

**Cour
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**International
Criminal
Court**

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No.: ICC-01/04-01/07
Date: 13 February 2015

TRIAL CHAMBER II

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Christine Van den Wyngaert, Judge
Judge Olga Herrera Carbuccion, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

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

Public Document

**Application by the United Nations for leave to submit observations pursuant to
Article 75 of the Statute**

Source: The United Nations

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

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I. INTRODUCTION

1. The United Nations respectfully seeks leave to file submissions on behalf of the following offices and representative of the United Nations in accordance with the Trial Chamber's Order on reparations on the issues addressed in the Registry's 'Report on applications for reparations in accordance with Trial Chamber II Order of 27 August':
 - i. The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO);
 - ii. The Office of the High Commissioner for Human Rights (OHCHR);
 - iii. The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women);
 - iv. Ms Zainab Hawa Bangura, Special Representative of the United Nations Secretary-General on Sexual Violence in Conflict (the "Special Representative").

II. PROCEDURAL HISTORY

2. In its "Scheduling order for interested States or other interested persons to apply for leave to file submissions pursuant to Article 75 of the Statute" (the Trial Chamber's Order) on 15 January 2015, the Trial Chamber invited representations from or on behalf of the convicted persons, victims, and other interested persons or interested States on the issues specifically addressed in the Registry's 'Report on applications for reparations in accordance with Trial Chamber II Order of 27 August ("Report")'.
3. On 30 January 2015, the United Nations sought, through the Registry, an extension of seven days in order to submit its application for leave to file submissions pursuant to Article 75 of the Rome Statute.
4. On 2 February 2015, the Trial Chamber issued its "Order extending the deadline for interested States and other interested persons to apply for leave to file submissions pursuant to Article 75 of the Statute" granting the Registry's request for an extension and setting a new deadline of 13 February 2015.

III. RELEVANT EXPERTISE OF THE UN OFFICES

A. MONUSCO

5. Security Council Resolution 2147 (2014) sets out the current mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) with a focus on three priorities — protecting civilians, stabilizing the country, and supporting implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo (DRC) and the region. In pursuit of these objectives, the Mission is, inter alia, authorized to “work with the Government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with States of the region and the ICC” (paragraph 4(d) of Security Council Resolution 2147).
6. MONUSCO maintains its presence across the country through its field offices, including its Bunia field office in the Ituri region.
7. MONUSCO's structure includes several sections that are charged with the implementation of the relevant components of the Mission's mandate. Of particular relevance in the context of the present submission are the Civil Affairs Section and the Joint Human Rights Office (JHRO), which includes two components — those of MONUSCO's Human Rights Section and of the Office of the High Commissioner for Human Rights (OHCHR).
8. The Civil Affairs Section contributes to the implementation of the Mission's mandate in Ituri via the collection of protection of civilian related information through a network of national staff (Community Liaison Assistants) who work permanently in the field with the communities, the mapping of all main stakeholders in the field, the promotion and use of an early warning mechanism enabling communities to transmit

alerts regarding imminent threats, conflict resolution measures and support to local communities in setting up local protection committees.

9. The Joint Human Rights Office has a presence in the Ituri region via MONUSCO's Bunia Field Office. JHRO monitors and reports on human rights violations, provides capacity building on human rights, advocates with local authorities regarding human rights issues, and works on the protection of civilians. JHRO also implements several programmes throughout the country which focus on issues relating to sexual violence and access to justice, including projects aimed at providing funding for the execution of domestic criminal judgments awarding reparations for victims of sexual violence, as well as capacity building on reparations issues. Finally, JHRO, in coordination with other Mission components and international and national partners, actively supports transitional justice efforts and the fight against impunity in the DRC, including providing authorities with logistical, technical and financial assistance in investigating, prosecuting and trying cases of grave human rights violations and violations of international humanitarian law.
10. MONUSCO therefore has extensive experience on the ground in the region in which the reparations would be awarded, and has worked closely with the communities that would be affected by the reparations programme. In addition, MONUSCO has substantive expertise on domestic reparations in the DRC, as well as on transitional justice mechanisms and the fight against impunity in the DRC.
11. The submission will be based on contributions from the following Mission components: Civil Affairs Section, Bunia Field Office, and the Joint Human Rights Office.

