

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: ICC-01/04-01/07
Date: **13 November 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 Draft Memorandum of Understanding between the Legal
Representative of Victims and the Trust Fund for Victims within the framework
of the Implementation of the Reparations**

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

Legal Representatives of Victims

Mr Fidel Nsita Luvengika

Counsel for the Defence of 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

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

TRIAL CHAMBER II ("Chamber") of the International Criminal Court, in the case of *The Prosecutor v. Germain Katanga*, decides as follows.

I. PROCEDURAL HISTORY

1. On 24 March 2017, the Chamber handed down its Order for Reparations pursuant to Article 75 of the Statute ("Order for Reparations").¹ In it, the Chamber analysed the 341 dossiers of individuals claiming to be victims of the crimes of which Germain Katanga ("Mr Katanga") was convicted, which the Registry had transmitted to it.² The Chamber found that, of those 341 individuals, 297 had demonstrated to the standard of proof of a balance of probabilities that they had suffered harm as a result of the crimes of which Mr Katanga was convicted.³ The Chamber therefore concluded that they were eligible for the individual and collective reparations approved by the Chamber in the case.⁴

2. On 25 July 2017, pursuant to the Order for Reparations, the Trust Fund for Victims ("Trust Fund") submitted its draft implementation plan ("DIP")⁵ to the Chamber. The Legal Representative of Victims ("Legal Representative")⁶ and the Defence⁷ filed their respective submissions on the DIP on 11 September 2017. On

¹ "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07-3728-tENG, with a public annex (Annex I) and a confidential annex *ex parte*, Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence team for Germain Katanga (Annex II).

² Order for Reparations, paras. 64-180.

³ Order for Reparations, para. 168.

⁴ Order for Reparations, paras. 281-295.

⁵ "Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017 (ICC-01/04-01/07-3728)", 25 July 2017, ICC-01/04-01/07-3751-Conf (and French translation notified on 21 August 2017), with a confidential annex (Annex 1), a public annex (Annex 2), a confidential annex *ex parte*, Registry (Annex 3), a confidential annex *ex parte*, Principal Counsel, Office of Public Counsel for Victims (Annex 4) and a confidential annex *ex parte*, Legal Representative (Annex 5).

⁶ "Observations relatives au projet de plan de mise en œuvre déposé par le Fonds au profit des victimes en exécution de l'Ordonnance de réparation en vertu de l'article 75 du Statut (ICC-01/04 01/07-3751-Red)", 11 September 2017, ICC-01/04-01/07-3763-Conf.

⁷ "Defence Observations on the TFV's Draft implementation plan", 11 September 2017, ICC-01/04-01/07-3764.

9 October 2017, the Legal Representative and the Trust Fund jointly filed additional submissions on the DIP.⁸

3. On 12 October 2017, the Chamber handed down its "Decision approving the Implementation of Individual Reparations and instructing the Trust Fund for Victims to Transmit to it Additional Information on the Implementation of Collective Reparations" ("Decision of 12 October 2017").⁹

4. On 4 December 2017, the Trust Fund filed a report on the implementation of the individual reparations and on the additional information requested by the Chamber ("Trust Fund's Report of 4 December 2017").¹⁰ On 13 December 2017, the Legal Representative filed his submissions on the Trust Fund's Report of 4 December 2017.¹¹

5. On 20 September 2018, the Chamber directed the Trust Fund to file information on the modalities of collective reparations, in particular a summary of the latest developments, the decision of the Trust Fund's Board of Directors on the question of assumption of support costs, the updated budget and a specification of the processes planned and the entities/persons which/who will be responsible for implementing the reparations modalities as well as the implementation schedule contemplated.¹²

⁸ "Joint Submission Concerning the Draft Implementation Plan Filed by the Trust Fund for Victims in Conformity with the Order for Reparations Pursuant to Article 75 of the Statute (ICC-01/04-01/07-3751-Red)", 9 October 2017, ICC-01/04-01/07-3767-Conf-tENG.

⁹ "Decision approving the Implementation of Individual Reparations and instructing the Trust Fund for Victims to Transmit to it Additional Information on the Implementation of Collective Reparations", 12 October 2017, ICC-01/04-01/07-3768-Conf-tENG.

¹⁰ "Report on the Trust Fund's execution of the payment of the individual reparations awards and additional information regarding the implementation of the collective reparations awards in compliance with Trial Chamber II's decision of 12 October 2017", 4 December 2017, ICC-01/04-01/07-3772-Conf.

