and ensure the fairness of the proceedings and the effectiveness of their rights in said proceedings. This course of events was pursued in other cases before the Court.⁶³

39. The direct result of the Chamber's error was that the Concerned Victims were left without any legal representation for approximately six months to, *de facto*, a year. Moreover, prior to the issuance of the Appointment Decision of 15 March 2017, the Chamber had already deliberated on the Impugned Decision as of 22 February 2017 and had already set the date for the delivery of the Impugned Decision on 24 March 2017. Thus, the Concerned Victims were afforded a new legal representative only eight days before the issuance of the Impugned Decision which is a period of time clearly insufficient for the newly appointed counsel to even contact her clients, given that all of them filed their applications for reparations in 2008 and 2009, and that some forms were even lacking contact details. Consequently, the Concerned Victims were given no real opportunity to defend their interests at a critical stage of the reparations proceedings.

⁶¹ See ICTY, *Prosecutor v. Jadranko Prlic et al*, Decision on Requests for Appointment of Counsel (Trial Chamber I), Case No. IT-04-74-PT, 30 July 2004, para. 31. See also ICTY, *Prosecutor v. Ante Gotovina, Ivan Cermak, Mladen Markac*, Decision on Miroslav Separovic's Interlocutory Appeal Against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct (Appeals Chamber), Case No. IT-06-90-AR73.1, 4 May 2007, para. 29, and ICTY, *Prosecutor v. Ante Gotovina, Ivan Cermak, Mladen Markac*, Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic (Appeals Chamber), Case No. IT-06-90-AR73.2, 29 June 2007, para. 55.

⁶² See the "Decision on Withdrawal of Counsel" (Pre-Trial Chamber I), No. ICC-01/11-01/11-620, 4 February 2016, para. 4.

⁶³ See the "Decision on the Requests for Withdrawal of the Legal Representative of Victims pursuant to Regulation 82 of the Regulations of the Court" (Pre-Trial Chamber I), No. ICC-01/13-54, 26 September 2016, para. 9, and "the Decision on the Request for Withdrawal of Counsel" (Pre-Trial Chamber I), No. ICC-01/13-56, 24 November 2016, para. 7. See also the "Decision on request for leave to withdraw" (Appeals Chamber), No. ICC-01/05-01/08-3413 A, 25 July 2016, para. 5.

40. Indeed, any lawyer is under a professional obligation to loyally advise clients as to their legal rights and obligations and the working of a given legal system, assist them in every appropriate way and further take legal action to protect their best interests.⁶⁴ Had the Chamber afforded legal representation for the Concerned Victims in a timely fashion, *i.e.* immediately after the withdrawal of the previous counsel, the Legal Representative will have easily focused on the analysis of the adequacy of their applications for reparations and would have concentrated her efforts to submit sufficient evidence of their identities, the harm suffered from and the causal link between the harm and the crime for which the accused was convicted. In other words, the outcome of the Impugned Decision would have been substantially different.

41. In this regard, the Legal Representative, having been able to contact her clients and to consult with them, is in the position to indicate – without pronouncing herself on the final outcome of the reparation claims – that the Concerned Victims shall be able to complete the majority, if not all, of their applications for reparations with sufficient evidence in a relatively short period of time. This fact also supports the contention that the Chamber’s error materially affected the outcome of the Impugned Decision.

42. Undoubtedly, in criminal litigation, there are important matters which necessitate the services of lawyers who have the expertise to explain their clients’ case, present evidence, develop oral and written arguments and counter the pleadings of opposing parties. In this regard, the European Court of Human Rights held that belated appointment of counsel constitutes a violation of fair trial rights.⁶⁵ Indeed, the personal participation of unrepresented individuals in criminal proceedings does not compensate for the absence of a qualified lawyer since, without

⁶⁴ See the United Nations Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990, paras. 13 and 15.

⁶⁵ See ECHR, *Artico v. Italy*, Judgment, (Application no. 6694/74), 13 May 1980, para. 34 and ECHR, *Tsonyo Tsonnev v. Bulgaria* (No. 2), Judgment, (Application no. 2376/03), 14 January 2010, para. 40.

the services of a legal professional, such persons are not in a position to make a useful contribution to the examination of various complex issues arising from their claims.⁶⁶ Yet, in the present case, the direct consequence of the Chamber's error was to deprive the Concerned Victims of their right to effectively participate, through their legal representative, in the reparations proceedings and present sufficient evidence in support of their claims for reparations.

43. The importance of designating a new legal representative immediately after having granted the withdrawal of the previous counsel should have been clear to the Chamber which even acknowledged in the Impugned Decision the vital role played by the Former Legal Representative in its analysis of the applications for reparations.⁶⁷ However, by virtue of the Chamber's choice of not timely appointing a new legal representative, the Concerned Victims were placed in a disadvantageous position compared to the other victims who remained represented by the Former Legal Representative throughout the reparations proceedings. While the Legal Representative was designated at a later stage, such belated assignment of counsel did not rectify the unfairness and the prejudice caused by this different treatment.⁶⁸

44. Certainly, the Chamber has a legal obligation to conduct fair and expeditious proceedings pursuant to article 64(2) of the Statute. In this regard, the Appeals Chamber held that the modalities of participation of victims under article 68(3) of the Statute must be specified by Trial Chambers in a way non-antagonistic to a fair trial.⁶⁹ Fair trial is, indeed, not a prerogative of accused persons alone, but something in

⁶⁶ See ECHR, *Pakelli v. Germany*, Judgment, (Application no. 8398/78), 25 April 1983, paras. 35–40.

⁶⁷ See the Impugned Decision, *supra* note 1, para. 69.