B. OHCHR

12. The mandate of the High Commissioner for Human Rights (OHCHR), set forth in United Nations General Assembly resolution 48/141 of 7 January 1994, includes promoting and protecting the effective enjoyment by all of all civil, cultural, economic, political and social rights, carrying out the tasks assigned to him by the competent bodies of the United Nations system and to making recommendations to

them with a view to improving the promotion and protection of all human rights, preventing human rights violations, enhancing international cooperation for human rights, coordinating relevant activities throughout the United Nations and strengthening and streamlining the United Nations human rights machinery.

13. OHCHR supports various human rights mechanisms that develop and monitor international human rights norms and standards, including with regard to the right to a remedy and reparations for victims of gross violations of human rights. OHCHR seeks to ensure that these norms and standards form the basis of rule of law programmes, policies and activities at the global, regional and national levels.
14. Combating impunity and strengthening accountability and the rule of law has long been a principal focus for OHCHR. It has been actively engaged in the area of transitional justice through policy development, research and analysis, and legal advice and assistance for the design and implementation of transitional justice processes from a human rights perspective. It develops guidance materials and operational tools which outline international norms and standards as well as good practices with regard to reparations. OHCHR, including through its field presences, has supported transitional justice programmes in more than 25 countries worldwide.
15. Throughout this work, OHCHR has acquired significant expertise in the area of reparations, including with regard to standard-setting, formulation of guiding principles and their application at the national level. OHCHR gathers and analyses good practices, and draws lessons learned to better address challenges in the area of reparations. For instance, OHCHR supported the drafting and finalizing of the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of Human Rights and Serious Violations of International Humanitarian Law* which was adopted by consensus in General Assembly resolution 60/147. Similarly, OHCHR supported the work that led to the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* and the accompanying studies and reports, which also contain important guiding principles on reparations.
16. To build upon this work and to assist in the implementation of the relevant principles, OHCHR developed an operational *Rule of Law Tool on Reparations Programmes* to provide guidance on implementing reparations initiatives. In 2010, OHCHR lead the

development of the *Secretary-General's Guidance Note on Transitional Justice*, which also addresses the issue of reparations. In 2014, in cooperation with UN Women, OHCHR prepared the *Secretary-General's Guidance Note on Reparations for Conflict-Related Sexual Violence*.

17. OHCHR field presences have also acquired significant practical experience with regard to participatory reparations approaches. For instance, OHCHR assisted in holding consultations with victims in Uganda, Nepal, the DRC and Kosovo, seeking their views on reparations. In DRC, OHCHR implemented projects to strengthen victims' access to justice, including through mobile courts, legal clinics and pilot initiatives to inform broader reparations efforts.

C. UN Women

18. The mandate of the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) is to lead, coordinate and promote accountability of the UN system to deliver on gender equality and the empowerment of women with the primary objective to enhance country-level coherence, ensure coordinated interventions and secure positive impacts in the lives of women and girls. UN Women's work is grounded in a rights-based approach and a long-standing relationship with the women's movement, gender-equality advocates, women's groups and organizations as well as national women's machineries.
19. As the UN system's lead on women's access to justice, UN Women's expertise in the area of transitional justice is clearly recognized. Specifically in relation to reparations, UN Women has been mandated to advance the international framework on gender sensitive approaches to reparations. In partnership with OHCHR, UN Women prepared the *Secretary General's Guidance Note on Reparations for Conflict-Related Sexual Violence* (2014) and is currently developing minimum standards for gender-sensitive transitional justice mechanisms. UN Women has been supporting reparations programs for securing justice and recovery for women in a range of post-conflict contexts including Uganda, Nepal and Colombia.

D. The Special Representative

20. The Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict is constituted under UN Security Council Resolution 1888 (2009). One of the functions of the Special Representative is to “provide coherent and strategic leadership [...] in order to address [...] sexual violence in armed conflict.” These efforts include “engag[ing] in advocacy efforts [with] judicial representatives.”