¹¹ "*Observations relatives au Rapport du Fonds au profit des victimes du 4 décembre 2017* (ICC-01/04-01/07-3772-Conf)", 13 December 2017, ICC-01/04-01/07-3773-Conf.

¹² "Order Directing the Trust Fund for Victims to File Information on the Modalities of Collective Reparations", 20 September 2018, ICC-01/04-01/07-3809-Conf-tENG, para. 15.

6. On 1 October 2018, the Legal Representative filed a report on the delivery of the individual and collective reparations ("Legal Representative's Report")¹³ and submitted a draft memorandum of collaboration between him and the Trust Fund ("Draft Memorandum").¹⁴

7. On 2 October 2018, after having been granted an extension of time,¹⁵ the Trust Fund filed information relevant to the implementation modalities of the collective reparations.¹⁶

8. On 11 October 2018, the Office of Public Counsel for Victims ("OPCV") filed its submissions on the Draft Memorandum ("OPCV's Submissions").¹⁷

II. ANALYSIS

A. Report on the delivery of the individual and collective reparations

9. Before formulating any conclusion, the Chamber notes that the delivery of the individual and collective reparations to the victims residing outside the Democratic Republic of the Congo ("DRC") is now complete since the recent joint missions undertaken by the Legal Representative and the Trust Fund, on which they reported on 1 October 2018¹⁸ and 2 October 2018¹⁹ respectively.

10. The Chamber furthermore acknowledges the difficulties on the ground in the DRC and notes that, in order to implement the reparations awarded to the

¹³ "Rapport sur l'octroi des réparations individuelles et collectives et dépôt d'un projet de mémorandum de collaboration entre le Représentant légal et le Fonds au profit des victimes", 1 October 2018, ICC-01/04-01/07-3810-Conf.

¹⁴ "Annex 1 to the 'Rapport sur l'octroi des réparations individuelles et collectives et dépôt d'un projet de mémorandum de collaboration entre le Représentant légal et le Fonds au profit des victimes'", 1 October 2018, ICC-01/04-01/07-3810-Conf-Anx1.

¹⁵ Email from Chamber to Trust Fund sent on 28 September 2018 at 12.48. Email from Trust Fund to Chamber on 28 September 2018 at 8.00.

¹⁶ "Information relevant to the modalities of implementation of collective reparations With Confidential annex A: Revised budget", 2 October 2018, ICC-01/04-01/07-3811-Conf with one confidential annex ("Trust Fund's Filing of 2 October 2018").

¹⁷ "Observations concernant le 'Rapport sur l'octroi des réparations individuelles et collectives et dépôt d'un projet de mémorandum de collaboration entre le Représentant légal et le Fonds au profit des victimes'", 11 October 2018, ICC-01/04-01/07-3812-Conf.

¹⁸ Legal Representative's Report, paras. 11-12, 15-20.

¹⁹ Trust Fund's Filing of 2 October 2018, paras. 12-18.

victims residing there, these difficulties can only be overcome through close collaboration between all the actors involved, namely the Trust Fund, the Legal Representative and the OPCV. As has been demonstrated by the above-mentioned joint missions, nothing is more effective than genuine cooperation between them.

11. Bearing this in mind, the Chamber will now turn to the matter of the Legal Representative's request that it adopt a Draft Memorandum of Understanding between him and the Trust Fund.

B. The Draft Memorandum

1. The Parties' Submissions on the Draft Memorandum

12. In his report of 1 October 2018, the Legal Representative submitted to the Chamber, in an annex, a draft memorandum of collaboration between him and the Trust Fund in relation to the implementation of the Order for Reparations of 24 March 2017. According to the Legal Representative, the Draft Memorandum is justified by a need to lay down the terms of the collaboration between him and the Trust Fund, so as to clarify and anticipate the tasks falling to each with a view to improving the implementation of the reparations.²⁰ According to the Legal Representative, it is the "lack of clear and transparent allocation of the tasks to be accomplished"²¹ that has caused "difficulty in implementing the modes of delivery on the ground".²² The Legal Representative therefore asks the Chamber to adopt this draft.²³

13. The OPCV notes that the draft submitted by the Legal Representative is the fruit of the latter's initiative alone, since the agreement of the Trust Fund is not explicitly indicated.²⁴ Moreover, the exclusion of the OPCV from the discussions about the contents of the draft – and from the parties who would purportedly be

²⁰ Legal Representative's Report, para. 21.

²¹ Legal Representative's Report, para. 22.

