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TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding
Judge Olga Herrera Carbuca
Judge Péter Kovacs

***SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA***

**Public
With Public Annexes A and B**

Defence Observations on the Monetary Value of the Alleged Harm

Source: Defence for Mr Germain Katanga

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

to:

The Office of the Prosecutor**Counsel for the Defence for Germain****Katanga**

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Legal Representatives of Victims

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REGISTRY

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Mr Herman von Hebel

Victims Participation and Reparations**Other****Section**

Ms Isabelle Guibal

1. The defence for Mr Katanga (“the defence”) hereby presents its observations on the monetary value of the alleged harm.

PROCEDURAL BACKGROUND

2. On 11 April 2016, the defence filed its *Second Defence Observations on the Victims Applications for Reparation* in which it submitted information regarding the current prices of the goods or property lost by the victim applicants in Bogoro, obtained through its investigations in Bogoro and Bunia.¹
3. On 15 July 2016, the Trial Chamber filed an *Order instructing the parties and the Trust Fund for Victims* to file observations on the monetary value of the alleged harm by 15 September 2016. It ordered them “to file additional observations on what they consider a fair monetary value for each type of harm, be it material, physical or psychological, suffered by the requesters” and referred them to Legal Representative of Victims’ Table describing links between crimes and harm suffered, as a potential list of types of harm alleged.²
4. On 23 August 2016,³ the Trial Chamber granted the Trust Fund for Victims’ request⁴ to access to the *Second Defence Observations on the Victims Applications for Reparation* and added that:

12. Afin de recevoir des observations suffisamment précises et pertinentes sur la valeur monétaire des préjudices allégués par les Demandeurs et afin d'avoir une vue d'ensemble, la Chambre complète son Ordonnance du 15 juillet 2016 et joint, en annexe de la présente ordonnance, une liste des types de préjudices plus détaillée. Le Représentant légal, la Défense et le Fonds sont enjoins de fournir leurs observations sur la valeur monétaire, qu'ils estiment équitable, pour chacun des préjudices de cette liste et, dans la mesure du possible, sur la méthode afin de déterminer ces valeurs, qu'il convient d'adopter. La Chambre est particulièrement intéressée à recevoir des observations sur la valeur de référence de ces préjudices ou des propositions

¹ ICC-01/04-01/07-3681-Conf-Exp, paras 36-37 and its Annex A.

² ICC-01/04-01/07-3702-tENG, para. 9, with reference to ICC-01/04-01/07-3687-Anx4.

³ ICC-01/04-01/07-3705, *Ordonnance relative à la requête du Fonds au profit des victimes sollicitant accès au document ICC-01/04-01/07-3681-Conf et relative aux observations concernant la valeur monétaire des préjudices allégués*.

⁴ ICC-01/04-01/07-3703, Request for access to document ICC-01/04-01/07-3681-Conf, 12 August 2016.

de fourchettes de prix, lorsque les parties et le Fonds considèrent que cela est pertinent.

13. Finalement, la Chambre note que la Défense a fourni des éléments d'information relatifs à la valeur monétaire actuelle. Dans ce contexte, la Chambre invite le Représentant légal, la Défense et le Fonds à lui soumettre des observations sur la question de savoir s'il convient d'évaluer la valeur monétaire des préjudices, dans la mesure où ils ont été établis, dans leur valeur en vigueur en 2003 ou dans celle en vigueur en 2016.

5. On 14 September 2016, at the Legal Representative of Victims' request,⁵ the Trial Chamber extended the deadline to file observations on the monetary value of the alleged harm until 30 September 2016.

DISCUSSION

6. The defence reiterates its observations contained, *inter alia*, in the *Defence Consolidated Response to the Parties, Participants and Other Interested Persons' Observations on Reparation*⁶, *Defence Observations on the Victims Applications for Reparation notified between 25 and 30 November 2015*,⁷ *Second Defence Observations on the Victims Applications for Reparation*,⁸ *Defence Observations on the Legal Representative of Victims' Transmission du « Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003 » and its Addendum*.⁹
7. The defence recalls that except in the circumstances in which the victim is partially responsible for the damage which occurred, the principle is that the victim should

⁵ ICC-01/04-01/07- 3707, *Demande de prorogation de délai en vue du dépôt d'observations sur la valeur monétaire des préjudices allégués* (Ordonnances ICC-01/04-01/07-3702 et ICC-01/04-01/07-3705), 9 September 2016.

⁶ ICC-01/04-01/07-3564, 16 June 2015.

⁷ ICC-01/04-01/07-3660-Conf.

⁸ ICC-01/04-01/07-3681-Conf-Exp.

⁹ ICC-01/04-01/07-3699-Conf, 22 June 2016.

obtain integral reparation for the harm caused by the crimes for which the accused was convicted.¹⁰

8. This means that the compensation allocated should return the victim to the situation in which he/she was before the perpetration of the crimes for which the accused was convicted. Thus the compensation awarded should not improve the situation of the victim by comparison with his/her situation before the Bogoro attack of 24 February 2003, but put him/her back in the same position. This is only possible if claims are itemized and supported by evidence. In addition, the Court may adopt the approach of international human rights courts, such as the European Court of Human Rights ('ECrHR'), in awarding just satisfaction. The ECrHR may decide on an equitable basis not to award the full loss suffered in terms of pecuniary damage.¹¹
9. For instance, to determine the compensation to allocate for the destruction or pillage of a good/property during the Bogoro attack of 24 February 2003, the Chamber should take into account the value and state (old/new/damaged, etc.) of the good/property at the time of the crime, with interests, in order to bring the victim back in his/her position before the crime.¹²
10. The defence notes that in some jurisdiction, like in France, the practice is to assess the harm at the date of the reparation judgment. The defence has no objection to evaluating prices at the time of reparation, as long as sufficient consideration is given to the argument that much of the lost property was in old and damaged, rather than new state.
11. Thus, the Chamber will need to take into account the economic, social and family situation of the victims locally, at the time of the attack, ie in the DRC, in 2003.
12. In this regard, it should be noted that pursuant to World Bank data, the DRC gross domestic product per capita was only 399 USD in 2001, 405 USD in 2002 and 423