21. The Special Representative is deeply committed to the provision of reparations for victims of sexual violence and the Democratic Republic of the Congo (“DRC”) has been a priority country since the creation of the Office’s mandate. Moreover, in March 2013, the Special Representative signed a joint communiqué with the Government of the Democratic Republic of the Congo in which the Special Representative pledged to support the Government’s commitment to “ensure reparation to victims of sexual and gender-based violence.” In furtherance of the commitments contained within the joint communiqué, the Team of Experts that reports to the Special Representative assisted the DRC government in creating an implementation plan that includes eventual programming for reparations for conflict-related sexual violence. The Special Representative’s joint participation in this proceeding on reparations would fulfil the Office’s mandate under Resolution 1888 and offer relevant country expertise to the Chamber on reparations.

IV. ISSUES TO BE RAISED IN THE SUBMISSION

A. MONUSCO

22. In light of MONUSCO’s mandate and its expertise in the above-mentioned areas, the Mission seeks leave to make a submission on the following three broad issues:

a) Considerations regarding the form of reparations that should be granted;

- i. The reparation process in such cases should go beyond the grant of pecuniary and other (including psychological assistance) benefits to

individuals. Because the entire community is always (directly or indirectly) affected by the atrocities that were committed, an effective reparation process must aim to bring a positive transformation not only in the lives of the "victims", but also in those of all the survivors. This is possible through:

- ii. The construction of collective social service infrastructure (schools, hospitals, markets, vocational training centers for the young boys and girls, etc.) that will also provide employment opportunities at the community level. These must be identified by the community itself through a facilitated participative needs assessment process.
- iii. The elaboration and implementation of specific income producing projects that can promote peaceful coexistence and mutually profitable economic/exchange relations between the various groups in conflict. These projects may also seek to reduce carefully assessed differences/imbbalances in the distribution of economic resources based on cultural perceptions of various vectors of difference/conflict (age, sex, religion, ethnicity, class, physical traits, etc.).
- iv. Transformative aspects of the award: enabling victims to have a better life via legal, judicial, economic and social national policies and practices. Reparations should be based on each victims' individual needs and provide to every victim the means to transform his / her life. The reparation programme should be multifaceted and include political, material, socio-economic, and legal components.
- v. Regardless of the amount, it is crucial that individual compensation is provided in addition to collective reparations.
- vi. Compensation would be better in kind, rather than financial. Instead of cash, provision of material kits comprised of the tools, equipment and / or merchandises of the victim's preferred income generating activity.
- vii. The acknowledgment of responsibility is an essential component of reparations programs. It serves as the connection between reparations

programs and other measures like memory and truth seeking, and guarantees of non-repetition.

- viii. Community reintegration / fight against stigmatization should also be considered: i.e. provision of a "Community House" where victims and other vulnerable persons can learn, receive apprenticeships, receive basic knowledge on small business management, human rights, literacy, and civic education. Victims can be taught common savings methods, locally called MUSO (Mutuelle de Solidarité).

b) Considerations regarding the principles to be applied, and the factors to be taken into account, in the administration of reparations, including but not limited to:

- i. Equality in awards: the same amount / quantity for the same victims of the same crime. The amount should vary according to level of harm and type of crime.
- ii. Ensuring that the way in which reparations are provided does not expose victims (i.e. must be combined with witness protection measures), or subject them to further stigmatization.
- iii. Ensuring national ownership by the involvement of Territorial Gender and Human Rights Offices (representing the National Ministries of Gender, Family and Child, and Justice and Human Rights at the local level). The National Ministry of Gender also manages Maisons de la Femme all over the country where women are empowered in social and economic activities. Local civil society organization can assist /train victims.
- iv. If financial compensation is provided via banking, efforts should be made to ensure that illiterate victims are assisted.
- v. In the case of micro-financing projects, the importance of supporting the initiatives of the beneficiaries.

