

Case Comment: Reparations for Death and Destruction in the Congo

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By: Pearl Eliadis

On March 7, 2014, Congolese warlord Germain Katanga was found guilty by the International Criminal Court (ICC) of being an accessory to crimes against humanity and war crimes as a result of an attack that took place in the Democratic Republic of Congo (DRC) in 2003. The charges relating to crimes against humanity were for murder, and the four war crimes were murder, attacking a civilian population, destruction of property and pillaging.

Katanga is the second person to be convicted by The Hague court. He was sentenced to 12 years imprisonment. The sentence was subsequently reduced and completed in January 2016.

Katanga was also found to have had legal responsibility for obtaining the weapons that were used to kill more than 200 villagers, although he was not found directly responsible for the killings. The use of machetes was described as especially cruel because it generated significant suffering among victims.

This case comment focuses on the types of reparations and their calculations that have been accepted by the ICC. The Trial Chamber II ("the Chamber") of the ICC ordered both individual and collective reparations to the victims in *The Prosecutor v. Germain Katanga* in March 2017.[1] The case reiterates the ICC's authoritative statement of the principles to be applied to both forms of reparations. Because Katanga was found to be indigent, the Chamber was given ongoing jurisdiction to monitor his

financial situation, and the Trust Fund for Victims (TPF) was asked to consider the use of its resources for reparations.

Background to a massacre

In the early 2000s, Eastern Democratic Republic of Congo was the site of multiple attacks and skirmishes among various militias that had degenerated into ethnic conflicts among the main ethnic groups, namely the Hema, the Ngiti and the Lendu.

The regional fighting had reportedly claimed an estimated 50,000 people.

Katanga was a militia commander of a Ngiti armed group called the *Forces de résistance patriotique en Ituri* and was accused of organizing and carrying out the massacre that took place in February 2003 in the gold rich Ituri district. Hundreds of villagers were killed in an ambush in Bogoro village in February 2003. The victims were primarily from the Hema ethnic group, many of whom were reportedly attacked with knives and machetes while they slept.

Reparations Order

The reparations order was made pursuant to art. 75 of the Rome Statute. The Chamber noted that reparations constituted a critical phase in the administration of justice, serving as public acknowledgement of the wrongs done to the victims and as an alleviation, to the extent possible, of the suffering caused.[2] Based on the evidence, as well as national and international practice, and the representations of the parties, the Chamber assessed the physical, material and psychological damage that suffered by the victims at approximately USD $3,752,620. The Chamber set the amount of Katanga's own liability for these damages at USD $1,000,000.

The Order provided for individual reparations for harm suffered by the victims of the crimes.[3] It further provided for collective reparations, focusing on community-wide projects that nonetheless focused on individual victims who shared a group identity and could demonstrate that they experienced harm as a result of the acts of the convicted person.

The ICC made individual awards to almost 300 victims out of the 341 individuals who had applied for reparations, with compensation allocated in the amount of USD $250 per victim as a form of "symbolic" reparations. The Chamber noted that the symbolic reparations award of USD$250 per individual victim were not intended to serve as comprehensive compensation, but rather to ensure that reparations are meaningful in relation to the harm suffered by the victims.

The Chamber also ordered collective reparations that included: support for housing, income-generating activities, education, and psychological support.

The nature of reparations proceedings

Relying on the 2015 ICC Appeals Chamber decision in *The Prosecutor v. Thomas Lubanga Dyilo,*[4] the Chamber noted that reparations proceedings are distinct judicial proceedings that are nonetheless connected to the penal proceedings under art. 74 of the Statute.

Reparations have two principal objectives, namely, to repair the harm caused by serious crimes, and to ensure that those responsible for those crimes are accountable for their acts. On the latter point, the Chamber cited with approval the principle set out in the *Lubanga* case that "reparations are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for those criminal acts is determined in a sentence."[5]

Victims have the burden of proof of demonstrating their identity, the harm caused, and the nexus between the harm and the acts of the convicted person. As well, both victims and convicted persons at the stage of reparations are "cast in the position of parties to the proceedings".[6]

Although the Prosecution bears the burden of proof of establishing guilt at trial beyond a reasonable doubt, the standard of proof at the reparations stages is based on the balance of probabilities.[7] Applying this standard, the Chamber had regard to overall the context, including the difficulty that victims may face in obtaining evidence as a result of the loss of destruction of evidence in the circumstances, especially, since in this case, fourteen years had elapsed since the Bogoro massacre.

