

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: 30 April 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 CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA

Public

Prosecution's Observations on the Procedure for Reparations

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Eric MacDonald

Counsel for the Defence

Mr David Hooper

Legal Representatives of Victims

Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Mr Pieter de Baan
(Trust Fund for Victims)

Introduction

1. The Office of the Prosecutor (“Prosecution”) unequivocally supports the mandate of the Court not only to end impunity and to determine the truth,¹ but also “to go beyond the notion of punitive justice” towards an inclusive process which “recognizes the need to provide effective remedies for victims.”²

2. The Appeals Chamber has confirmed that reparations fulfil two main purposes enshrined in the Statute of this Court: “they oblige those responsible for serious crimes to repair the harm they caused to the victims [] and they enable the Court to ensure that offenders account for their acts.”³ To those ends, the Prosecution endorses the primary role of the Legal Representatives of Victims in proceedings solely pertaining to reparations. However, mindful of its own mandate to take appropriate measures in the interests of victims,⁴ and its direct role in fostering accountability,⁵ the Prosecution welcomes the invitation in this case to make general procedural observations, as a participant,⁶ to facilitate these proceedings.⁷

Submissions

3. In the following paragraphs, the Prosecution presents its observations on the applicability to the present case of the principles on reparations set out by the Appeals Chamber in the *Lubanga* case⁸ with respect to seven of the nine topics identified by the Trial Chamber in its Order.⁹ With respect to the remaining two

¹ See Rome Statute (“Statute”), Preamble, arts.54(1)(a), 66(3), 69(1), 74(2).

² ICC-01/04-01/06-3129-AnxA A A2 A3 (“*Lubanga* Order for Reparations, Amended”), para.1.

³ *Lubanga* Order for Reparations, Amended, para.2.

⁴ Statute, art.68(1).

⁵ Statute, art.42(1).

⁶ See ICC-01/04-01/07-3532 (“Order”), para.10 (requiring the Parties and participants to file observations in the reparation proceedings, and distinguishing between the “parties” and the Registry, the Prosecution and the Trust Fund). The Prosecution takes this to indicate that it is a “participant” in these reparation proceedings.

⁷ By analogy, see e.g., *mutatis mutandis*, ICC-01/04-556 OA4 OA5 OA6, para.55 (recalling the case law of the Appeals Chamber that a participant is different from a party, and that the role of a participant is confined to “participation” in “issues [...] touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused” and “fair and impartial” proceedings).

⁸ Order, para.12.

⁹ Order, para.14 (topics i-vii).

topics, concerning the transmission of requests for reparation to the Trust Fund for Victims and the creation of a working plan,¹⁰ the Prosecution takes no position. In addition, the Prosecution respectfully urges an expeditious resolution to these proceedings.

1. Applicable principles in reparation proceedings

4. As a starting point for this Trial Chamber, the Prosecution concurs with the general principles governing reparations approved by the Appeals Chamber in *Lubanga*¹¹—although they may “be applied, adapted, expanded upon, or added to”,¹² as required by the circumstances of this case.

i. Victims eligible for reparations

5. Victims eligible for reparations may include both natural and legal persons.¹³ They must be victims who suffered harm as a result of the crimes for which the accused person was convicted.¹⁴

6. Both direct and indirect victims of the crimes for which a person was convicted should be eligible for reparations.¹⁵ In determining whether a person is a “family” member of a victim, the Court should have regard to the social and familial structures applicable in Ituri, bearing in mind that the concept of “family” may have

¹⁰ Order, para.14 (topics viii-ix).

¹¹ See ICC-01/04-01/06-3129 A A2 A3 (“*Lubanga* Reparations Appeal Judgment”) and *Lubanga* Order for Reparations, Amended.

¹² *Lubanga* Order for Reparations, Amended, para.5.

¹³ *Lubanga* Order for Reparations, Amended, para.8; Rules of Procedure and Evidence (“Rules”), rule 85(b).

¹⁴ *Lubanga* Reparations Appeal Judgment, paras.1, 32 (defining the fourth essential element of a reparations order: defining the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted), 99 (where the Appeals Chamber confirmed the Trial Chamber’s ruling that it is the obligation of the convicted person to remedy the harm caused by the crimes for which he or she was convicted), 184 (where the Appeals Chamber held—with respect to the fourth element of a reparation order—that the Trial Chamber must clearly define the harms that result from the crimes for which the person was convicted), 211 (where the Appeals Chamber recalls that only victims within the meaning of rule 85(a) and regulation 46 of the Regulations of the Trust Fund who suffered harm as a result of the commission of the crimes of which the accused was found guilty may claim reparations against Mr Lubanga); *Lubanga* Order for Reparations, Amended, para.20 (“Reparation orders are intrinsically linked to the *individual* whose criminal liability is established”, emphasis supplied).