²² Legal Representative's Report, para. 22.

²³ Legal Representative's Report, para. 25.

²⁴ OPCV's Submissions, paras. 5-6.

bound by it – results in the emergence of two different sets of rules applying in the same case, creating discrimination with regard to the victims represented by the OPCV.²⁵ The OPCV has therefore sought the Chamber's leave to make submissions on the Draft Memorandum proposed by the Legal Representative.²⁶

2. The Chamber's Determination

14. The Chamber first notes that the Trust Fund has not approved the latest version of the draft, as the Legal Representative acknowledges by stating that "the Trust Fund has still not managed to signify its formal acceptance of the memorandum, despite numerous discussions".²⁷ The Chamber also notes that the Draft Memorandum comprises sections drafted by the Legal Representative, of which the Trust Fund was not informed beforehand.²⁸ Last, the Chamber notes that the Trust Fund has not expressed its views on the Draft Memorandum since it was submitted to the Chamber; in its filing of 2 October 2018, the Trust Fund describes all the instances of collaboration between it and the Legal Representative but makes no mention of the memorandum.

15. The Chamber notes moreover that the OPCV was informed of the draft's existence only after it was submitted to the Chamber, which shows that no consultation in this regard took place between the Legal Representative, the Trust Fund and the OPCV. Consequently, the OPCV has not had an opportunity to express its views on the contents of the draft and approve it explicitly, even though the draft concerns it directly, given that it is involved in the implementation of the reparations in exactly the same manner as the Legal Representative.

16. The Chamber emphasizes that the effective implementation of reparations orders depends on all those involved, with and between whom collaboration is essential to achieving the most satisfactory results.

²⁵ OPCV's Submissions, para. 8.

²⁶ OPCV's Submissions, paras. 9-10.

²⁷ Legal Representative's Report, para. 21.

²⁸ Legal Representative's Report, paras. 23-24.

17. In this regard, the Chamber recalls that it has stressed many times the utmost importance of effective cooperation between the Legal Representative and the OPCV and has directed them to unite their efforts with a view to executing the reparations orders.²⁹ The Chamber also recalls that it has encouraged the Trust Fund to pursue a constructive dialogue³⁰ and "its discussions with the Legal Representative and the OPCV on the implementation of collective reparations".³¹

18. The Chamber again emphasizes that "[TRANSLATION] implementation will succeed only if the Legal Representative, the OPCV and the Trust Fund demonstrate flexibility, a willingness to compromise and an openness to accommodation, in a spirit of mutual respect and trust".³² Within the framework of the implementation of the reparations, those three key actors are therefore expected to cooperate efficiently and respectfully in accordance with the Chamber's instructions, which presupposes that they liaise and consult with each other about the decisions that need to be taken in this regard. Lastly, the Chamber considers that the Draft Memorandum is intended to serve only as a kind of general framework for the Trust Fund and the Legal Representative's work to implement the reparations. In the Chamber's view, however, there is no need to introduce such a general framework at this advanced stage in the process; it is far more desirable that any cause for disagreement between those involved in implementing the reparations be referred to the Chamber so that it can decide each specific matter individually.

19. To this end, the Chamber would like to stress that it has already had occasion to express its willingness to hear issues arising during the implementation of the reparations – which include issues of cooperation and collaboration – which may be referred to it by any party. The Chamber oversees the implementation process and

²⁹ "Decision on the Application by the Legal Representative for Victims regarding Compliance with Ethical Rules by the Parties and the Trust Fund for Victims in the Reparations Proceedings", 21 August 2018, ICC-01/04-01/07-3807-Conf-tENG, para. 29.

³⁰ Decision of 12 October 2017, para. 10.

³¹ Decision of 12 October 2017, operative provisions.

³² Decision of 21 August 2018, para. 29.

“any matter of contention [...] may be brought before the Chamber at any point in the procedure”.³³

C. The OPCV's request to make submissions on the Draft Memorandum

20. The OPCV has asked the Chamber for leave to make submissions on the Draft Memorandum proposed by the Legal Representative.

21. In the light of the above, the Chamber deems the OPCV's request to make submissions on the draft to be no longer relevant.

³³ Order for Reparations, para. 314.

FOR THESE REASONS, the Chamber

DISMISSES the Draft Memorandum of Understanding between the Legal Representative and the Trust Fund; and consequently

DECLARES the OPCV's request to make submissions on the draft to be no longer relevant.

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 13 November 2018

At The Hague, Netherlands