

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **5 October 2017**

**Appeal Chamber**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF**

***THE PROSECUTOR v. GERMAIN KATANGA***

**Public document**

**Observations pursuant to rule 103 of the Rules of Procedure and Evidence**

**Source:** The Trust Fund for Victims

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

Mr Eric MacDonald

**Counsel for Germain Katanga**

Mr David Hooper

Ms Caroline Buisman

**Legal Representative of Victims**

Mr Fidel Nsita Luvengika

Paolina Massidda

**States Representatives**

**REGISTRY**

---

**Registrar**

Mr Herman von Hebel

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

## I. BACKGROUND

1. On 24 March 2017, Trial Chamber II (“Trial Chamber”) issued an order for reparations against Mr Katanga (“Order for Reparations”).<sup>1</sup>
2. On 27 June 2017, the legal representative of victims<sup>2</sup> and the Office of the Public Counsel for Victims (“OPCV”)<sup>3</sup> submitted their appeal briefs against the Order for Reparations.
3. On 29 June 2017, Mr Katanga submitted his appeal brief.<sup>4</sup>
4. On 25 July 2017, the Trust Fund for Victims (“Trust Fund”) submitted its draft implementation plan relevant to the Order for Reparations (“Draft Implementation Plan” or “Plan”).<sup>5</sup>
5. On 25 August 2017, following an invitation from the Appeals Chamber,<sup>6</sup> the Trust Fund submitted a request for leave to submit observations on two issues arising in the present appeals (“Request to Submit Observations”).<sup>7</sup>
6. On 14 September 2017, the Appeals Chamber granted the Trust Fund’s request, setting the deadline to 5 October 2017 with a page limit of no more than 15 pages.<sup>8</sup>
7. The Trust Fund hereby submits its observations on the two issues for which leave was granted.

---

<sup>1</sup> [ICC-01/04-01/07-3728](#).

<sup>2</sup> [ICC-01/04-01/07-3745-tENG](#).

<sup>3</sup> [ICC-01/04-01/07-3746-Red](#) (“OPCV Appeal Brief”).

<sup>4</sup> [ICC-01/04-01/07-3747-Red](#) (“Defence Appeal Brief”).

<sup>5</sup> Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017 (ICC-01/04-01/07-3728) with five annexes, [ICC-01/04-01/07-3751-Red](#).

<sup>6</sup> The Appeals Chamber, *The Prosecutor v. Germain Katanga*, Directions on the conduct of the appeals proceedings, 7 August 2017, [ICC-01/04-01/07-3752](#).

<sup>7</sup> Request for leave to file observations, [ICC-01/04-01/07-3755](#).

<sup>8</sup> The Appeals Chamber, *The Prosecutor v. Germain Katanga*, Decision on the Trust Fund’s request for leave to file observations, 14 September 2017, [ICC-01/04-01/07-3765](#).

## II. THE TRUST FUND'S OBSERVATIONS

### **1. The potential procedural and substantive impact of the parties' requested relief on the draft implementation plan submitted in the *Katanga* case**

8. The Trust Fund recalls that OPCV requests that the Appeals Chamber “implement reparations proceedings” for its clients (including those rejected by the Trial Chamber and those found to have suffered only some of the harm alleged) by allowing the submission of additional evidence and “examining anew [their] applications for reparations [...] and issuing a decision on their merit in light of the additional evidence submitted”.<sup>9</sup> The Trust Fund also recalls that Mr Katanga requests “that [his] financial liability [...] be reduced”.<sup>10</sup> In its Request to Submit Observations, the Trust Fund noted that “both of these requested reliefs would substantively alter the order for reparations upon which its draft implementation plan is premised”<sup>11</sup> and could potentially raise procedural questions regarding how modifications to the Draft Implementation Plan required by changes to the Order for Reparations should be carried out by the Trust Fund.<sup>12</sup>

9. Prior to addressing this first issue, the Trust Fund wishes to reiterate that its observations on this issue do not relate to whether the requested reliefs should be granted, but only to the potential implications on its already submitted Draft Implementation Plan if they were granted. Secondly, the Trust Fund would also like to assure the Appeals Chamber and the parties that it does not raise these implications as ‘problems’. The Trust Fund is committed to ensuring that its Draft Implementation Plan is fully responsive to the Court’s Order for Reparations, including any changes that may be the result of the appellate process. In this regard, the Trust Fund also wishes to express its commitment to promptly and efficiently make any modifications required to its current Draft Implementation Plan, in consultation and collaboration with the parties as has been the practice to date.

