

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **26 June 2018**

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***

Confidential

**Decision on the Application of the Office of Public Counsel for Victims for a
Partial Amendment of the Order for Reparations Issued Pursuant to Article 75 of
the Rome Statute**

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

Legal Representatives of Victims

Mr Fidel Nsita Luvengika

Defence Counsel for Germain Katanga

Mr David Hooper

Ms Caroline Buisman

Office of Public Counsel for Victims

Ms Paolina Massidda

Trust Fund for Victims

Mr Pieter de Baan

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Esteban Peralta Losilla

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

TRIAL CHAMBER II ("Chamber") of the International Criminal Court ("Court") issues the following decision.

I. PROCEDURAL HISTORY

1. On 24 March 2017, the Chamber issued its "Order for Reparations pursuant to Article 75 of the Rome Statute", according victim status to 297 applicants for the purpose of reparations, and awarding both individual and specifically designed collective reparations ("Order for Reparations").¹
2. On 8 March 2018, the Appeals Chamber delivered its judgment on the appeals² against the Order for Reparations ("Judgment on Reparations").³
3. On 19 April 2018, the Office of Public Counsel for Victims ("OPCV") filed an application requesting, *inter alia*, an amendment of the Reparations Order in the interests of the victims it represents in the light of the new evidence collected during interviews with its clients ("Concerned Victims"), so that they might receive reparations awards for the entire scope of their harm ("Application" or "Application for a Partial Amendment of the Reparations Order").⁴

¹ "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG, with one public annex and one confidential annex *ex parte* Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence team for Germain Katanga, p. 118.

² "Defence Notice of Appeal against the 'Ordonnance de réparation en vertu de l'article 75 du Statut'", 26 April 2017, ICC-01/04-01/07-3738; "Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute on 24 March 2017", 26 April 2017, ICC-01/04-01/07-3739; "Notice of Appeal against the 'Ordonnance de réparation en vertu de l'article 75 du Statut' and its Annex II", 25 April 2017, ICC-01/04-01/07-3737-tENG.

³ "Confidential Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'", 8 March 2018, ICC-01/04-01/07-3778-Conf. On 9 March 2018, a public redacted version of the Judgment was filed.

⁴ "Demande de reprise d'instance des actions introduites par les victimes a/0117/09 et a/0351/09 et requête aux fins de modification partielle de l'Ordonnance de réparation rendue en vertu de l'article 75 du Statut de Rome", 19 April 2018, ICC-01/04-01/07-3789-Conf-Exp, paras. 2, 30-56. On 23 April 2018, a confidential redacted version, *ex parte* OPCV and the Defence, was filed (ICC-01/04-01/07-3789-Conf-Exp-Red). On 14 May 2018, a public redacted version was filed (ICC-01/04-01/07-3789-Red2). On 25 May 2018, a confidential redacted version *ex parte* OPCV, Defence and Legal Representative of Victims, was filed (ICC-01/04-01/07-3789-Conf-Red3).

4. On 8 May 2018, the Chamber instructed the Defence team for Germain Katanga ("Defence") to file observations on the Application for a Partial Modification of the Order by 18 May 2018.⁵

5. On 18 May 2018, the Legal Representative of Victims ("Legal Representative") filed an application asking for a less redacted version of the Application for a Partial Modification of the Reparations Order to be filed or for the OPCV to provide its reasons for making some of its redactions ("Legal Representative Application of 18 May 2018").⁶

6. On 21 May 2018, the Defence filed a response to the Application requesting its rejection ("Response" or "Defence Response of 21 May 2018").⁷

7. On 22 May 2018, the OPCV filed a motion requesting the rejection of the Defence Response of 21 May 2018 on the ground that this document was filed after the deadline set by the Chamber in its Order of 8 May 2018 ("OPCV Motion of 22 May 2018").⁸

8. On 25 May 2018, the OPCV filed a confidential redacted version *ex parte* OPCV, Defence and Legal Representative of Victims, of its Application for a Partial Amendment of the Reparations Order.⁹

9. On 28 May 2018, the Defence filed a consolidated response to the Legal Representative Application of 18 May 2018 and to the OPCV Motion of 22 May 2018.¹⁰

⁵ "Order Instructing the Defence Team for Germain Katanga to File Observations on the Application of the Office of Public Counsel for Victims of 19 April 2018, and for the Office of Public Counsel for Victims to File a Public Redacted Version of its Application", 8 May 2018, ICC-01/04-01/07-3791-tENG.