⁶⁸ See ECCC, *Co-Prosecutors v. Ieng Sary, Ieng Thirith, Nuonchea, Khieu Samphan*, Decision on Appeals Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications (The Pre-Trial Chamber), Separate and Partially Dissenting Opinion of Judge Catherine Marchi-Uhel, Case File No. 002/19-09-2007-ECCC/OCIJ, 24 June 2011, para. 21.

⁶⁹ See the "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007" (Appeals Chamber), No. ICC-01/04-556 OA4 OA5 OA6, 19 December 2008, para. 45.

which victims have a share⁷⁰ and fairness of the proceedings includes respect for the procedural rights of victims as guaranteed by the relevant statutory provisions of the Court.⁷¹

45. Therefore, had the Chamber assigned the Legal Representative immediately after the withdrawal of the previous counsel, the Concerned Victims will have been able to take part, through their lawyer, in many important litigations, as mentioned *supra*,⁷² leading to the issuance of the Impugned Decision - such as observations and responses on the monetary value for each type of harm, on the modalities of reparations, on the request to hold a hearing on reparations related matters - on an equal footing with the victims represented by the Former Legal Representative. Moreover, a timely appointed counsel will have had ample opportunity to supplement and complete the applications for reparations of the Concerned Victims and will have taken any other procedural steps necessary to represent the best interest of his/her clients.

46. In conclusion, the procedural error or the Chamber's failure to ensure continuous legal representation had a detrimental effect upon the Concerned Victims' ability to effectively participate in the reparations proceedings leading to the issuance of the Impugned Decision in accordance with article 68(3) of the Statute and resulted in unfairness towards them at a highly critical stage of the reparations proceedings. The cumulative effects of this procedural error materially affected the Chamber's factual findings and had a significant impact upon the outcome of the Impugned Decision relating to the Concerned Victims' claims for reparations.

⁷⁰ See the "Decision on the defence request for a temporary stay of proceedings" (Trial Chamber IV), Concurring Separate Opinion of Judge Eboe-Osuji, No. ICC-02/05-03/09-410, 26 October 2012, paras. 131-133.

⁷¹ See the "Decision on the Prosecutions Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (Pre-Trial Chamber I), No. ICC-01/04-135-tEN, 20 April 2006, para. 38.

⁷² See paras. 16, 18 and 19.

C. The Appeals Chamber's competence to correct the procedural error and grant reparations to the Concerned Victims

47. As shown *supra*, the Impugned Decision is erroneous with regard to the Concerned Victims who, in turn, should be granted appropriate reparations, after having been given a genuine opportunity to present or supplement anew their applications for reparations. Moreover, if this appeal is to be granted, the Legal Representative submits that the Appeals Chamber remains the appropriate *forum* to decide afresh on the merits of the applications for reparations, along with additional evidence, to be submitted by the Concerned Victims.

48. Article 83 of the Statute regulates appellate proceedings provided for in article 81, particularly, appeals against a conviction or sentence. Thus, there are no provisions in the Statute for appeals against reparations orders, although this *lacuna* is addressed by rule 153 of the Rules.⁷³ Rule 153(1) of the Rules provides that, “[t]he Appeals Chamber may confirm, reverse or amend a reparation order made under article 75”. Therefore, the Appeals Chamber can substitute its own finding for that of the Trial Chamber in respect of reparations orders. The Legal Representative submits that, since the Trial Chamber failed to discharge its obligations with regard to the Concerned Victims, it would not be sufficient for the Appeals Chamber simply to reverse the Impugned Decision. Rather, the Legal Representative submits that even though rule 153 of the Rules does not expressly set out the powers of the Appeals Chamber to request the presentation of additional evidence, the Appeals Chamber possesses the power to request the submission of all evidence that it considers necessary for making the final ruling on the matters on appeal pursuant to rule 149 of the Rules.⁷⁴ Indeed, said rule provides that “[p]arts 5 and 6 and rules governing

⁷³ See Brady (H.), “Appeal and Revision”, in Lee (R.S.) (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, p. 587.

⁷⁴ See Article 69(3) of the Statute in conjunction with Rule 149 of the Rules of Procedure and Evidence. See also, in this regard, Brady (H.), “Appeal and Revision”, in Lee (RS) (Ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, p. 588. See, in particular, the joint proposal by Australia and France on the provisions

proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber”.

49. Consequently, the Legal Representative contends that, given the procedural error committed by the Trial Chamber with regards to the Concerned Victims, it is incumbent upon the Appeals Chamber, pursuant to rule 153 of the Rules, to fulfil the Court’s reparations responsibilities under article 75 of the Statute *in lieu* of the Trial Chamber. In other words, the Legal Representative argues that the Appeals Chamber should implement the reparations proceedings, in particular, by (i) allowing the Concerned Victims to present additional evidence in support of their applications for reparations within a set period of time; (ii) examining anew the applications for reparations submitted by the Concerned Victims and issuing a decision on their merit in light of the additional evidence presented; and (iii) taking any other necessary measures in order to fully give effect to the Concerned Victims’ right to reparations, pursuant to article 75 of the Statute.

IV. CONCLUSION

For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to grant this appeal, to reverse the Impugned Decision with regards to the Concerned Victims and to implement reparations proceedings pursuant to article 75 of the Rome Statute requesting the Concerned Victims to supplement their applications for reparations and subsequently ruling anew on their claims.

for appeal proceedings, PCNICC/1999/WGRPE/DP.26 (29 July 1999), which subsequently served as the basis for the drafting of rule 153.

It is hereby certified that this document contains a total of 7,342 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.⁷⁵

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 27th day of June 2017

At The Hague, The Netherlands

⁷⁵ This statement (70 words), not itself included in the word count, follows the Appeals Chamber's direction. See No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32.