---

<sup>9</sup> [OPCV Appeals Brief](#), para. 49.

<sup>10</sup> [Defence Appeals Brief](#), para. 87.

<sup>11</sup> [Request to Submit Observations](#), para. 9.

<sup>12</sup> *Ibid.*

### a) Implications to the substance of the Draft Implementation Plan

10. Regarding the potential substantive implications to its Draft Implementation Plan, the Trust Fund recalls that the Trial Chamber ordered individual and collective reparations in the amount of 1,000,000 USD for the benefit of 297 identified victims<sup>13</sup> and instructed the Trust Fund to prepare a draft implementation plan that maintained a proportional link between the reparations and the prejudices suffered by each victim, suggesting in this regard that the Trust Fund consider creating different categories of reparations beneficiaries.<sup>14</sup> The Trust Fund therefore prepared its Draft Implementation Plan in accordance with these instructions, creating five beneficiary categories<sup>15</sup> that have differing monetary values associated with each category,<sup>16</sup> corresponding with the differing degrees and types of harm suffered, as established by the Trial Chamber.<sup>17</sup> A proposed budget of approximately 1,000,000 USD was also prepared that reflects the costs associated with each category based on, *inter alia*, the number of individual beneficiaries in each category.<sup>18</sup>

11. Regarding OPCV's clients, the Trust Fund observes that only those that were found to be eligible by the Trial Chamber were included in the Draft Implementation Plan and are currently placed within the category that corresponds to the harms that the Trial Chamber established they had suffered.<sup>19</sup> As such, OPCV's requested relief, if granted, would alter the Plan, and its budget, in terms of the total number of beneficiaries and in terms of the number of beneficiaries within each harm category.

12. In relation to the above, the Trust Fund wishes to point out that OPCV's requested relief could also potentially affect the amount of Mr Katanga's liability for the reparations awarded. In so submitting, the Trust Fund wishes to be clear that it is not attempting to give a different meaning to OPCV's appeal brief than that which OPCV itself intends. In this regard, the Trust Fund would respectfully request that the following paragraphs addressing this particular

---

<sup>13</sup> See [Order for Reparations](#), p. 129.

<sup>14</sup> [Order for Reparations](#), para. 305

<sup>15</sup> [Draft Implementation Plan](#), para. 84.

<sup>16</sup> [Draft Implementation Plan](#), para. 99.

<sup>17</sup> See Annex 3 to the [Draft Implementation Plan](#).

<sup>18</sup> See Annex 1 to the [Draft Implementation Plan](#).

<sup>19</sup> See Annex 4 to the [Draft Implementation Plan](#).

point be disregarded by the Appeals Chamber if OPCV responds to these observations that the Trust Fund has misunderstood its requested relief.

13. With that said, the Trust Fund nonetheless observes that the Trial Chamber arrived at the amount of Mr Katanga's liability by first establishing a total monetary amount (3,752,620 USD), which was calculated by multiplying the monetary value associated with each harm by the total number of individuals found to have suffered from that specific harm.<sup>20</sup> Of this total amount, the Trial Chamber determined that Mr Katanga was liable for 1,000,000 USD in reparations.<sup>21</sup>

14. The Trust Fund notes that, if granted, OPCV's requested relief would arguably change the total monetary harm calculation and therefore potentially also affect the amount for which Mr Katanga is liable. In any case, under either scenario, i.e. either: 1) adding beneficiaries or finding additional harms were suffered by the current beneficiaries within the current 1,000,000 USD amount for reparations or 2) increasing the amount of liability in terms of additional harms having been established, the Draft Implementation Plan would no longer correspond to the amended order for reparations and would need to be adjusted.

15. As a final comment on this point, the Trust Fund also observes that OPCV's request for a 'decision' under article 75 of the Statute could be read as requesting that the Appeals Chamber issue a separate order for reparations relevant only to OPCV's clients. In relation to those who were initially rejected, this would not affect the current Draft Implementation Plan. However, in relation to those who are currently included in the Draft Implementation Plan (those referred to as partially granted)<sup>22</sup> this would require modifying the Plan so that these individuals do not receive reparations awards under both plans.

16. Regarding Mr Katanga's requested relief, as explained above, the Trust Fund's Draft Implementation Plan is premised on 1,000,000 USD being the amount of reparations for which Mr Katanga is liable and which is accordingly to be provided to the beneficiaries in various types (individual and collective) and modalities (housing assistance, education assistance,

---

<sup>20</sup> [Order for Reparations](#), p. 87.