¹⁵ *Lubanga* Order for Reparations, Amended, para.6.

many cultural variations.¹⁶

7. In addition, collective reparations may be awarded to a community, understood as a group of eligible victims, if there is a sufficient causal link between the harm suffered by members of that community and the crimes for which the accused is found guilty.¹⁷

ii. Identification of eligible victims

8. Reparations are voluntary, and the informed consent of the recipient is necessary prior to any award of reparations.¹⁸ This principle is reflected in regulation 118 of the Regulations of the Registry (“RoR”) which underlines the potential confidential nature of the information contained in the victims’ applications for reparations.¹⁹

9. Victims should be consulted on issues relating to the identity of the recipients of reparations.²⁰ Moreover, and in determining which victims are eligible for reparations, the Trial Chamber should take into account, without discrimination,²¹ the needs of all victims in accordance with article 68 of the Statute, and, in particular, children, elderly persons, persons with disabilities, and victims of sexual or gender based crimes.²²

¹⁶ *Lubanga* Order for Reparations, Amended, para.7.

¹⁷ *Lubanga* Reparations Appeal Judgment, paras.212, 214. Other members of the affected communities could benefit from activities undertaken by the Trust Fund in relation to its assistance mandate. See Reparations Appeal Judgment, para.215.

¹⁸ *Lubanga* Order for Reparations, Amended, para.30; *Lubanga* Reparations Appeal Judgment, paras.159-160. Although the Appeals Chamber was referring to collective reparations, this principle equally applies to individual reparations.

¹⁹ See RoR, regulation 118(2) (“Where an order is issued by the Chamber for an award of reparations through the Trust Fund for Victims, the Registrar shall, *having regard to confidentiality*, provide the Secretariat of the Trust Fund for Victims with such information received in the applications sent by victims and such further information and documents as are necessary for the implementation of the order”, emphasis added).

²⁰ *Lubanga* Order for Reparations, Amended, para.32.

²¹ See Statute, art.21(3) (proscribing adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth, or other status).

²² Rules, rule 86. See also Statute, art.68; *Lubanga* Order for Reparations, Amended, paras.12-14, 16-18,

iii. Requirement of harm to victims

10. “Harm” may be understood as “hurt”, “injury” or “damage”.²³ In its nature, the harm may be “material”, “physical” or “psychological”.²⁴ It must have been “personal to the victim”²⁵ in the sense that the victim was himself or herself adversely affected by it, although not necessarily uniquely so. The harm need not have been “direct[ly]” suffered by the victim,²⁶ provided that the requisite causal link between the harm and the crimes of the convicted person is established.

11. Victims seeking reparations bear the burden of showing the necessary harm.²⁷

12. In the order for reparations, the Trial Chamber must clearly define the harms to direct and indirect victims that result from the crimes for which the accused person is convicted.²⁸

13. As noted above, the harm must result from crimes for which the accused person is convicted.²⁹ In the instant case, Mr Katanga was convicted of murder as a crime against humanity under article 7(1)(a), and the war crimes of murder under article 8(2)(c)(i), attacking civilians under article 8(2)(e)(i), destruction of the enemy’s property under article 8(2)(e)(xii) and pillaging under article 8(2)(e)(v). Although Mr Katanga was acquitted of the war crime of using children under the age of 15 to actively participate in hostilities under article 8(2)(e)(vii), and rape and sexual slavery as crimes against humanity under article 7(1)(g) and war crimes under article

especiall para.16 (“Reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status, as set forth by article 21 (3) of the Statute”); Office of the Prosecutor, ICC, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, available at <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> (“OTP SGBC Policy”), paras.11, 102.

²³ *Lubanga* Order for Reparations, Amended, para.10.

²⁴ *Lubanga* Order for Reparations, Amended, para.10.

²⁵ *Lubanga* Order for Reparations, Amended, para.10.

²⁶ *Lubanga* Order for Reparations, Amended, para.10.

²⁷ *See Lubanga* Order for Reparations, Amended, para.22. *See also below* para.18.

²⁸ *Lubanga* Reparations Appeal Judgment, paras.181, 184.

²⁹ *See above* para.5.