⁶ "*Requête relative à la requête du Bureau du Conseil Public pour les Victimes de modification partielle de l'Ordonnance de réparation rendue en vertu de l'article 75 (ICC-01/04-01/07-3789-Red2)*", 18 May 2018, ICC-01/04-01/07-3794-Conf. A redacted public version was filed on the same day.

⁷ "Defence Response to OPCV *Requête aux fins de modification partielle de l'Ordonnance de réparation rendue en vertu de l'article 75 du Statut de Rome*", dated 18 May 2018 and registered on 21 May 2018, ICC-01/04-01/07-3795-Conf.

⁸ "*Requête en rejet de la 'Defence Response to OPCV Requête aux fins de modification partielle de l'Ordonnance de réparation rendue en vertu de l'article 75 du Statut de Rome'*", 22 May 2018, ICC-01/04-01/07-3796-Conf.

⁹ ICC-01/04-01/07-3789-Conf-Red3.

II. ANALYSIS

A) Preliminary matters

1. Legal Representative Application of 18 May 2018

10. As mentioned above, the Legal Representative filed an application requesting that a less redacted version of the Application be filed or that the OPCV provide the reasons for making some of its redactions.

11. The Chamber notes that a less redacted confidential version, accessible to the Legal Representative, was filed on 25 May 2018.¹¹ Accordingly, the Chamber considers that the Legal Representative Application has become moot.

2. OPCV Motion of 22 May 2018

12. Also as mentioned above, the OPCV filed a motion to have the Defence Response of 21 May 2018 rejected on the ground that it was filed after the deadline set by the Chamber in its Order of 8 May 2018. In its consolidated response of 28 May 2018, the Defence requests that the OPCV Motion of 22 May 2018 be dismissed,¹² explaining that its Response was filed a few minutes after 16.00 on 18 May 2018 because of a technical problem with the access software, Citrix.¹³ The Defence argues that this delay causes no harm to the OPCV, whereas the rejection of the Response would be detrimental to the rights of Mr Katanga insofar as the size of his liability for reparations is at stake.¹⁴

13. The Chamber notes that this is not the first time that the Defence has put forth a technical problem as the reason for not being able to file a document within the set deadline. The Chamber notes, however, that on the other occasion it had been

¹⁰ "Defence Consolidated Response to the OPCV and LRV Requests", 28 May 2018, ICC-01/04-01/07-3798-Conf with one confidential annex ("Defence Consolidated Response of 28 May 2018").

¹¹ ICC-01/04-01/07-3789-Conf-Red3.

¹² Defence Consolidated Response of 28 May 2018, para. 20.

¹³ Defence Consolidated Response of 28 May 2018, paras. 21-22.

¹⁴ Defence Consolidated Response of 28 May 2018, paras. 24-25.

informed by the Registry.¹⁵ The Chamber recalls that the parties are required to respect the deadlines set and that they may request an extension of time as long as they provide the Chamber with a valid reason. The Chamber also stresses that in the event of technical problems causing a brief delay the parties can alert the Chamber by email or telephone. This notwithstanding, the Chamber considers that it is not in the interests of justice to reject the Defence Response of 21 May 2018 on the basis of a 12-minute delay, given the potential consequences for the amount of Mr Katanga's liability for reparations. The Chamber therefore rejects the OPCV Motion of 22 May 2018.

B) Application for a Partial Amendment of the Reparations Order

1. Submissions of the parties

a) OPCV

14. The OPCV submits that it is aware of the fact that, in the Judgment on Reparations, the Appeals Chamber rejected the ground raised in its appeal, finding that the Chamber did not abuse its discretion by not appointing a counsel for some victims after the previously designated counsel withdrew from his mandate, and that the Appeals Chamber concluded that this Chamber's decision on the status of victims for the purpose of reparations was henceforth final.¹⁶ The OPCV contends nevertheless that, for the reasons given in its Application, the Order for Reparations "[TRANSLATION] may – and must – be amended" in order to recognize the extent of the harm suffered by the Concerned Victims, on the basis of "[TRANSLATION] newly" submitted evidence that it considers sufficient to prove the harm that the Chamber had initially rejected,¹⁷ and thus, to award them reparations.¹⁸ The OPCV maintains that the Application refers only to those persons to whom the Chamber accorded victim status for the purpose of reparations but in respect of

¹⁵ Email from the Registry sent on 30 April at 17.03.

¹⁶ Application, para. 24.

¹⁷ Application, para. 2.

