

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **26 October 2017**

THE APPEALS CHAMBER

Before:

**Judge Howard Morrison, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Sanji Monageng
Judge Christine Van den Wyngaert
Judge Piotr Hofmański**

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO IN THE CASE OF *THE PROSECUTOR v. GERMAIN KATANGA*

Public

**Response to the
“Observations pursuant to rule 103 of the Rules of Procedure and Evidence”
filed by the Trust Fund for Victims**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims - acting as Legal Representative of a number of victims (the “Legal Representative”)¹ submits that the Observations filed by the Trust Fund for Victims (“TFV”) on the potential effect that the granting of the appeal lodged by the OPCV may have on the convicted person’s liability and on the resources needed to implement reparations awards should be disregarded.

2. The Legal Representative contends that the right of victims to appropriate, adequate and prompt reparations shall prevail over any administrative concerns raised by the TFV. Said administrative concerns may be addressed eventually at a later stage of the proceedings once the Appeals Chamber has ruled on the issue of principle raised in the Legal Representative’s appeal. In this regard, the Legal Representative underlines that nothing in the provisions governing the TFV impedes an amendment or adjustment to the Draft Implementation Plan and that the Chamber has discretion in ordering the TFV to amend or adjust said Plan if this is needed to grant effective reparations to victims.

3. Furthermore, the TFV’s suggestion that the appeal, if granted, could potentially affect the amount of the Katanga’s liability and potentially render some of the proposed concrete activities “cost prohibitive”, is premature and unpersuasive.

4. In this regard, the Legal Representative submits that even if the appeal is granted, this result will not necessarily have an impact on the amount of the convicted person’s liability because the Appeals Chamber could decide that said amount is still appropriate, particularly considering the fact that Mr Katanga is indigent. Moreover, the impact on the resources needed for the implementation of

¹ See the “Décision relative à la requête du Représentant légal commun des victimes du 2 mars 2017” (Trial Chamber II), No. ICC-01/04-01/07-3727, 15 March 2017.

additional reparations awards will be minimal compared to the overall resources needed to implement the reparations order.

II. PROCEDURAL HISTORY

5. On 24 March 2017, the Chamber issued the “Order for Reparations pursuant to Article 75 of the Statute” (the “Impugned Decision”).² On 24 and 25 April 2017, the Common Legal Representative,³ the OPCV⁴ and Mr Katanga⁵ filed their notices of appeal against the Impugned Decision. On 27 June 2017, the Common Legal Representative,⁶ Mr Katanga,⁷ and the OPCV⁸ filed their respective documents in support of the appeals. On 23 and 28 August 2017, the Common Legal Representative of Victims,⁹ the OPCV,¹⁰ and Mr Katanga¹¹ filed their respective responses to each other’s documents in support of the appeals.

² See the “Ordonnance de réparation en vertu de l’article 75 du Statut” (Trial Chamber II), No. ICC-01/04-01/07-3728, 24 March 2017 (the “Impugned Decision”).

³ See the “Acte d’appel relatif à l’Ordonnance de réparation en vertu de l’article 75 du Statut et son Annexe II”, No. ICC-01/04-01/07-3737 A3, 24 April 2017.

⁴ See the “Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute on 24 March 2017”, No. ICC-01/04-01/07-3739 A5, 25 April 2017.

⁵ See the “Defence Notice of Appeal against the Ordonnance de réparation en vertu de l’article 75 du Statut”, No. ICC-01/04-01/07-3738 A4, 25 April 2017.

⁶ See the “Document déposé à l’appui de l’appel relatif à l’Ordonnance de réparation en vertu de l’article 75 du Statut et son Annexe II”, No. ICC-01/04-01/07-3745 A3, 27 June 2017 (the “Common Legal Representative’s Document in Support of the Appeal”).

⁷ See the “Defence Document in Support of Appeal against the Reparations Order”, No. ICC-01/04-01/07-3747-Conf-Exp A4, 27 June 2017 (a public redacted version was filed on 29 June 2017: No. ICC-01/04-01/07-3747-Red A4).

⁸ See the “Document in Support of the Appeal against Trial Chamber II’s ‘Ordonnance de réparation en vertu de l’article 75 du Statut’”, No. ICC-01/04-01/07-3746-Conf A5, 27 June 2017 (a public redacted version was filed on 28 June 2017: No. ICC-01/04-01/07-3746-Red A5) (the “OPCV’s Document in Support of the Appeal”).

