

Case Comment: Review of the Appeals against the Reparations Order in Prosecutor v. Germain Katanga

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By: Irit Weiser

On March 8, 2018, the ICC Appeals Chamber largely confirmed the reparations decision of the Trial Chamber in Prosecutor v. Germain Katanga. Katanga was convicted in March 2014 of being an accessory to war crimes and crimes against humanity relating to conflict in the Democratic Republic of Congo. Despite its overall support, the Appeals Chamber did make some pointed obiter comments of the trial level's approach to determining reparations. Protracted and complex individual assessments had been conducted, but in the end not relied upon, as each victim had been awarded a set US$250. In this regard, the Appeals Chamber emphasized that proceedings intended to compensate victims need to be as expeditious and cost effective as possible.

Introduction

On March 8, 2018, the Appeals Chamber of the International Criminal Court rendered a judgement[1] largely confirming the reparations decision of the Trial Chamber in *Prosecutor v. Germain Katanga*.[2] The reparations order stems from Katanga's conviction in March 2014 of being an accessory to war crimes and crimes against humanity including murder, attack on a civilian population, and destruction

of property and pillaging in connection with the war in the Democratic Republic of Congo. The Trial Chamber ordered Katanga to pay reparations of US$1,000,000 to 297 victims as a symbolic compensation award, with each victim entitled to receive US$250, and collective awards for housing allowance, education assistance, income generating activities and psychological rehabilitation.[3]

Appeals against the order for reparations were filed by Katanga, the Legal Representative of the Victims (LRV) and the Office of Public Counsel for Victims.

Standard of Review

As this is an appeal, the first issue addressed by the Appeals Chamber was the appropriate standards of review. It noted that in the case of an *error of law*, the Appeals Chamber will reach its own independent interpretation and not defer to that of a trial chamber. However, even if a trial chamber misinterprets the law, the Appeals Chamber will only intervene if the error materially affects the impugned decision.[4] Similarly, in the case of a *procedural error*, the Appeals Chamber will only reverse an impugned decision if it is materially affected by the error.[5]

A different approach was adopted in respect of *errors of fact*. The Appeals Chamber noted that it will interfere with factual findings only where it can be shown that the first-instance court misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. It is not a matter of whether the Appeals Chamber would have come to a different conclusion, but rather whether the Appeals Chamber "cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[6]

Katanga Appeals

Katanga appealed on four different grounds, each of which is examined below.

(i) *Did the Trial Chamber properly conclude that an Applicant who established harm resulting from the destruction of a house should be presumed to have also suffered material harm resulting from pillaging of livestock and the destruction of fields*.[7]

The Appeals Chamber treated this ground of appeal as alleging an error of fact. Evidence at trial demonstrated that the nature of daily village life involved farming and maintenance of livestock. However, there did not exist in the region, established regulatory or documentary regimes to demonstrate ownership. Hence, the presumption drawn by the Trial Chamber to the effect that destruction of a house also meant harm to livestock and fields, was a reasonable "factual presumption" in the circumstances.[8]

(ii) *Did the Trial Chamber properly presume that all family members of a direct victim of the village attack were entitled to reparations for psychological harm for the loss of a family member.*

The Trial Chamber concluded that an applicant who had lost a family member – even a distant one – during the village attack, did not have to prove the existence of psychological harm. Rather, it was

presumed that the nature of the relationship was such that psychological harm must have resulted from the loss.[9]

The Appeals Chamber noted that the definition of "victims" entitled to reparations under article 75 of the *Statute of the International Criminal Court* is not restricted to any specific class of persons. Moreover, rule 85 of the *Rules of Procedure and Evidence* emphasizes that victims are persons who have suffered harm; no mention is made of a familial relationship.[10]In light of these provisions, the Appeals Chamber concluded that evidence demonstrating the existence of a familial relationship – close or distant – on a balance of probabilities, can suffice to categorize someone as an "indirect victim" entitled to reparations for psychological harm.[11]

(iii) *Did the Trial Chamber err in ruling ultra petita*[12] *by allocating compensation exceeding the claims of the applicants.*

Specifically, Katanga focused on three aspects of the Trial Chamber ruling which: (1) granted applicants a minimum amount for loss of cattle even if they claimed a lesser amount; (2) allocated compensation for moral harm connected to the village attack to some applicants who did not claim harm, and to some who were not present during the attack; and (3) allocated US $250 to each applicant, despite the victims' legal representative having asked for symbolic reparations of only one euro for each applicant.[13]

After examining article 75 of the Statute and rule 97 of the Rules, the Appeals Chamber concluded that a trial chamber has discretion to depart from an applicant's claim for reparations.[14] In fact, the Appeals Chamber went so far as to say that the *ultra petita* rule does not strictly apply to reparations proceedings given that a trial chamber is permitted to issue a decision on reparations without being seized by any party.[15] At the same time, the Appeals Chamber did issue a caution. It said:

… if, in the future, trial chambers were to presume psychological harm associated with the experience of an attack for all applicants who have proved material harm, but have not personally experienced the attack, they should carefully approach this issue, providing clear reasons as to the basis on which such a presumption is made. Furthermore, while the Trial Chamber awarded USD 250 to each victim in this case, this should not be viewed as a precedent or indication of quantum when it comes to the determination of awards in future cases.[16]

The Appeals Chamber may have been motivated to issue this statement because convicted persons are often indigent and therefore, payment of reparations is sought from the Trust Fund for Victims. Sadly, the number of victims and their needs are infinite, yet the funds not so. Hence, some prudence may be required in the allocation of reparations awards.

