



Original: **French**

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

Date: **4 February 2019**

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 Request by the Trust Fund for Victims to Reclassify Certain Documents and to Reclassify and Redact Other Documents

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 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**

Other

TRIAL CHAMBER II (“Chamber”) of the International Criminal Court (“Court”), acting in accordance with regulation 23 *bis* of the Regulations of the Court, rules as follows.

I. PROCEDURAL HISTORY

1. On 24 March 2017, the Chamber delivered the “Order for Reparations pursuant to Article 75 of the Statute (“Order for Reparations”).¹
2. On 25 July 2017, pursuant to the Order for Reparations, the Trust Fund for Victims (“Trust Fund”) submitted to the Chamber the draft implementation plan (“Draft Implementation Plan”).² On 11 September 2017, the Legal Representative of Victims (“Legal Representative”)³ and the Defence team for Germain Katanga (“Defence”)⁴ filed their respective observations on the Draft Implementation Plan.
3. On 9 October 2017, the Legal Representative and the Trust Fund filed additional joint submissions on the Draft Implementation Plan⁵ (ICC-01/04-01/07-3767-Conf).
4. On 12 October 2017, the Chamber approved the implementation of individual reparations and instructed the Trust Fund to transmit to it additional information on the implementation of collective reparations⁶ (ICC-01/04-01/07-3768-Conf-tENG).

¹ “Order for Reparations pursuant to Article 75 of the Statute”, ICC-01/04-01/07-3728-tENG, with one public annex (Annex I) and one 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 “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. The French translation was notified on 21 August 2017, along with one confidential annex (Annex 1), one public annex (Annex 2), one confidential annex *ex parte*, Registry (Annex 3), one confidential annex *ex parte*, Principal Counsel, Office of Public Counsel for Victims (Annex 4) and one confidential annex *ex parte*, Legal Representative (Annex 5).

³ “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.

⁴ “Defence Observations on the TFV’s Draft implementation plan”, 11 September 2017, ICC-01/04-01/07-3764.

⁵ “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.

5. On 13 November 2017, the Trust Fund submitted a request to the Chamber for an extension of time, proposing a date of 4 December 2017, for the submission of additional information on the implementation of collective reparations⁷ (ICC-01/04-01/07-3770-Conf). On 30 November 2017, the Chamber granted the request of 30 November 2017⁸ for an extension of time (ICC-01/04-01/07-3771-Conf).

6. On 4 December 2017, the Trust Fund filed a report on the implementation of individual reparations and on the additional information requested by the Chamber (ICC-01/04-01/07-3772-Conf).⁹ On 13 December 2017, the Legal Representative filed his observations on that report (ICC-01/04-01/07-3773-Conf)¹⁰.

7. On 20 February 2018, the Trust Fund, the Office of Public Counsel for Victims (“OPCV”) and the Legal Representative filed a joint request seeking that the Chamber initiate an exchange of information pursuant to the negotiated agreement governing relations between the Court and the United Nations¹¹ (ICC-01/04-01/07-3775-Conf-Exp and its annexes). On 1 March 2018, the Chamber rendered its decision on the joint request concerning initiation of an exchange of information with the United Nations¹² (ICC-01/04-01/07-3777-Conf-Exp-tENG).

8. On 20 September 2018, the Chamber directed the Trust Fund to file information on the modalities of collective reparations (ICC-01/04-01/07-3809-Conf-

⁶ “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.

⁷ “Request for an extension of time”, 13 November 2017, ICC-01/04-01/07-3770-Conf.

⁸ “Decision Granting the Request for an Extension of Time Filed by the Trust Fund for Victims on 14 November 2017”, 30 November 2017, ICC-01/04-01/07-3771-Conf-tENG.

⁹ “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.

¹⁰ “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.

¹¹ “Urgent joint request to the Trial Chamber to consider initiating an exchange of information pursuant to the Court’s agreement with the United Nations” with four annexes, 20 February 2018, ICC-01/04-01/07-3775-Conf-Exp.

¹² “Decision on the Joint Request to Initiate an Exchange of Information with the United Nations”, 1 March 2018, ICC-01/04-01/07-3777-Conf-Exp-tENG.

tENG).¹³ On 2 October 2018, the Trust Fund filed information relevant to the modalities of the implementation of the collective reparations.¹⁴ (ICC-01/04-01/07-3811-Conf).

9. On 22 November 2018, the Trust Fund filed a request to reclassify certain documents and suggested the publication of other documents with proposals for redactions to six annexes¹⁵ (“Request by the Trust Fund to Reclassify Certain Documents” or “Request to Reclassify Certain Documents”). The annex to the Request shows that the Legal Representative does not object to the Request by the Trust Fund to Reclassify Certain Documents.¹⁶

10. On 27 November 2018, the OPCV responded that it, likewise, did not object to the Request by the Trust Fund to Reclassify Certain Documents.¹⁷

II. ANALYSIS

A. Trust Fund’s arguments

11. In its request to reclassify, the Trust Fund seeks (i) reclassification from confidential to public, documents ICC-01/04-01/07-3767-Conf, ICC-01/04-01/07-3770-Conf, ICC-01/04-01/07-3771-Conf, ICC-01/04-01/07-3772-Conf and ICC-01/04-01/07-3777-Conf-Exp¹⁸ (“Documents Listed in the Request”) and, to this end, (ii) the application of a number of redactions to or reclassification from confidential to

¹³ “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.

¹⁴ “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.

¹⁵ “Request to reclassify documents and proposal of redactions to apply to certain documents with five confidential annexes (I – V) and one confidential *ex parte* (VI)”, 22 November 2018, ICC-01/04-01/07-3816.

