

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **15 May 2015**

TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Péter Kovács

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

PUBLIC

Registry's Observations pursuant to Order ICC-01/04-01/07-3532

Source: Registry

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

The Office of the Prosecutor

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Counsel for the Defence

Mr David Hooper

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

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REGISTRY

Registrar

Mr Herman von Hebel

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Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Trust Funds for Victims

Mr Pieter de Baan

The Registrar of the International Criminal Court (the “Court”);

NOTING the Report of the Registry on Applications for Reparations in the case *The Prosecutor v. Germain Katanga* (the “Case”), notified on 16 December 2014 (the “Registry’s Report”);¹

NOTING the Appeals Chamber’s Judgment on reparations’ principles and procedures in the case *The Prosecutor v. Thomas Lubanga Dyilo* (the “Lubanga Appeals Judgment”) and the Amended Order for Reparations (the “Lubanga Amended Order for Reparations”), notified on 3 March 2015;²

NOTING the Order of Trial Chamber II (the “Chamber”) notified on 1 April 2015 inviting the Defense, the Legal Representative of Victims (the “LRV”), the Registry, the Trust Fund for Victims (the “TFV”) and the Prosecutor to submit observations on 1) the applicability of the principles on reparations issued in the Lubanga Amended Order for Reparations in light of the circumstances of the Case; 2) the extent of damage, loss or injury caused to, or in respect of victims, as well as the appropriate types and modalities of reparations; and 3) any other questions on the Case, including the procedures that the Chamber may adopt, by 30 April 2015 at 4pm (the “Order”);³

NOTING the Chamber’s decision granting the TFV, the Defense, the LRV, the Registry, and the Prosecutor an extension of time to submit their Observations until 15 May at 4pm, notified on 24 April 2015;⁴

NOTING the Chamber’s decision ordering, *inter alia*, the LRV, in consultation with the Registry, to submit further information to support applications for reparations and new applications for reparations by 1 October 2015, notified on 8 May 2015 (the “Decision of 8 May 2015”);⁵

NOTING articles 68 (1) and 75 of the Rome Statute, rules 94 and 97 of the Rules of Procedure and Evidence (the “Rules”), regulation 88 of the Regulations of the Court,

¹ ICC-01/04-01/07-3512-Anx1-Red2.

² ICC-01/04-01/06-3129 and ICC-01/04-01/06-3129-AnxA.

³ ICC-01/04-01/07-3532, paras.10-16.

⁴ ICC-01/04-01/07-3541.

⁵ ICC-01/04-01/07-3546.

regulation 110 of the Regulations of the Registry and regulation 46 of the Regulations of the TFV (the “TFV Regulations”);

RESPECTFULLY SUBMITS:

I. Introduction

1. The Registry appreciates the opportunity to present observations on the questions outlined in the Chamber’s Order. Since the Registry submitted an extensive report on reparations in the Case in December 2014, it will limit itself at this point in the proceedings to make a few remarks on some of the questions raised by the Chamber.⁶ These will be mainly to highlight the amendments that are necessary to the Registry’s Report in light of the Lubanga Appeals Judgment and Lubanga’s Amended Order for Reparations, as well as some observations regarding how to assess the harm alleged in the applications for reparations submitted, or to be submitted.

II. Observations on some of the questions raised in paragraph 14 of the Chamber’s Order

Victims and Groups of Victims Eligible for Reparations (question i)

2. In light of the clarification provided in the Lubanga Appeals Judgment as regards collective reparation that “where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria are eligible”.⁷ The question arises as to what sort of verification or screening process will be required in order to satisfy rule 85 of the Rules and regulation 46 of the TFV Regulations where a collective award of reparations is made, and how, if at all, would this differ from a screening process that would be necessary in the event of an award of individual reparations. In the Registry’s Report, the

⁶ Chamber’s Order, para. 14.

⁷ Lubanga Appeals Judgment, para. 211.