<sup>21</sup> [Order for Reparations](#), para. 264.

<sup>22</sup> See [OPCV Appeals Brief](#), para. 22, footnote 37. See for comparison Annex 4 to the [Draft Implementation Plan](#).

income generating activities, and psychological rehabilitation), as ordered by the Trial Chamber in the Order for Reparations. Any 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<sup>23</sup> cost prohibitive.

## **b) Procedural implications**

17. The Trust Fund recalls that it requested to make observations on this issue because it “understands these requested reliefs to potentially involve the Appeals Chamber acting pursuant to its amendment authority under rule 153 of the Rules, as opposed to remanding these matters for a new determination to the Trial Chamber”.<sup>24</sup> The Trust Fund also noted that, “while Rule 153 of the Rules includes provisions for the Appeals Chamber to amend an order for reparations, neither the Rules nor the TFC Regulations lay out the procedure for the adjustment or modification of a draft implementation plan, including to which chamber such a plan would be submitted”.<sup>25</sup>

18. The Trust Fund considers that it is for the parties to indicate their views on whether a modified draft implementation plan should be submitted to the Appeals Chamber, if it amends the Order for Reparations, and accordingly takes no position on this matter. The Trust Fund does consider that, however ultimately decided, it is important that this is clarified in the Appeals Chamber’s eventual judgment in order to prevent any avoidable delay.

19. Accordingly, in the case that either of the requested reliefs is granted, the Trust Fund respectfully requests that the Appeals Chamber address in its judgment whether it considers itself seized to receive an amended draft implementation plan or whether it considers this to be a matter for the Trial Chamber. In the case that the Appeals Chamber were to issue a decision pursuant to article 75 in relation to OPCV’s clients, in particular those not currently included in the present Draft Implementation Plan, the Trust Fund would also respectfully request that the Appeals Chamber include instructions as to whether a separate draft implementation plan

---

<sup>23</sup> See [Draft Implementation Plan](#), paras 124-131.

<sup>24</sup> [Request to Submit Observations](#), para. 8.

<sup>25</sup> [Request to Submit Observations](#), para. 10.

should be developed or the current Plan modified, and to which Chamber the plan(s) should be submitted.

20. Finally, in the case that the Appeals Chamber decides that it will remain seized for purposes of receiving the amended draft implementation plan, the Trust Fund would request that a reasonable deadline for its submission be set in the judgment. In this regard, the Trust Fund assures the Appeals Chamber of its willingness to promptly provide the Appeals Chamber with an indication of how much time it would need to modify the Draft Implementation Plan (or prepare a second plan) once the judgment is rendered, if this would be of assistance.

## **2. Whether 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 for reparations**

21. The Trust Fund recalls that in his submissions relevant to the amount of liability for reparations imposed against him, Mr Katanga argues that “[his] proposed approach would merely alter the proportionate relationship between Mr Katanga’s share of the reparation burden on the one hand, and the share of the [Trust Fund] on the other [...]”.<sup>26</sup>

22. To the extent that Mr Katanga argues that his amount of liability established in the Order for Reparations could be reduced, but the total 1,000,000 USD would still be maintained by the Trust Fund providing funds above the amended amount ordered against Mr Katanga, the Trust Fund submits that this argument is contrary to the jurisprudence of the Court, and also misrepresents the principle of proportionality for reparations and regulation 56 of the Regulations of the Trust Fund (“TFV Regulations”).

23. First, as already held by the Appeals Chamber, “the legal framework clearly establishes that an order for reparations has to be issued in *all* circumstances against the convicted person”<sup>27</sup> (emphasis in original), reflecting the principles that reparations under the Statute

---

<sup>26</sup> [Defence Appeals Brief](#), para. 85.

<sup>27</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against “Decision establishing the principles and procedures to be applied to reparations”, 3 March 2015, [ICC-01/04-01/06-3129](#) (“*Lubanga Appeals Chamber Reparations Judgment*”), para. 76.

“ensure that offenders account for their acts” and “oblige those responsible for serious crimes to repair the harm they caused to the victims”.<sup>28</sup> The Trust Fund submits that there is no legal basis in the Court’s framework to assert that any part of an order for reparations could be directed against the Trust Fund, as opposed to solely against the convicted person, or that the Trust Fund shares the convicted person’s reparations “burden”. As stated in a different context by the *Al Mahdi* Trial Chamber: “After all, it is [the convicted person] – not the TFV – who is responsible for the harm caused to victims”.<sup>29</sup>

24. Second, the Trust Fund submits that the principle of liability established by the Appeals Chamber in the *Lubanga* case<sup>30</sup> relates to whether the amount of liability for reparations ordered against the convicted person is proportionate taking into account the *convicted person’s* actions (i.e. the harm that the convicted person’s crimes caused, how the convicted person carried out the crimes, and other specific circumstances of the case prosecuted against the convicted person), not vis-à-vis the convicted person and the Trust Fund. The Trust Fund submits that it, as well as its Board of Directors’ (“Board”) ability to decide to complement the payment of the awards for reparations ordered against the convicted person, is not relevant to the principle of liability or to determining the amount of the convicted person’s liability.