8(2)(e)(vi), his conviction under article 8(2)(e)(i) encompassed acts of rape committed during the attack.³⁰ Accordingly, victims of these acts of rape are entitled to reparations for such harm as direct victims of the war crime of attacking civilians.³¹

14. To the extent that victims of other crimes (for which a person has not been convicted) are not eligible for reparations from the convicted person, they are not excluded from the benefits of any other assistance activities that the Trust Fund may undertake.³²

15. Among the different types of harm caused to direct victims, the Trial Chamber may identify: physical injury and trauma; psychological trauma and the development of psychological disorders; loss of property and livestock. With respect to indirect victims, the Trial Chamber may identify various types of harm, including: psychological suffering experienced as a result of the sudden loss of, or harm to, a family member; material deprivation resulting from the loss of, or harm to, a family member's contributions to their collective livelihood; loss, injury or damage suffered by an intervening person who attempted to prevent a direct victim from being further harmed as a result of a relevant crime.

³⁰ ICC-01/04-01/07-3436 (*"Katanga Article 74 Judgment"*), para.876 (referring to the Chamber's findings on the crime of rape committed against P-132 and P-249 during the Bogoro attack: sections VIII-D-2-a-i and ii). The Trial Chamber also considered acts of rape committed during the attack (under the heading "violence and scope of the crimes committed") in assessing the gravity of the crimes for the purposes of determining the sentence. See ICC-01/04-01/07-3484 (*"Katanga Sentencing Judgment"*), para.48 (referring to *Katanga Article 74 Judgment*, para.876).

³¹ P-132 and P-249 are also entitled to reparations for other types of harm suffered during the attack: see *Katanga Article 74 Judgment*, paras.814, 829, 832, 836, 873, 876 (referring to sections VIII-B-2-a and VIII-B-2-d). See also paras.825, 834 for P-132. Although the Trial Chamber did not consider the acts of rape committed against P-353 as being part of the unlawful attack against civilians, she is entitled to reparations for other harm she suffered during the attack as a result of the crime of attacking civilians under article 8(2)(e)(i), for which the accused was convicted: see *Katanga Article 74 Judgment*, paras.826-827, 846, 873 (referring to section VIII-B-2-c).

³² *Lubanga Reparations Appeal Judgment*, para.199.

iv. Causal link required

16. As noted above,³³ reparations should be awarded based on the harm occasioned as a result of the commission of crimes falling within the jurisdiction of the Court,³⁴ and for which the accused has been convicted.³⁵ However, the nature of the causal link required between the harm and the crimes may be determined in light of the specificities of the case.³⁶

17. In this case, the causal link required should certainly not exceed a “but for” and “proximate cause” relationship.³⁷

18. The victims seeking reparation bear the burden of providing sufficient proof of the causal link between the harm suffered by them and the crimes committed based on the specific circumstances of the case.³⁸ The Prosecution agrees with the Appeals Chamber’s ruling that the “appropriate” standard of proof—and what is “sufficient” for an applicant to meet the burden of proof—will depend upon the circumstances of the specific case, including with reference to any specific difficulties that may be encountered.³⁹ In any event, the standard need not be the criminal standard of proof (“beyond reasonable doubt”).⁴⁰ It may generally be appropriate to require proof on the “balance of probabilities”, as the Appeals Chamber found in the *Lubanga* Reparations Appeal Judgment.⁴¹

v. Scope of Mr Katanga’s responsibility with respect to reparations

19. Reparations are the corollary of a convicted person’s individual liability for

³³ See above para.5.

³⁴ *Lubanga* Reparations Appeal Judgment, para.79, *Lubanga* Order for Reparations, Amended, para.11.

³⁵ *Lubanga* Reparations Appeal Judgment, paras.1, 32, 99, 184, 211. See also *Lubanga* Order for Reparations, Amended, para.20.

³⁶ *Lubanga* Reparations Appeal Judgment, para.80; *Lubanga* Order for Reparations, Amended, para.11.

³⁷ See *Lubanga* Order for Reparations, Amended, para.59.

³⁸ *Lubanga* Reparations Appeal Judgment, para.81. *Lubanga* Order for Reparations, Amended, para.22.

³⁹ *Lubanga* Reparations Appeal Judgment, para.81.

⁴⁰ *Lubanga* Order for Reparations, Amended, para.22.