Applicable principles

In terms of general principles of liability, the Chamber noted that reparations orders must be made against the convicted person and identify the eligible victims. The Chamber is also required to define the harm (which may be direct or indirect), and determine the scope of liability. Finally, the Chamber is required to set out the reasons for reparations[8]. The following key principles were applied:

- victims must be treated with humanity, with dignity, and with respect for their human rights;
- reparations should reflect local cultural and customary practices unless these are discriminatory, exclusive, or deny victims equal access to their rights;[9]
- reparations must be meaningful to victims, acknowledging the grave nature of the harm caused;[10]
- to the extent possible, reparations must be appropriate, adequate and prompt;
- the needs and preferences of the victims must be taken into consideration, including personal safety, physical and psychological well?being and privacy;[11]
- victims are to be treated fairly, and equally whether or not they participated in the trial proceedings;[12]
- reparations must be granted without "adverse distinction based on gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status;"[13]
- reparations should also aim to reconcile the parties, a factor that is also relevant in the area of collective reparations.[14]

Types of Damage Recognized

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The Court set out a useful list of the types of harms resulting from the crimes for which it would award reparations and quantified them, including damage to homes, buildings and furniture, businesses, damage to agricultural property the pillaging of harvest, and harm to livestock.[15] Both physical harm and psychological harm were quantified and the Court provided a useful chart on the quantification of psychological harm connected to the loss of relatives from a comparative perspective.[16]

The overview table below provides an additional insight into the ICC'S determination of the extent of harm suffered with respect to material harm, physical harm, and psychological harm.[17]

Overview Table

Implementation and subsequent developments

Katanga was indigent and unable to pay for the reparations. The Board of Directors of the TVF was asked to use its discretion to draw on the TFV's resources to implement both the individual and the collective reparations.

The Chamber also instructed the TFV to contact the DRC authorities about the possibility of working together to establish and implement reparations, and the TFV had to present an implementation plan containing the planned projects.

The Legal Representative of Victims, the Public Counsel for Victims and the Defence for Katanga have appealed the reparations order. The final decision on reparations had not been rendered at the time of writing.

Conclusion

This case should be read together not only with the *Lubanga* case, cited above, but also with the procedures and principles applied by the ICC in ordering reparations in the *Al Mahdi* case, discussed in the Global Justice Journal's article, "Reparations for the Destruction of the Precious Past." (That case had been the first international trial concerning the destruction of historical and religious monuments and reparations for a war crime aimed at damaging such monuments and addressing the resulting economic losses.) The Court in *Al Mahdi* had established principles of general application for assessment of reparations based on the UN Basic Principles of Justice for Victims of Crime and Abuse of Power and the UN Basic Principles on Reparations for Victims, including principles addressing the impact of war crimes on a community and the issue of moral harm.

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References

1. *The Prosecutor v. Germain Katanga :* No. ICC-01/04-01/07, 24 March 2017 (Trial Chamber II) Online <www.icc-cpi.int/CourtRecords/CR2017_05121.PDF>

2. *Katanga*, op. cit., paras. 14-15. See also Christopher Muttukumaru, “Reparations to Victims” in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results* (Kluwer 1999), pp. 262–270; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014), pp. 143-195.

3. Victims are identified by the Chamber victims as eligible to benefit from the awards for reparations or as set out in the criteria of eligibility based on the link between the harm suffered by the victims and the crimes of which the person was convicted. *Katanga*, para. 31.2).

4. *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Decision establishing the principles and procedures to be applied to reparations”, 7 August 2012, [French] translation registered on 19 February 2013, ICC-01/04-01/06-2904, para. 178 (“Lubanga, Trial Chamber I, Decision on Reparations”); *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Order for reparations” (amended), 3 March 2015, [French] translation registered on 1 August 2016, ICC-01/04-01/06-3129- AnxA, para. 3 (“Lubanga, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA”).

5. *Katanga,* para. 31(4).

6. *Katanga,* para. 15, citing See *Lubanga*, “Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016”, 4 March 2016, ICC-01/04-01/06-3202-tENG, para. 12. Article 82(4) of the Rome Statute provides that both the accused person and the victims have *locus standi*.

Katanga, para. 49-50*. Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 65. *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, paras. 81-84.

8. *Katanga*, para. 31.
9. *Katanga,* para. 268.
10. *Katanga*, para 15.
11. *Katanga*, para 30; see also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 34.
12. *Katanga*, para 30.
13. *Katanga*, para 30; see also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 16, 18.
14. *Katanga*, para. 268.
15. *Katanga*, para. 239.
16. *Katanga* para. 230.
17. *Katanga*, at 81.