⁹ See the “Observations sur le document déposé par le BCPV à l’appui de son appel (ICC-01/04-01/07-3746-Conf)”, No. ICC-01/04-01/07-3753-Conf A5, 23 August 2017, and the “Observations sur le document déposé par la Défense à l’appui de son appel (ICC-01/04-01/07-3747-Conf-Exp et ICC-01/04-01/07-3747-Red)”, No. ICC-01/04-01/07-3756 A3 A4 A5, 28 August 2017.

¹⁰ See the “Consolidated Response to the Common Legal Representative’s and the Defence’s Documents in Support of the Appeal against Trial Chamber II’s ‘Ordonnance de réparation en vertu de l’article 75 du Statut’”, No. ICC-01/04-01/07-3757 A3 A4 A5, 28 August 2017.

¹¹ See the “Defence Response to the OPCV and Legal Representative of Victims’ Documents in Support of Appeal Against the Reparation Order”, No. ICC-01/04-01/07-3758-Conf-Red A3 A4 A5 (a public redacted version was filed on 5 September 2017: No. ICC-01/04-01/07-3758-Red2).

6. On 25 July 2017, the TFV filed the “Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017”¹² (the “Draft Implementation Plan”).

7. On 7 August 2017, the Appeals Chamber instructed the TFV to indicate whether it seeks to submit observations on the appeals and on which particular issue under rule 103 of the Rules of Procedure and Evidence.¹³ On 25 August 2017, the TFV filed the “Request for leave to file observations” (the “TFV’s Request”) on two issues, namely on, (i) “[t]he potential procedural and substantive impact of the parties’ requested relief on the draft implementation plan submitted in the Katanga case”; and (ii) “[w]hether the Trust Fund can assume a ‘share of the reparations burden’ outside of or beyond the amount of liability imposed on the convicted person in the order of reparations.”¹⁴

8. On 11 September 2017, the OPCV,¹⁵ Mr Katanga¹⁶ and the Common Legal Representative of Victims¹⁷ filed their respective observations on the Draft Implementation Plan.

9. On 14 September 2017, the Appeals Chamber granted the TFV’s Request and instructed the OPCV, Mr Katanga and the Common Legal Representative of Victims to file their respective responses to the TFV’s submission by 26 October 2017.¹⁸

¹² See the “Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017 (ICC-01/04-01/07-3728)”, No. ICC-01/04-01/07-3751-Conf+Anxsl, 25 July 2017 (a public redacted version of the document was notified on the same day: No. ICC-01/04-01/07-3751-Red) (the “Draft Implementation Plan”).

¹³ See the “Directions on the conduct of the appeal proceedings” (Appeals Chamber), No. ICC-01/04-01/07-3752 A3 A4 A5, 7 August 2017.

¹⁴ See the “Request for leave to file observations”, No. ICC-01/04-01/07-3755 A3 A4 A5, 25 August 2017 (the “TFV’s Request”).

¹⁵ See the “Observations sur le Projet de plan de mise en œuvre de l’Ordonnance de réparation déposé par le Fonds au profit des victimes”, No. ICC-01/04-01/07-3762, 11 September 2017.

¹⁶ See the “Defence Observations on the TFV’s Draft implementation plan”, No. ICC-01/04-01/07-3764, 11 September 2017.

¹⁷ See the “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)”, No. ICC-01/04-01/07-3763-Conf, 13 September 2017 (a public redacted version of the document was notified on 13 September 2017: No. ICC-01/04-01/07-3763-Red).

10. On 5 October 2017, the TFV filed its Observations (the “Observations”).¹⁹

III. SUBMISSIONS

11. Preliminarily, the Legal Representative notes that she addressed the matter of potential new beneficiaries in the bilateral discussions leading to the preparation of the Draft Implementation Plan in order for the TFV to be aware of the need to eventually modify said Plan and that – at the time – the TFV did not raise any specific issues.

12. The Legal Representative addresses in this response only the Observations related to the potential impact that the granting of her appeal may have on the amount of Mr Katanga liability and on the alleged increased costs for the proposed programmes;²⁰ and in particular the fact that “[a]ny change in the amount of liability would require modifying the values associated with the five beneficiary categories and could also potentially render some of the proposed concrete activities cost prohibitive.”²¹

13. The Legal Representative submits that the right of the victims – whose applications for reparations were wholly or partially rejected in the Impugned Decision (the “Concerned Victims”) – to fair and just reparations shall prevail over any administrative concerns raised by the TFV, even if the appeal may have as a consequence the need to amend or adjust the Draft Implementation Plan.