Registry had assumed that collective reparations may not need to involve an application or registration process as such.⁸ This may no longer be correct, as some sort of verification process would clearly be required. The Registry does not propose a solution at this point, but raises the question for the Chamber's consideration, and refers to its previous observations on verification processes.⁹

3. The Registry notes in this regard that its comments on the difficulties often faced in drawing the line clearly between "individual" and "collective" awards for reparations remain valid, particularly when it comes to the practical aspects of verification.¹⁰ The Registry stands ready to assist the Chamber and the TFV in the design of an identification and verification process of potential victim beneficiaries of any collective and/or individual reparations awards.
4. As a consequence of the Appeals Chamber's ruling on this point, the Registry observes that in the recommendation in paragraph 94(f) of the Registry's Report, "community" should now be understood as "a group of victims"¹¹ that will each need to demonstrate a causal link (further addressed below) between the harm suffered and the crimes of which Mr. Katanga was found guilty.
5. Finally, the Registry notes the Appeals Chamber's reminder that such a requirement for an individualised verification should not be interpreted as precluding other members of the affected communities from being able to benefit from activities undertaken by the TFV under its assistance mandate.¹²

Identification of Victims and Submission of New Applications for Reparations (question ii)

6. The Registry notes the Decision of 8 May 2015 ordering applications for reparations to be submitted at the latest on 1st October 2015.¹³ The Registry and the LRV have begun consultations and will work together to identify potential

⁸ Registry's Report, Section VII, para 94(f).

⁹ See ICC-01/04-01/06-2806, including paras. 61, 66, 193 and 197.

¹⁰ See Generally paras. 88-90 of the Registry's Report.

¹¹ Lubanga Appeals Judgment, para. 212.

¹² On the contrary, the Appeals Chamber considered that "the meaningfulness of reparation programmes with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes for which Mr Lubanga was found guilty", Lubanga Appeals Judgment, para. 215.

¹³ Decision of 8 May 2015, operative paragraph page 10.

victims who may qualify for reparations in the Case and to provide them with the opportunity to apply for reparations if they wish to do so. This will include seeking the necessary information from them in light of, *inter alia*, the Registry's Report, the Lubanga Amended Order for Reparations and the Decision of 8 May 2015.

7. The Registry and the LRV have also begun consultations on how to work jointly to ensure that all documents related to applications for reparations, and any new application for reparations are submitted to the Registry for their respective transmissions, taking into account the 1st October 2015 deadline.

Standards of Proof and Causation (question iv)

8. The Registry notes the Appeals Chamber's finding that "the causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case"¹⁴ and that victims are required to provide "sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case."¹⁵ The Appeals Chamber went on to clarify that what is "sufficient" in terms of victims meeting the burden of proof will also depend upon the circumstances of the specific case and that "Trial Chambers should take into account any difficulties that are present from the circumstances of the case at hand."¹⁶ The Chamber specified that this would include the difficulties victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.¹⁷ The Appeals Chamber confirmed the standard of causation in *Lubanga* as a "but/for" relationship between the crime and the harm and a "proximate cause" test.¹⁸
9. In light of the indications noted below, the Registry believes it can already be concluded that the standard of proof and causal link should be no more demanding than that being applied in the *Lubanga* case.

¹⁴ Lubanga Appeals Judgment, para. 80.

¹⁵ *Id.*, para. 81.

¹⁶ *Id.*

¹⁷ Lubanga Amended Order for Reparations, para. 22.

¹⁸ *Id.*, para. 59.

10. The Registry notes that in the present case, Mr. Katanga was convicted of the war crimes of murder and attack on a civilian population, and of two property related crimes (pillage and destruction of property). The types of harm reported by the victims in the Case, which due to the difference in the crimes committed are not the same as in the *Lubanga* case, are set out in the Registry's Report. In paragraph 92 of its Report, the Registry mentions some of the difficulties faced by victims in providing documentary evidence to support their claims including official records. As several years have passed since most of the applications were presented, it seems likely that at this point, now some 12 years after the crimes occurred, it will only be more difficult for victims to produce supporting evidence.
11. The Registry further notes that based on information available so far, it can already be anticipated that a distinction may need to be made between two categories in terms of what can be expected that any supporting evidence will show when seeking to assess the extent of loss, damage or injury. The Registry would expect that in many cases it will be feasible to establish that harm occurred (noting the potential for presumptions to be made, at least for some types of harm such as death of a close family member), what type of harm, and the fact that it was linked to the crimes committed. On the other hand, it may be much more difficult to obtain evidence on the basis of which damage, loss and injury can be quantified for each victim individually. The Registry respectfully recommends that this be taken into account when the Chamber is considering what awards of reparations to make in this Case, including the possibility of standardised awards for particular types of harm as opposed to individually assessed awards. The Registry believes this could be achieved with the assistance of appropriately qualified experts, and would not necessarily go against the wishes of the victims as expressed during the Registry consultations in 2014.
12. In light of the evident difficulties faced by victims in providing supporting documentation, the Registry is currently researching this matter with a view to better understanding the reasons, and establishing what types of documentation

or other means might be available to applicants in practice, including from sources other than the victims themselves,¹⁹ to substantiate their requests for reparations. Once this exercise has been completed, the Registry will be in a better position to provide more informed observations on precisely what types of supporting evidence can be expected.²⁰