¹⁸ Application, paras. 2, 58.

whom it did not recognize a part of the harm alleged in their applications for reparations for want of sufficient evidence.¹⁹

15. The OPCV argues that, in the light of the specific circumstances of this case, "[TRANSLATION] the Chamber retains the discretion to amend the Order for Reparations, especially when its implementation has yet to begin for the Concerned Victims."²⁰

16. The OPCV also points out that, in *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga* case"), this Chamber decided that new persons could submit applications for reparations after the Order for Reparations was issued and that it would be for the Trust Fund to consider, at the implementation stage of reparations, whether they qualified for awards.²¹

17. In the light of the foregoing, the OPCV infers that a Reparations Order "[TRANSLATION] is not frozen in time and must be adaptable to the special circumstances of a case so that as many victims as possible can qualify for reparations".²²

18. It stresses that the same reasoning is even more applicable to the Concerned Victims to whom the Chamber did accord victim status for the purpose of reparations, but a part of whose applications for reparations were rejected.²³ It argues that it would be unfair – as observed in *Lubanga* – for new persons to be authorized to submit an application for reparations after the Order for Reparations is issued while, in the case at bar, persons who have already been accorded victim status for the purpose of reparations are refused the opportunity to submit additional evidence during the implementation phase of reparations.²⁴ The OPCV asserts that this is all

¹⁹ Application, para. 2.

²⁰ Application, paras. 2 and 25.

²¹ Application, para. 25.

²² Application, para. 26.

²³ Application, para. 27.

²⁴ Application, para. 27.

the more justified since some of the instances of harm were rejected because evidence was not submitted.²⁵

19. The OPCV contends that the lack of evidence, "[TRANSLATION] when considered concomitantly with the withdrawal by the previously designated legal representative from his mandate and the lack of representation of the Concerned Victims for a lengthy period," constitutes a special circumstance allowing the Concerned Victims to submit new evidence in support of all the harm suffered.²⁶

20. The OPCV argues that disregarding the evidence in question would be tantamount to refusing the Concerned Victims their right to effective remedy.²⁷

21. Lastly, the OPCV asserts that the requested amendment of the Order for Reparations will not affect the rights of Mr Katanga, given that he was found liable for a set quantum of the total monetary value of the extent of the harm.²⁸

b) The Defence

22. The Defence submits that the decisions of this Chamber and of the Appeals Chamber regarding the clients represented by the OPCV are final; the OPCV's appeal was rejected and this Chamber recalled that the Order for Reparations is final, save in relation to the issue of the transgenerational harm.²⁹

23. The Defence also submits that the reparations proceedings must be brought to an end. The Defence is of the view that both the convicted person and the victims are entitled to a fair trial within a reasonable time.³⁰ The Defence argues that it would be unfair to it for the OPCV to be granted leave to tender evidence at this stage, whereas the Order for Reparations has been issued and confirmed by the

²⁵ Application, para. 27.

²⁶ Application, para. 27.

²⁷ Application, para. 28.

²⁸ Application, para. 29.

²⁹ Response, para. 23.

³⁰ Response, paras. 24-25.

Appeals Chamber vis-à-vis the OPCV's clients.³¹ The Defence further submits that it would also be unfair to the other victims authorized to participate in the proceedings who did not receive additional time to submit new evidence.³²

24. The Defence recalls, in addition, that the Legal Representative ensured that each of her clients, including the Concerned Victims, received the same level of representation and that the Concerned Victims had every opportunity to substantiate their allegations.³³

25. Lastly, the Defence affirms that the OPCV is wrong to rely on the *Lubanga* case. It submits that the Chamber took different approaches in the two cases in question to identifying victims and their harm for the purpose of determining reparations.³⁴

2. The Chamber's finding

26. The Chamber first recalls "the importance of the reparations phase, which marks a critical juncture in the administration of justice".³⁵ The Chamber also recalls that "[reparations proceedings] constitute a discrete set of proceedings, where the victims tender evidence which [...] the convicted person may impugn".³⁶ The Chamber further recalls that "[t]he order for reparations is the culmination of all such exchanges"³⁷ and that it must "be treated in the same manner as a decision".³⁸ Moreover, the Chamber stresses that

[L]ike all proceedings before the Court, the reparations phase is a judicial process. Accordingly, the Chamber must strike a fair balance between the divergent rights and interests of the victims on the one hand and those of the convicted person on the other.³⁹

³¹ Response, para. 27.

³² Response, para. 27.

³³ Response, para. 26.

³⁴ Response, para. 28.