- vi. Managing expectations about the process: harm can be exacerbated when the process of claiming reparations is restrictive or sets unrealistic expectations for the victims. Once reparations have been promised to victims they also need to be delivered effectively, to avoid causing additional disappointment to victims.
 - vii. Monetary compensation measures as reparations that are not provided to everyone could cause problems for the victims and victims could therefore be re-victimized by the process of reparations itself
 - viii. Integrated approach to reparations. The absence of an integrated approach is founded on the misunderstanding that monetary compensation, if provided, is sufficient as reparation.
 - ix. Necessity of taking into account the perception of all sides of the conflict as to what form the reparations should take and when and how to implement them.
 - x. Consideration of reparations granted by national courts in cases involving convictions for similar crimes, and efforts to ensure that there is not too great a discrepancy between the two types of reparations.
 - xi. Gender sensitive implementation of reparations in the access to benefits.
- c) Possible impact of the implementation of the ICC reparation programme on domestic reparations/peace and reconciliation process/fight against impunity in DRC.**
- i. It should be kept in mind that ICC reparations may serve as an example for domestic reparations. For instance, the Personal Representative of the Head of State on Sexual Violence and Child Recruitment has in her work plan a creation of a reparation fund for victims of sexual violence and child recruitment. The ICC Trust Fund for Victims and the administration of the reparations in the Katanga case may serve as an example for how this might function.

- ii. Symbolic impact of the provision of reparations in the Katanga case on efforts to ensure that reparations granted in domestic judgments are actually provided to victims by the State (i.e. there has so far only been one case in the DRC in which the State has paid reparations to victims, although it has been ordered to do in several cases).
- iii. Dissuasive effect of reparations/Katanga judgment on activities of armed groups in Ituri and in DRC more generally.
- iv. Complementary between the reparations programme/Katanga judgment and other initiatives in the fight against impunity in DRC.

B. OHCHR

23. In light of its mandate and expertise in the above-mentioned areas, OHCHR's intended submission will draw upon its work in supporting the development and implementation of international norms and standards, as well as good practices in the area of reparations for victims of gross violations of human rights and serious violations of international humanitarian law.
24. Accordingly, OHCHR respectfully requests leave to file a submission on the issues, including "the types and modalities of the reparations requested" as indicated in the Chamber's Scheduling order. The intended submission would focus on relevant international norms, standards and jurisprudence as well as guiding principles and good practices. It would also draw on the Office's practical experience in conducting consultations with victims and implementing pilot projects on reparations, including in the Democratic Republic of Congo.
25. In particular, OHCHR's submission would include the following: the appropriateness of different forms and combinations of reparations; modalities of distribution, including collective and individual; the transformative potential of reparations; the need for a gender sensitive approach; meaningful participation and consultation of victims; and avoiding further harm and managing expectations. Through its intended

submission, the Office also plans to bring to bear the depth and diversity of our expertise as part of the comprehensive approach towards combating impunity.

C. UN Women

26. In light of UN Women's mandate and its expertise in the above-mentioned areas, the Office seeks leave to make a submission on the following two issues:

a) Considerations regarding the form of reparations that should be granted, including but not limited to:

- i. The potential for reparations programmes to be transformative in design and impact.
- ii. Designing individual and collective reparations, including the appropriate combination of different forms, should be guided by their potential to be transformative, subverting instead of reinforcing gender hierarchies and systemic marginalization. This also requires engaging with the underlying rationales for a reparations programme which can affect the way reparations are designed to allocate material and symbolic resources on an individual and/or collective basis. For example, for female victims of sexual violence, the goal of seeking to restore in the sense of returning the individual to the status quo ante is problematic as the status quo for women and girls in the DRC before, during and after the conflict has been one of systemic disadvantage. Sexual violence during war is a product of structural gender inequalities that exist during peace. Restoring a female survivor to the position they were in before means continuing to work within a framework of gender inequality.
- iii. Capitalizing on the transformative potential; reparations have to move societies towards greater social and gender equality, involves adopting an understanding of reparations that seeks not only to restore but to redress broader social injustices, actively empowering individuals and communities to

take control of their lives. In essence, an understanding of reparations that is development-centered and incorporates both short term measures that respond to urgent needs and long term measures that establish conditions for societal change.