Modalities and Forms of Reparations (question vi)

13. The Registry will not repeat here its recommendations on types and modalities of reparations arising from the consultations carried out with victims. In this regard the Registry considers that the objectives of reparations articulated by the Appeals Chamber in *Lubanga* serve to reinforce the close link between the crime committed and the specific harm suffered by the victims. The Appeals Chamber identified among the objectives of reparations to “relieve the suffering caused by the serious crimes committed” and “afford justice to the victims by alleviating the consequences of the wrongful acts”.²¹ In light of the strong preference expressed by victims during the consultations to receive individual material benefit, the Registry reiterates the importance of ensuring that modalities and forms of reparation awarded in the Case, whether on an individual or a collective basis or both, address the harm suffered by the victims individually.²²
14. The Registry notes that an amendment is necessary to its recommendation in paragraph 94(i) of the Registry’s Report. The Appeals Chamber clarified that the Trial Chamber in *Lubanga* “erred in assuming control of the Trust Fund’s other resources’ instead of imposing liability on Mr. Lubanga” and that the “Trust Fund’s Board of Directors may decide whether to advance its resources in order

¹⁹The Registry notes that according to international practice among international claims processes, where claimants have difficulty in producing reliable evidence in support of claims, the tribunal or other body dealing with the claim may rely on independent sources of evidence including those that can be accessed directly by the tribunal itself. See *Howard M. Holtzmann and Edda Kristjansdottir ed., International Mass Claims Processes: legal and practical perspectives*, Oxford University, 2007, page 212. The Registry notes in this regard the possibility for the Chamber to rely on experts in rule 97 of the Rules.

²⁰ This will comprise a preliminary step in implementing the Chamber’s Decision of 8 May 2015.

²¹ *Lubanga Amended Order for Reparations*, para. 71.

²² The Registry also recalls para. 33 of the Amended Order for Reparations in which the Appeals Chamber states that collective reparations should be awarded in a way which addresses the harm suffered by the victims both individually and collectively.

to enable the implementation of the order for reparations.”²³ Consequently, the Registry respectfully amends its recommendation under paragraph 94(i) of the Report as follows: “Invite the TFV to consider advancing the resources it has set aside for the present case for the implementation, as appropriate, of individual and collective awards or reparations.”

Transmission of Requests for Reparations to the Trust Fund (question viii)

15. The Registry notes that the Lubanga Amended Order for Reparations instructs the Registry to seek the consent of the victims, through their LRV, to disclose their individual applications for reparations to TFV for the purpose of participation in the TFV’s eventual collective programme(s).²⁴ The Registry has held preliminary discussions with the LRV and suggests that should the Trial Chamber order the same to be done in the Case, the LRV will secure such consent from his clients, and will provide the Registry with a list of those victims who have provided their consent to the transmission of their applications to the TFV.²⁵ On the basis of such communication, the Registry would transmit the relevant application(s) to the TFV.



Marc Dubuisson, Director, Division of Court Services

per delegation of

Herman von Hebel, Registrar

Dated this 15 May 2015

At The Hague, The Netherlands

²³ Lubanga Appeals Judgment, para. 116.

²⁴ Lubanga Amended Order for Reparations, para. 73.

²⁵ As previously reported in ICC-01/04-01/07-3535-Corr, para. 2, in light of the fact that during the Consultation the victims answered, at length, multiple questions regarding reparations in the presence of their legal representative, the Registry respectfully submits that it is not advisable to organise meetings with victims again on the issue of reparations when there have been no developments in their case. Returning to victims solely for the purpose of obtaining their consent on a legal issue may only serve to cause frustration, create unrealistic expectations and impact on the well-being and dignity of the victims.