25. Finally, to the extent that this argument is premised on the fact that the Trust Fund’s Board has decided in this case to complement the payment of the reparations awards pursuant to regulation 56 of the TFV Regulations, the Trust Fund submits that this has also already been addressed by the Appeals Chamber, when it held that “the Trust Fund may advance its ‘other resources’ pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable

---

<sup>28</sup> [Lubanga Appeals Chamber Reparations Judgment](#), paras 65, 93.

<sup>29</sup> Trial Chamber VIII, Reparations Order, 17 August 2017, [ICC-01/12-01/15-236](#) (“*Al Mahdi* Reparations Order”), para. 115.

<sup>30</sup> The Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Annex A to Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 order for reparations (amended), 03 March 2015, [ICC-01/04-01/06-3129-AnxA](#) (“*Lubanga* Amended Order for Reparations”), para. 21: “The convicted person’s liability for reparations must be proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case”.

[...].<sup>31</sup> Furthermore, in that same judgment, the Appeals Chamber also established, as a Key Finding, that: “The determination, pursuant to regulation 56 of the Regulations of the Trust Fund, of whether to allocate the Trust Fund’s “other resources” for purposes of complementing the resources collected through awards for reparations falls solely within the discretion of the Trust Fund’s Board of Directors”.<sup>32</sup> As such, the Trust Fund respectfully submits that, contrary to the implication of Mr Katanga’s argument, the Court’s jurisprudence has already made clear that the Trust Fund can not be ordered to provide a monetary complement under regulation 56 of the TFF Regulations, which necessarily means it also could not be ordered to provide a monetary complement in excess of the amount ordered against Mr Katanga.

26. The Trust Fund submits that the Court’s jurisprudence has established that the convicted person bears the sole liability for reparations<sup>33</sup> and that this must be set out in the order for reparations, which occurs before the Trust Fund is seized of that order and before the Board considers whether to complement the payments of the reparations awards set out in the order.<sup>34</sup> Accordingly, the Trust Fund submits that a decision by its Board to complement the payment of reparations awards can only be, by definition, up to the amount of the convicted person’s financial liability established against him or her in the order for reparations. The Trust Fund submits that regulation 56 of the TFF Regulations does not give its Board the authority to decide on its own to provide an amount for reparations that is more than that ordered against the convicted person by the Court. The Trust Fund respectfully suggests that to hold otherwise would sever the “intrinsic link” between a reparations order and “the individual whose criminal liability is established in a conviction and whose culpability for the criminal acts is determined in a sentence”,<sup>35</sup> in this case being solely Mr Germain Katanga.

---

<sup>31</sup> [Lubanga Appeals Chamber Reparations Judgment](#), para. 115.

<sup>32</sup> [Lubanga Appeals Chamber Reparations Judgment](#), “Key Finding 4.”, p. 7.

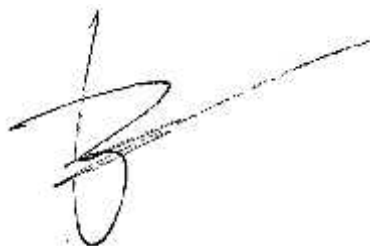
<sup>33</sup> [Al Mahdi Reparations Order](#), para. 112 (“First, the present award is levied against Mr Al Mahdi personally – the resources of the TFF are irrelevant to the question of Mr Al Mahdi’s liability”).

<sup>34</sup> Regulations 50 (b) and 56 of the [TFF Regulations](#).

<sup>35</sup> [Lubanga Amended Order for Reparations](#), para. 20.

**FOR THE FOREGOING REASONS**

The Board of Directors of the Trust Fund for Victims respectfully submits these observations in the present appellate proceedings on the two above-mentioned issues.



---

Pieter W.I. de Baan  
Executive Director of the Secretariat of the Trust Fund for Victims,  
on behalf of the Board of Directors of the Trust Fund for Victims

Dated 5 October 2017

At The Hague, The Netherlands