- iv. UN Women's submission will consider what transformative reparations could look like in the context of the case, drawing on good practices from courts, tribunals, commissioned research, and transitional justice processes across the globe.

b) Considerations regarding the principles of be applied, and the factors to be taken into account, in the administration of reparations, including but not limited to:

- i. Ensuring the meaningful participation of victims, including women and girls in the design and delivery of reparations programmes.
- ii. The submission will address the specific measures necessary to secure the effective access and participation of women and girl victims in the design and implementation of reparations programmes. Specific measures may include outreach programmes, quota provisions to ensure that women are represented in the process including at leadership levels, procedures for protecting the security and dignity of victims and witnesses, measures to compensate for time constraints and mobility including travel and child care costs, ensuring processes take place in local languages, and, if necessary, the provision of identity documents to facilitate women's participation. This may also involve facilitating consultations with victims and communities including women's groups on the kinds of reparations appropriate to repair harm, particularly with the design of collective reparations.
- iii. Resourcing of reparations through consolidating linkages with development actors.

- iv. Mindful of the limited resources of the ICC's Trust Fund for Victims, and that Mr Katanga himself has been shown to be indigent, the submission will address how development cooperation could support access to reparations for victims in the case. While the right to reparations and the right to development are distinct and separate, coordinating programming, strategies and actors can assist in better realizing both rights. The submission will refer to case examples of where such assistance has been utilized in the past and how new sources of funding with sustainable and transformative impact for victims could be secured.

D. The Special Representative

27. In her submission, the Special Representative seeks to address two issues in the Registry's "Report on Applications for Reparations in Accordance with Trial Chamber II's Order of 27 August" (the "Registry Report"):
28. First, in the Chamber's Judgment of 7 March 2014, it found that the crimes of rape and sexual slavery occurred in the attack on Bogoro beyond reasonable doubt;¹ yet, the Chamber ultimately acquitted Mr Katanga of these crimes.² The question thus arises whether victims of sexual violence in Bogoro could potentially receive relief under a future plan of collective and community reparations. The Special Representative wishes to provide comments on how victims of sexual violence in the community might be redressed through the recommendation made by the Registry in paragraph 94(f) of its Report. This paragraph notes that under Rule 98(5) of the ICC's Rules of Procedure and Evidence ("RPE") that the Trust Fund for Victims "may use other resources for the benefit of victims and their families, with no requirement for them to be linked to the case specifically [and] address such harm [that] would [...] allow the wider affected community to benefit."³ As a consequence, RPE Rule 98(5) may also provide a mechanism to address victims of sexual violence.

¹ Judgment, *The Prosecutor v Germain Katanga*, (Case No ICC-01/04-01/07) (7 March 2014), ¶¶ 999, 1023

² *Ibid* at ¶¶ 1663–64

³ Registry Report, ¶ 94(f), p 47.

29. Second, and relatedly, the Special Representative wishes to offer comment on paragraph 95(e) of the Registry Report on creating “[a] gender-inclusive approach [to] the design and implementation of principles and procedures to be applied to reparations.”⁴ It is essential that any programme of reparations be transformative in its design, implementation, and impacts and account for the victims of conflict-related sexual violence within the community that the Chamber has found to exist.

ACCORDINGLY, the aforementioned offices and representative of the United Nations therefore, respectfully request leave to file a joint submission in this matter on the issues described above.

The United Nations respectfully requests that the Court allow 30 calendar days for the preparation of its full submission.

⁴ *Ibid* at ¶ 95(e), pp 49–50

⁵ *Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence* (June 2014), p 1



Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs
and United Nations Legal Counsel
on behalf of

The Under-Secretary-General for Peacekeeping Operations;
the High Commissioner for Human Rights; the Executive Director of UN Women;
the Special Representative of the Secretary-General on Sexual Violence in Conflict.

Dated this 13th day of February 2015

At New York, United States of America