¹⁶ Annexe I to the Request to Reclassify, ICC-01/04-01/07-3816-Conf-AnxI. See also “*Communication du Représentant légal relative aux vues et préoccupations des victimes bénéficiaires de réparation*”, 14 December 2018, ICC-01/04-01/07-3819-Conf (“Document ICC-01/04-01/07-3819-Conf”), para. 19.

¹⁷ “*Réponse à la 'Request to reclassify documents and proposal of redactions to apply to certain documents'*”, 27 November 2018, ICC-01/04-01/07-3817.

¹⁸ Request to Reclassify Certain Documents, para. 6 and conclusion.

public after certain redactions have been applied, of documents ICC-01/04-01/07-3768-Conf, ICC-01/04-01/07-3773-Conf, ICC-01/04-01/07-3775-Conf with its annexes 1, 2 and 3, ICC-01/04-01/07-3809-Conf as well as document ICC-01/04-01/07-3811-Conf without its annexes.¹⁹

12. Relying on the principle of publicity of proceedings,²⁰ the Trust Fund submits that this is an apt approach given that the developments concerning the implementation of reparations, as described in the said documents, no longer constitute a security risk for the victims. It follows that, since the reason warranting the confidentiality of the documents is no longer valid, the documents may be reclassified.²¹ The Trust Fund further submits that disclosing the developments to the public will not affect the discreet implementation of reparations.²²

B. The Chamber's finding

13. At the outset, the Chamber notes that the effect of filing the Request to Reclassify Certain Documents as "public" would be to draw public attention to the fact that the implementation of reparations is under way, which is clearly at odds with the Chamber's decision to ensure that reparations are implemented discreetly. The Registry is therefore directed to reclassify as confidential the Request to Reclassify Certain Documents.

14. With regard to the merits of the Request, the Chamber notes at the outset that, whereas the Trust Fund asserts that there is no longer any risk to beneficiaries of reparations associated with the disclosure of developments in the implementation of reparations, it presents no detailed and specific information in support of the assertion.

¹⁹ Request to Reclassify Certain Documents, para. 7 and conclusion.

²⁰ Request to Reclassify Certain Documents, paras. 7 and 10.

²¹ Request to Reclassify Certain Documents, paras. 4, 5, 6 and 9.

²² Request to Reclassify Certain Documents, paras. 4 and 9.

15. Regarding the basis for the chosen classification, the Chamber notes that, although there have been periods of calm, the security situation in the Democratic Republic of the Congo, especially in Ituri Province where most beneficiaries of the reparations live, is still largely unstable as both the Trust Fund and the Legal Representative themselves note in their recent submissions to the Chamber.²³

16. The Chamber therefore also finds that, contrary to the what the Trust Fund claims, reclassification of the documents listed in the Request could potentially affect the discreet implementation of reparations. The Chamber recalls in this respect that the beneficiaries to whom the individual reparations have been distributed are also beneficiaries of collective reparations and considers, for this reason, that any action undertaken to implement collective reparations could attract unwanted attention to the beneficiaries. The Chamber recalls its duty to protect “the safety, physical and psychological well-being, dignity and privacy of victims [...]” within the meaning of article 68(1) of the Statute, and considers that publicizing the implementation of reparations while in progress could give rise to additional risks to victims. The Chamber emphasizes that the purpose of this stage of the proceedings is to put into effect the right of beneficiaries to reparations, which it publicly recognized in the Order for Reparations, and considers that the effect thereof must not be to introduce additional risks to the beneficiaries.

17. Although in the case of *Lubanga*, cited by the Trust Fund, the Appeals Chamber acknowledged the principle of publicity of reparations proceedings before this Court,²⁴ the Chamber notes that this is not an absolute principle and must be restricted where circumstances so demand.

18. Having weighed the interests of the parties involved, in order to protect the beneficiaries of reparations from any danger or interference and to ensure that the

²³ Document ICC-01/04-01/07-3811-Conf, paras. 13, 23, 24 and document ICC-01/04-01/07-3819-Conf, paras. 21-26.

²⁴ *The Prosecutor v Thomas Lubanga Dyilo*, “Order for Reparations (amended)”, ICC-01/04-01/06-3129-AnxA, paras. 51-52. See also Order for Reparations, para. 345. See also rule 96 of the Rules of Procedure and Evidence.

collective reparations are, to the extent possible, implemented discreetly, the Chamber finds it appropriate to maintain for the time being the current level of classification of the documents listed in the Request. The Trust Fund's request to reclassify documents ICC-01/04-01/07-3767-Conf, ICC-01/04-01/07-3770-Conf, ICC-01/04-01/07-3771-Conf, ICC-01/04-01/07-3772-Conf and ICC-01/04-01/07-3777-Conf-Exp is therefore rejected.

19. In the light of the foregoing, the Chamber finds that the Trust Fund's request concerning documents ICC-01/04-01/07-3768-Conf, ICC-01/04-01/07-3773-Conf, ICC-01/04-01/07-3775-Conf with annexes 1, 2 and 3, ICC-01/04-01/07-3809-Conf and document ICC-01/04-01/07-3811-Conf without its annex, has become moot.

FOR THESE REASONS, the Chamber

REJECTS the Trust Fund's request for reclassification; and

DIRECTS the Registry to reclassify document ICC-01/04-01/07-3816 as "confidential".

Done in both English and French, the French version being authoritative.

[signed]

Judge Marc Perrin de Brichambaut

Presiding Judge

_____ [signed] _____

Judge Olga Herrera Carbuccion

_____ [signed] _____

Judge Péter Kovács

Dated this 4 February 2019

At The Hague, Netherlands