³⁵ Order for Reparations, para. 14. [Footnote omitted].

³⁶ Order for Reparations, para. 16.

³⁷ Order for Reparations, para. 16.

³⁸ Order for Reparations, para. 17. [Footnote omitted].

³⁹ Order for Reparations, para. 18. [Footnote omitted].

27. The Chamber recalls that it issued its Order for Reparations on 24 March 2017. As recognized by the OPCV, the Appeals Chamber rejected the OPCV appeal and upheld the Order for Reparations, save in relation to the issue of the transgenerational harm alleged by some applicants.⁴⁰

28. The Chamber also recalls that the OPCV appeal had to do with the fact that, after the previously designated legal representative withdrew from his mandate on 5 September 2016,⁴¹ the Concerned Victims did not have the opportunity to submit the necessary evidence in support of their applications for reparations because no legal representative was appointed to replace him thenceforth until the Order for Reparations was issued.⁴² In this regard, the Chamber notes that the Appeals Chamber found that “the Trial Chamber did not abuse its discretion in failing to appoint new counsel for the purpose of assisting the Concerned Victims in completing their applications”.⁴³

29. The OPCV is now requesting that the Chamber examine the additional evidence submitted in support of the harm alleged by the Concerned Victims which the Chamber did not recognize. The OPCV asserts that, in the light of the special circumstances of this case, the Chamber retains the discretion to amend the Order for Reparations.

30. The Chamber is nonetheless of the view that, as acknowledged by the OPCV, apart from the issue remanded by the Appeals Chamber, the mandate of this Chamber at this stage of the proceedings is limited to monitoring and supervising the implementation of reparations. The Chamber is also of the view that the circumstances enumerated by the OPCV – the absence of evidence, the withdrawal by the previously designated legal representative from his mandate and the lack of representation of the Concerned Victims for a lengthy period – are the same as those submitted to and adjudicated by the Appeals Chamber.

⁴⁰ Judgment on Reparations, para. 260.

⁴¹ “Second decision on the Legal Representative of the Victims’ request for termination of the representation agreement”, 6 September 2016, ICC-01/04-01/07-3706-Conf-tENG.

⁴² Judgment on Reparations, para. 205.

⁴³ Judgment on Reparations, para. 220.

31. Nor does the Chamber agree with the OPCV's argument that an order for reparations issued pursuant to article 75 of the Statute "[TRANSLATION] is not frozen in time and must be adaptable to the special circumstances of a case so that as many victims as possible can qualify for reparations". The Chamber is of the opinion that both the victims and the defence are entitled to a fair trial within a reasonable time. It is also of the opinion that, in the context of reparations proceedings, the victims therefore have the right to be informed of their status, as well as of any reparations that they are awarded. Likewise, the defence has the right to be informed of the scope of liability for reparations, once and for all.

32. The Chamber thus considers it advisable to recall that the finality of a legal process constitutes a basic and consistent principle in all legal systems. This principle reflects the idea that it is in the public interest for any litigation to have an end, and also the need for certainty and stability in legal solutions.⁴⁴ For the Chamber, it stands to reason that the same principle applies to orders for reparations issued

⁴⁴ In this context, see the Report of Ms Gabet, *Cour de Cassation* rapporteur, <https://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/gabet_conseiller_12332.html> accessed on 7 June 2018. See also, for example, International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Radovan Karadzic*, Case No. MICT-13-55-0136/02, "Decision on a Motion for Redacted Versions of Decisions Issued Under Rule 75(H) of the ICTY Rules, dated 18 July 2016 and French translation registered on 1 September 2016, p. 4: "legal certainty presupposes respect of the principle for *res judicata* [...], which holds that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case." This ICTY decision refers to the International Criminal Tribunal for Rwanda, *Juvénal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, 23 May 2005, para. 202: "This doctrine [of *res judicata*] refers to a situation when 'a final judgement on the merits' issued by a competent court on a claim, demand or cause of action between parties constitutes an absolute bar to 'a second lawsuit on the same claim' between the same parties." It also refers to the European Court of Human Rights, *Brumărescu v. Romania*, Judgment of 28 October 1999, Application no. 28342/95, para. 61: "[t]he right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question"; and *Ryabykh v. Russia*, Judgment 3 December 2003, Application no. 52854/99, para. 52: "Legal certainty presupposes respect of the principle of *res judicata* [...], that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case."

pursuant to article 75 of the Statute, which must, as stated above, "be treated in the same manner as a decision to convict or sentence".⁴⁵

33. Hence, in the interest of judicial stability, the Chamber considers that it is not within its purview to amend the Order for Reparations to recognize additional harm, as requested by the OPCV, given that the Appeals Chamber has upheld this Order, save for the issue on transgenerational harm – which it remanded.