⁴¹ *Lubanga* Reparations Appeal Judgment, para.83.

their crimes. Accordingly, a person found to be criminally responsible for certain crimes is the person to be held liable for reparations.⁴²

20. As a result of this intrinsic link between reparations and the Court's determination of a person's criminal responsibility, the convicted person's liability for reparations should not only be proportionate to the harm caused by their crimes, but also to the nature of their participation in the crimes for which they were convicted.⁴³ This assessment should be conducted in the specific circumstances of the case.⁴⁴

21. Given the unique characteristics of the crimes within the jurisdiction of this Court (and the potential for an individual to cause even greater harm and suffering by inspiring, assisting, or directing the crimes of others), the Trial Chamber should refrain from *a priori* reasoning as to the relative gravity of the different modes of liability under articles 25 and 28 of the Statute. Instead, it should look at the facts of the case to ascertain the true nature of their participation in the crimes for which they were convicted.

vi. Modalities of reparations

22. Reparations may be ordered on an individual or collective basis, or both. Reparations should be awarded in a way that avoids creating tensions and divisions within the relevant communities.⁴⁵ Collective reparations should be awarded in a way which addresses the harm suffered by the victims both individually and collectively.⁴⁶

⁴² *Lubanga* Reparations Appeal Judgment, para.99.

⁴³ *Lubanga* Reparations Appeal Judgment, paras.6, 118; *Lubanga* Order for Reparations, Amended, paras.20-21.

⁴⁴ *Lubanga* Reparations Appeal Judgment, paras.6, 118; *Lubanga* Order for Reparations, Amended, para.21.

⁴⁵ *Lubanga* Order for Reparations, Amended, para.33. The Appeals Chamber referred to individual reparations. This principle should equally apply to collective reparations.

⁴⁶ *Lubanga* Order for Reparations, Amended, para.33.

23. In its order for reparations, the Trial Chamber may (1) specify the nature and size of an award for reparations or, at a minimum (2) identify the modalities of reparations that are appropriate for the circumstances of the case at hand.⁴⁷ As set out in rule 97(2) of the Rules, the Trial Chamber may avail itself of an expert in making its determination.⁴⁸

24. The types of reparations which may be ordered under article 75 of the Statute include, but are not limited to, restitution, compensation and rehabilitation.⁴⁹ The Trial Chamber should consider ordering reparations on each of these bases. Further, consideration should be given to the feasibility and pertinence in this case of additional kinds of reparation, such as those of a symbolic, preventative or transformative nature.

- The concept of restitution reflects the principle that reparations may be able to restore to the victim(s) those things that they lost as a result of the crimes committed. This might include returning the victim(s) to their homes, returning their property to them, or putting them in a position to resume their livelihood, trade or professional/social/community activities.⁵⁰
- The concept of compensation reflects the principle that reparations may provide economic relief to address, in a proportionate and appropriate manner, harm suffered as a result of the crimes committed for which restitution is not adequate or feasible.⁵¹ By its more flexible nature, compensation may provide a measure of relief for many kinds of harm

⁴⁷ *Lubanga* Reparations Appeal Judgment, para.200.

⁴⁸ See *above* para.12. The Prosecution would support the carrying out of a gender analysis by an expert or an appropriate body in order to determine the most effective and appropriate forms of reparation within a particular community. This approach is intended to promote reparations that are transformative and contribute to advancing gender equality. See OTP SGBC Policy, paras.11, 102.

⁴⁹ *Lubanga* Order for Reparations, Amended, para.34. See also Statute, art.75(2).

⁵⁰ *Lubanga* Order for Reparations, Amended, paras.35-36.

⁵¹ See *Lubanga* Order for Reparations, Amended, paras.37, 40.

(including both material and non-material harm)—although certain harms may be difficult to quantify financially.⁵² Consistent with the general principle that indigence is no bar to an order for reparation,⁵³ the Trial Chamber should only take into account the feasibility of compensation on the basis of “the availability of funds” in the sense of considering what concrete measures may practicably be ordered.⁵⁴

- The concept of rehabilitation reflects the principle that reparations may assist in the personal recovery and healing of victims, including but not limited to: the provision of medical services and healthcare; psychological, psychiatric and other assistance to support those suffering from grief and trauma; and other relevant social and professional services.⁵⁵
- The possibility of ordering other symbolic, preventative and transformative measures reflects the principle that reparations may help to vindicate the rights of the victims, including by ensuring that their suffering is not repeated by others and preventing the convicted person from further profiting at their expense. Such measures may include, where appropriate and on the basis of consultation with the victims: steps for the wider dissemination of the judgment of the convicted person;⁵⁶ measures to facilitate and to encourage a meaningful apology by the convicted person; and other such measures which may be fitting in the circumstances.

25. The *quantum* of any award of reparations should be proportionate to the harm suffered by the victims and, to the extent possible, adequate to their resulting

⁵² See *Lubanga* Order for Reparations, Amended, paras.37, 39-40.

⁵³ *Lubanga* Reparations Appeal Judgment, para.102.

⁵⁴ See *Lubanga* Order for Reparations, Amended, para.37.