14. Indeed, and as stressed by Trial Chamber I, the reparations scheme is a key feature of the Rome Statute as the right to victims to appropriate, adequate and

¹⁸ See the “Decision on the Trust Fund’s request for leave to file observations” (Appeals Chamber), No. ICC-01/04-01/07-3765 A3 A4 A5, 14 September 2017.

¹⁹ See the “Observations pursuant to rule 103 of the Rules of Procedure and Evidence”, No. ICC-01/04-01/07-3766 A3 A4 A5, 5 October 2017 (the “Observations”).

²⁰ *Idem*, para. 14.

²¹ *Ibid.*, para. 16 (emphasis added).

prompt reparations is a well-established and basic human right, enshrined in universal and regional human rights treaties and in other international instruments.²² In the same vein, Trial Chambers I²³ and II²⁴ indicated that in all matters pertaining to reparations, the Court shall respect the human rights of the victims and treat all the victims fairly and equally while taking into account their needs; an approach shared by the Appeals Chamber.²⁵

15. The Legal Representative further notes that nothing in the provisions governing the TFV impedes an amendment or adjustment to the Draft Implementation Plan and that the Appeals Chamber may exercise its discretion asking the TFV to amend or adjust the Draft Implementation Plan - even if already approved – if it deems it necessary to grant the full right to reparations to the victims in an effective way.

16. In any case, the question of whether or not the Concerned Victims would eventually qualify for reparations will ultimately depend on the completeness of the newly submitted applications for reparations, if allowed. Consequently, even if the Appeals Chamber grants the appeal lodged on behalf of the Concerned Victims, its outcome will not automatically increase the number of beneficiaries of individual or collective reparations. In this regard, it should also be noted that nine out of the Concerned Victims have already been granted partial reparations and, accordingly, are already included in the Draft Implementation Plan and in the relevant calculations of costs. For these individuals, it is argued that the financial impact of a decision granting the appeal will be minimal.

²² See the “Decision establishing the principles and procedures to be applied to reparations” (Trial Chamber I), No. ICC-01/04-01/06-2904, 7 August 2012, paras. 178 and 185.

²³ *Idem*, paras. 189-190.

²⁴ See the Impugned Decision, *supra* note 2, para. 30.

²⁵ See the Annex A to “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations, (Annex A) and public annexes 1 and 2”, No. ICC-01/04-01/06-3129-AnxA, A A2 A3, 3 March 2015, paras. 1-14.

17. Therefore, the Legal Representative argues that the TFV's suggestion that the appeal, if granted, could result in a change in the amount of Mr Katanga's liability and could potentially render some of the proposed activities "cost prohibitive" is premature. Final calculation of the number of new beneficiaries with the total monetary amount of the harms they suffered from and an eventual change in Mr Katanga's liability will only be possible after the Appeals Chamber has ruled anew on the reparations claims of the Concerned Victim.

18. Even if, *arguendo*, the Appeals Chamber allows the submission of completed applications for reparations and then decides to grant full reparations to all of the Concerned Victims, the number of new beneficiaries (or 23 victims whose claims for reparations were completely rejected) will be less than 10 percent of the total of 297 victims who were initially granted reparations in the Impugned Decision.

19. Moreover, if there is a real need to make, in advance, calculation for the total monetary harm and pre-determine the amount for which Mr Katanga would be liable at this stage, the potential effect of the appeal lodged by the Common Legal Representative of Victims must equally be factored. Indeed, the Common Legal Representative of Victims also appealed the Impugned Decision on behalf of five victims (a/25094/16, a/25096/16, a/25098/16, a/25099/16 and a/25097/16) whose claims for reparations were wholly rejected and raised two grounds of appeal related to the concept of transgenerational harm.²⁶ If the Appeals Chamber decides to grant the appeal, the recognition of this type of harm will also add new beneficiaries (at least five) and potentially increase the total monetary amount of the harm suffered from by the victims on which Mr Katanga's liability would be based. Yet, there is no evidence showing that the TFV considered this possibility which, if materializes, would certainly lead to the modification of the current terms of the Draft

²⁶ See the Common Legal Representative's Document in Support of the Appeal, *supra* note 6, paras. 3, 28-60 and 61-87.

Implementation Plan, thus resulting in an unspecified amount of increase of the projected costs.

20. Therefore, the Legal Representative submits that the TFV's contention that the appeal lodged by the Concerned Victims alone, if granted, could result in a change in the amount of Mr Katanga's liability and would potentially render some of the proposed activities "cost prohibitive" is equally unpersuasive.

IV. CONCLUSION

21. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to disregard the Trust Fund of Victims' submissions related to the appeal lodged on behalf of the Concerned Victims.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 26th day of October 2017

At The Hague, The Netherlands