

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **1 August 2018**

TRIAL CHAMBER II

Before: Judge Marc Perin de Brichambaut, Presiding Judge
Judge Olga Herrera Carbuccia
Judge Péter Kovács

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

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

Public

**Prosecution's request to be provided with an unredacted version of the Trial
Chamber's decision of 19 July 2018 (ICC-01/04-01/07-3804-Red)**

Source: Office of the Prosecutor

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

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Introduction

1. On 19 July 2018, Trial Chamber II issued its decision on the assessment of transgenerational harm as alleged by five applicants in the reparations proceedings in this case (“Decision”).¹ The Trial Chamber found that the applicants had not established to the required standard - the balance of probabilities - the causal nexus between the psychological harm suffered by the five applicants and the crimes for which Mr Katanga had been convicted.² The Prosecution only has access to the public redacted version of the Decision which does not disclose the Chamber’s analysis of the claims made by the five applicants, including the Chamber’s assessment of the causal nexus between the harm suffered by the applicants and Mr Katanga’s crimes.³

2. The Prosecution requests access to the unredacted version of the Decision to understand the Chamber’s assessment of the required standard of causation with respect to these five applications.⁴ This will enable the Prosecution to provide meaningful submissions in reparations proceedings, but also to inform the Prosecution’s position in other Court proceedings where causation is an issue.

Submissions

3. The Prosecution’s access to the Chamber’s analysis of the causal nexus is of significance in at least two aspects.

4. *First*, the Decision is the first judicial ruling on the assessment of transgenerational harm in this Court. The way in which the Chamber assessed causation in respect of the claims of transgenerational harm is likely to be relevant in determining whether any future claims for transgenerational or other forms of harm can be brought before this Court, and if so, how those claims will be assessed. In this context, an understanding of the Chamber’s application

¹ ICC-01/04-01/07-3804-Red (“Decision”). On 8 March 2018, after largely confirming the Reparations Order, the Appeals Chamber referred this matter to Trial Chamber II for it to reassess the causal nexus between the crimes for which Mr Katanga was convicted and the applicants’ psychological harm, and whether they should be awarded reparations. *See* ICC-01/04-01/07-3778 A3 A4 A5 (“*Katanga* Reparations AJ”), para. 260.

² Decision, paras. 141-142 and p. 33.

³ *See e.g.* Decision, paras. 35-140.

⁴ The Trial Chamber endorsed the “but/for” causation standard and the requirement that the crime be the “proximate cause” of the harm. *See* Decision, paras. 15-17, 30. *See also* ICC-01/04-01/07-3728-tENG (“*Katanga* Reparations Order”), para. 162. The standard of proof is the “balance of probabilities” and applicants “must show that it is more probable than not that he or she suffered harm as a consequence of one of the crimes of which Mr Katanga was convicted”. *See Katanga* Reparations Order, para. 50.

of the law on causation is important to the Prosecution being able to make informed and meaningful observations on the issue of causation in reparations.⁵

5. Although not a party to reparations proceedings,⁶ the Prosecution may make observations on reparations if it is invited or permitted to do so,⁷ and indeed the Prosecution has done so in the past⁸ including on the issue of causation.⁹ In participating in reparations proceedings, the Prosecution is motivated by its duty to foster accountability,¹⁰ including by taking appropriate measures in the interests of victims.¹¹ The Prosecution unequivocally supports the mandate of the Court not only to end impunity and to establish the truth, but also “to go beyond the notion of punitive justice” towards an inclusive process which “recognises the need to provide effective remedies for victims”.¹² Having access to the unredacted version of the Decision will aid the Prosecution in exercising its duty effectively in support of the Court’s mandate.

6. *Second*, the Decision builds on the Court’s jurisprudence more broadly on the standards of causation, in particular, the “but/for” relationship between the harm and the crime and the requirement that the crime be the “proximate cause” of the harm for which reparations are sought.¹³ In other proceedings before the Court where causation is an issue, and this may not just be limited to reparations proceedings,¹⁴ the Chamber’s assessment of the causal nexus to

⁵ The same causal standard has been applied generally with respect to harms for which reparations are sought. See *Katanga* Reparations Order, paras. 162-163; ICC-01/04-01/06-3129-AnxA (“*Lubanga* Amended Reparations Order”), para. 59; ICC-01/12-01/15-236 (“*Al-Mahdi* Reparations Order”), para. 44.

⁶ ICC-01-12-01/15-172, fn. 3 (*Al-Mahdi*); ICC-01/04-01/07-3532, para. 10 (*Katanga*); ICC-01/04-01/06-3179, paras. 5-6 and ICC-01/04-01/06-2953, para. 74 (*Lubanga*). The Prosecution cannot appeal reparations orders. See article 82(4).

⁷ Statute, article 75(3).

⁸ See ICC-01/04-01/07-3544 (“*Katanga* Prosecution Observations on Reparations Procedure”); ICC-01/04-01/06-2867 (“*Lubanga* Prosecution Observations on Reparations Procedure”); ICC-01/04-01/06-3186 (“*Lubanga* Prosecution Observations on the TFV DIP”); ICC-01/05-01/08-3454 (“*Bemba* Prosecution Observations on Reparations”); ICC-01/05-01/08-3517 (“*Bemba* Prosecution Response to Defence Request for Suspension of the Reparations Proceedings”); ICC-01/05-01/08-3646 (“*Bemba* Prosecution Submissions on Reparations Proceedings before Trial Chamber III”); ICC-01/12-01/15-192-Conf (“*Al Mahdi* Prosecution Observations on Reparations”); ICC-01/12-01/15-195-Conf (“*Al Mahdi* Prosecution Observations on Reparations Experts”).

⁹ *Katanga* Prosecution Observations on Reparations Procedure, paras. 10-18; *Bemba* Prosecution Observations on Reparations, paras. 23-24; *Al-Mahdi* Prosecution Observations on Reparations, para. 20.

¹⁰ Statute, article 42(1).

¹¹ Statute, article 68(1).

¹² *Lubanga* Amended Reparations Order, para. 1.

¹³ Decision, paras. 15-17, 30.

¹⁴ See e.g. ICC-01/05-01/13-2276-Red A6 A7 A8 A9 (“*Bemba et al. SAJ*”), para. 263 (finding that “the consequences of a crime or offence in relation to which a person was convicted may be taken into account to aggravate the sentence in one way or another as long as these consequences were, at least, objectively foreseeable by the convicted person”).

the facts of this case may relevantly inform the Prosecution as to how this causation standard operates in the Court.

Relief Sought

7. For the foregoing reasons, the Prosecution requests access to the unredacted version of the Decision. Access to the unredacted version of the Decision will permit the Prosecution to understand the Chamber's application of the law on causation to the five applications.



Fatou Bensouda, Prosecutor

Dated this 1st day of August 2018
At The Hague, The Netherlands