⁵⁵ *Lubanga* Order for Reparations, Amended, paras.41-42.

⁵⁶ See *Lubanga* Order for Reparations, Amended, para.43.

needs.⁵⁷

26. In designing any award of reparations, the Trial Chamber should seek to reconcile victims with their families and affected communities, where necessary.⁵⁸ Reparations should reflect local cultural and customary practices, to the extent compatible with the governing law of this Court and its founding principles.⁵⁹ Reparations should be structured so as to ensure that they are practicable and sustainable, and capable of genuinely meeting the objectives leading to their award.⁶⁰

27. At all times in reparations proceedings, victims should be treated with humanity, and appropriate measures should be taken to ensure their safety, physical and psychological wellbeing, and privacy.⁶¹ Further, a gender-inclusive approach should guide the design of the reparations proceedings, ensuring that they are accessible to all victims in their implementation.⁶² The Office supports this approach as a consistent matter of policy.⁶³ An award of reparations should avoid reinforcing previous structural inequalities between victims, or between victims and the communities in which they live, and should avoid perpetuating any previous discriminatory practices.⁶⁴

28. Nothing in these principles should prevent measures to give priority to the needs of any victims who are shown to be in a particularly vulnerable situation, or

⁵⁷ *Lubanga* Order for Reparations, Amended, paras.44-45.

⁵⁸ *Lubanga* Order for Reparations, Amended, para.46.

⁵⁹ *Lubanga* Order for Reparations, Amended, para.47.

⁶⁰ See *Lubanga* Order for Reparations, Amended, para.48 (“Reparations need to support programmes that are self-sustaining, in order to enable victims, their families and communities to benefit from these measures over an extended period of time. If pensions or other forms of economic benefits are to be paid, these should be allocated, if possible, by periodic instalments rather than by way of a lump payment”).

⁶¹ *Lubanga* Order for Reparations, Amended, para.15. See also Rules, rules 87-88.

⁶² *Lubanga* Order for Reparations, Amended, para.18 (continuing, “Accordingly, gender parity in all aspects of reparations is an important goal of the Court”).

⁶³ See OTP SGBC Policy, paras.11, 102 (“The Office supports a gender-inclusive approach to reparations, taking into account the gender-specific impact on, harm caused to, and suffering of the victims affected by the crimes for which an individual has been convicted”).

⁶⁴ See *Lubanga* Order for Reparations, Amended, paras.38, 41, 47.

who are otherwise in need of urgent assistance.⁶⁵ Nor should anything in these principles prevent the Trial Chamber taking account of age-related harm to victims, and the consequent effects upon their needs, or any differential impact of the crimes on women and men, girls and boys.⁶⁶

29. In making any decision affecting a child, the Trial Chamber should be guided by the best interests of the child, including the need to take all appropriate measures for their recovery, reintegration, and development,⁶⁷ and should reflect a gender-inclusive perspective.⁶⁸ The views of child victims should be considered when making decisions affecting them, bearing in mind their circumstances, age, and level of maturity.⁶⁹ Child victims' parents, guardians, and legal representatives should also be adequately informed and consulted.⁷⁰

vii. Objective of reparations

30. As previously set out, reparations should “oblige those responsible for serious crimes to repair the harm they caused to the victims[,] and [...] enable the Court to ensure that offenders account for their acts.”⁷¹

2. Reparation proceedings should be conducted expeditiously

31. The Prosecution notes the principle that the award of reparations should not only be appropriate and adequate but also prompt.⁷² In the interests of the victims seeking reparation, the Prosecution, as a participant,⁷³ supports the expeditious resolution of these proceedings, and will conduct itself accordingly.

⁶⁵ *Lubanga* Order for Reparations, Amended, para.19.

⁶⁶ *Lubanga* Order for Reparations, Amended, paras.18, 23-24. *See also* OTP SGBC Policy, paras.11, 102.

⁶⁷ *Lubanga* Order for Reparations, Amended, paras.25-26, 28.

⁶⁸ *Lubanga* Order for Reparations, Amended, para.24.

⁶⁹ *Lubanga* Order for Reparations, Amended, para.28.

⁷⁰ *Lubanga* Order for Reparations, Amended, para.27.

⁷¹ *Lubanga* Order for Reparations, Amended, para.2.

⁷² *Lubanga* Order for Reparations, Amended, para.44.

⁷³ *See above* fn.6.

Conclusion

32. The Prosecution respectfully requests the Trial Chamber to consider these observations.



Fatou Bensouda, Prosecutor

Dated this 30th day of April 2015

At The Hague, The Netherlands