34. The Chamber is thus of the view that, contrary to what the OPCV argues, the matter of whether the recognition of additional harm at this stage of proceedings could have an impact on Mr Katanga's liability for reparations has not yet been adjudicated. In this respect, the Chamber recalls that it invited the parties to make submissions on the issue of transgenerational harm (which was remanded).⁴⁶ However, as explained above, other than in the context of this remand, the Chamber considers that it does not have the authority to revisit its findings setting the size of the reparations award for which Mr Katanga is liable.

35. Lastly, the Chamber concurs with the Defence that the OPCV is wrong to refer to the *Lubanga* case. As the Defence contended, the Chamber conducted reparations proceedings differently in the two cases, bearing in mind the specific circumstances of each and, especially, in the light of the limited mandate assigned to this Chamber in the *Lubanga* case.

36. In *Lubanga*, the Chamber merely identified a first group of victims and relied on other evidence to set the size of the reparations award for which Thomas Lubanga Dyilo ("Mr Lubanga")⁴⁷ is liable. The situation of this first group of

⁴⁵ In this context, the Chamber notes that article 84 of the Rome Statute entitled "Revision of conviction or sentence" provides that an application may be submitted to the Appeals Chamber "to revise the final judgment of conviction or sentence" under certain restricted conditions. This recourse, however, is not applicable to the present Application.

⁴⁶ "Order instructing the Legal Representative of Victims and the Defence Team for Germain Katanga to File Submissions Further to the Appeals Chamber Judgment on Reparations of 8 March 2018", 16 March 2018, ICC-01/04-01/07-3779-tENG.

⁴⁷ "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'", 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG, with two public annexes (Annex I and Annex III) and one confidential annex, *ex parte* Registry, Trust Fund for Victims, Legal Representatives of the V01 and V02 Groups of Victims, and Office of Public Counsel for Victims

applicants⁴⁸ is comparable to those in the instant case, insofar as this Chamber took a final decision on their victim status for the purpose of reparations. Accordingly, this Chamber is no longer in a position to consider additional evidence.

37. The Chamber nevertheless recalls that in *Lubanga* it noted that the first group of victims identified was not exhaustive, and that hundreds and possibly thousands more victims had also suffered harm as a consequence of the crimes of which Mr Lubanga was convicted.⁴⁹ It is only in relation to this group of applicants *not yet identified* that the Trust Fund will be responsible for examining their eligibility for reparations.⁵⁰ Needless to say, it is in *this context* only that applicants will be able to submit documents in support of their dossiers.

38. Consequently, the OPCV's argument on this point is not persuasive.

3. Public redacted version of the Application and the present decision

39. As a final point, the Chamber notes that the public version of the Application filed by the OPCV is heavily redacted. In order to ensure that the present proceedings remain public, the Chamber directs the OPCV to submit to it proposals for redactions that it considers absolutely necessary to safeguard the Concerned Victims' security, well-being and privacy, within the meaning of article 68(1) of the Statute – pursuant to which the present decision is taken – as well as to file a less redacted public version of its Application.

(Annex II) and a confidential redacted version of Annex II. The decision and annexes were issued on 15 December 2017 and the corrected versions were filed on 21 December 2017.

⁴⁸ Decision of 15 December 2017, para. 190.

⁴⁹ Decision of 15 December 2017, p. 123 and, in particular, paras. 232-244.

⁵⁰ Decision of 15 December 2017, para. 293, referring to the "Decision on the Motion of the Office of Public Counsel for Victims for Reconsideration of the Decision of 6 April 2017", 13 July 2017, ICC-01/04-01/06-3338-tENG, para. 11.

FOR THESE REASONS, the Chamber

FINDS the Legal Representative Application of 18 May 2018 to be moot;

REJECTS the OPCV Motion of 22 May 2018;

REJECTS the Application for a Partial Amendment of the Order for Reparations; and

INSTRUCTS the OPCV to submit to it proposals for redactions of the present decision and to file a less redacted version of its Application by 6 July 2018.

Done in both English and French, the French version being authoritative.

[signed]

Judge Marc Perrin de Brichambaut
Presiding Judge

[signed]

Judge Olga Herrera Carbuccia

[signed]

Judge Péter Kovács

Dated this 26 June 2018

At The Hague, Netherlands