(iv) *Did the Trial Chamber err in issuing a reparations order that was not proportionate to, and exceeded, Katanga's part in the crimes.*

In dismissing this argument, the Appeals Chamber noted that the purpose of reparations, first and foremost, is to repair harm inflicted on the victims. Thus, it is irrelevant that other persons may have

contributed to the harms resulting from the crimes committed by the convicted individual. Similarly, the gravity of the crimes or any mitigating personal circumstances of the convicted person are not relevant. However, a reparations order must not exceed the overall cost of repairing the harms caused.[17]

Appeal of the Office of the Public Counsel for Victims (OPCV)

The OPCV alleged that the Trial Chamber erred procedurally by allowing the former legal representative of a select group of victims to withdraw without immediately appointing a new legal representative. The Appeals Chamber dismissed this contention, stating that the Court's legal texts do not require that victims be represented by counsel at all times before a trial chamber.[18]

Appeals of the Legal Representative for the Victims (LRV)

Two appeals were brought by the LRV, both of which were characterized by the Appeals Chamber as alleging errors of fact. The first appeal centered around the Trial Chamber's finding that there existed no causal link between the village attack and "transgenerational psychological harm" in respect of five applicants for reparations. These five applicants were born after the village attack, but claimed "transgenerational harm" – that is, harm passed on to them from their parents who suffered trauma from the war crimes. The Trial Chamber concluded there was no nexus despite having earlier stated that these individuals were "in all likelihood" suffering from transgenerational harm. The Appeals Chamber concluded that the Trial Chamber had failed to properly reason its decision and remanded the five applications back to it for reassessment.[19]

The LRV's second ground of appeal, which argued that the Trial Chamber had failed to consider certain expert evidence, was dismissed by the Appeals Chamber.[20]

Concluding Comments

Despite its almost complete affirmation of the trial decision, the Appeals Chamber had pointed comments about the lower chamber's approach of assessing each application individually and attaching monetary values to various categories of harms. The appeal judges agreed it was necessary to establish categories of harm. However, given the large number of victims, individual assessments turned out to be protracted, complex and expensive. Moreover, in the end, the monetary values attached to the various categories of harms did not reflect the reparations eventually awarded to the victims. The Appeals Chamber urged that proceedings intended to compensate victims for harm suffered, often years ago, be as expeditious and cost effective as possible.[21]

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Irit Weiser **About the Author**

Irit Weiser has spent most of her career with the federal Department of Justice. She was Senior General Counsel and Head of Legal Services for Health Canada and the Public Health Agency of Canada. She provided legal, policy and strategic advice to senior levels of government in regard to various health-related matters, including the Canada Health Act, food and drug regulation, quarantine, and tobacco. Prior to heading up Health Legal Services, Irit was General Counsel and Director of the Human Rights Law Section of the Department of Justice. She provided legal and policy advice, and litigation support on the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and international human rights law. Before joining the Department of Justice, Irit worked for the Lawyers Committee for Human Rights in New York. She has also taught International Human Rights at the Faculty of Law of the University of Ottawa. Finally, she has written articles and presented papers on international human rights matters, the Canadian Charter of Rights and Freedoms, and health law. Since retiring, Irit has become involved in a number of pro bono activities, including providing legal assistance to private sponsors through the Refugee Sponsorship Support Program. She is also a member of the Research Ethics Board of the Ottawa Health Science Network, the Strategic Governance Committee of the Royal Ottawa Hospital, and the Council of the Royal College of Physicians and Surgeons of Canada.

References

1. The Prosecutor v. Germain Katanga: No. ICC-01/04-01/07-377, 8 March 2018 (Appeal Chamber) https://www.legal-tools.org/uploads/tx_ltpdb/CR2018_01651.pdf
2. 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. For a comprehensive review of the Trial Chamber decision on reparations, see Pearl Eliadis, “Reparations for Death and Destruction in the Congo” (2017) 1 PKI Global Just J 14.
3. As Katanga is indigent, the Trust Fund for Victims was seized of the matter and its Board decided to provide $1 million for the reparations awarded to victims in the Katanga case.
4. Para. 39
5. Para. 40
6. Para. 41 (footnote 77)
7. Para. 82
8. Para. 78, 89-92
9. Para. 113
10. Para. 115
11. Para. 116
12. “beyond that which is sought”
13. Para. 144

14. Para. 146. The Appeal Chamber noted in particular article 75(1) of the Statute, which grants the trial chambers, in exceptional circumstances, the possibility to determine the scope and extent of any damage for the purposes of reparations proprio motu (i.e., on its own initiative).
15. Para. 147
16. Para. 149
17. Paras. 178, 184
18. Para. 216
19. Paras. 238-239
20. Para. 249
21. Paras. 63-72