¹⁰ Pursuant to the French Cour de cassation, « *Le propre de la responsabilité civile, est de rétablir aussi exactement que possible l'équilibre détruit par le dommage et de replacer la victime, aux dépens du responsable, dans la situation où elle se serait trouvée si l'acte dommageable ne s'était pas produit* » (Cass. civ. 2, 28 oct. 1954, JCP 1955, II, 8765 ; Civ. 2ème, 1er avril 1963, JCP 1963. II. 13408, note ESMEI) ; « *les dommages-intérêts alloués à une victime doivent réparer le préjudice subi sans qu'il en résulte pour elle ni perte ni profit* » (Civ. 2ème, 23 janvier 2003, Bull. II, n° 20).

¹¹ The European Court of Human Rights, Questions & Answers for Lawyers 2014, para. 23.

¹² See, inter alia, the position in The Netherlands: 'Schadevergoeding door daders van misdrijven', at <https://www.rijksoverheid.nl/onderwerpen/slachtofferbeleid/documenten/brochures/2011/04/05/schade-vergoeding-door-daders-van-misdrijven>

USD in 2003; it is 782 USD nowadays.¹³ According to the World Bank estimates, the percentage of the Congolese population living on less than \$1.90 a day determined by international prices in 2011 was 77% in 2012.¹⁴ The poorest 20% earned only 5.5 percent of the total national income in 2012.¹⁵ Ituri was one of the poorest parts of the DRC, as it has been a continuous conflict zone starting with the Ugandan invasion in 1998.¹⁶

13. The victim applications should be considered in light of this reality. In the current case, the defence observes that very few of the applicants have submitted any or sufficient evidence to corroborate their statements and to substantiate their reparation claims. This particularly holds true for any claim relating to the loss of property, fields and/cattle.

14. Therefore the defence submits that:

- For any applicant present during the Bogoro attack of 24 February 2003, the submission of an application for reparation before the Court, including the copy of the applicant's identity card, describing the attack, is sufficient to justify compensation for the moral harm caused by the fact to have attended the attack, provided that the applicant's statements are intrinsically coherent, credible and relate to the Bogoro attack of 24 February 2003.
- Compensation for any other type of harm can be allocated only when the applicant's statement is corroborated by documentary evidence, ie witness statements, residence certificate, death certificate, kinship certificate, medical certificate, *etc.*

15. In light of the limited information and evidence submitted by the applicants, the defence has suggested a fixed amount of compensation for each category of harm; most, if not all, of the applicants do not provide enough details/evidence to justify a higher award of compensation than any of the other applicants within each category of harm. Having reviewed all the applicants' forms, the defence submits that the Chamber is generally not in a position to differentiate their claims within each category of harm. For instance, regarding the death of a relative, the applicants usually do not specify what was the income of such a relative.

¹³ Available @ <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?locations=CD>.

¹⁴ Available @ <http://databank.worldbank.org/data/reports.aspx?source=2&country=COD>.

¹⁵ Available @ <http://databank.worldbank.org/data/reports.aspx?source=2&country=COD>.

¹⁶ HRW "Ituri: 'covered in blood'", July 2003, Vol. 15, No. 11 (A), available @ <https://www.hrw.org/sites/default/files/reports/DRC0703.pdf>.

16. The defence submits as annex A, a monetary assessment of various categories of alleged material harm.
17. The defence submits as annex B, a monetary assessment of various categories of alleged physical and moral harm.
18. These figures are based, *inter alia*, on the investigations led by the defence and on several exchanges with the Legal Representative of Victims. The defence and Legal Representative of Victims have succeeded in reaching an agreement regarding certain categories of harm; but disagree with respect to some other categories of harm.
19. The defence notes that several countries, such as France,¹⁷ the United Kingdom,¹⁸ the Netherlands¹⁹ etc., have issued detailed guidebooks which may be used by their national jurisdictions to assess the monetary value of the harm of the victims, in particular regarding the physical and moral harm linked to an injury.
20. While of interest, the defence submits that these guidebooks are obviously not directly applicable in the current case for several reasons. First, there is an extremely important difference of level of life conditions between the DRC and these other countries. It is also the case that the applicants submitted only a limited amount of evidence and details before the Court, which do not allow the Chamber to enter into such differentiated compensation.

¹⁷ See the *Rapport du groupe de travail chargé d'élaborer une nomenclature des préjudices corporels* led by Mr DINTILHAC, July 2005, available at <http://www.ladocumentationfrancaise.fr/rapports-publics/064000217/>; *RÉFÉRENTIEL INDICATIF RÉGIONAL DE L'INDEMNISATION DU PRÉJUDICE CORPOREL, COURS D'APPEL DE AGEN, ANGERS, BORDEAUX, GRENOBLE, LIMOGES, NÎMES, ORLEANS, PAU, POITIERS, TOULOUSE, VERSAILLES, BASSE-TERRE*, Quatrième édition, November 2011, available @ <http://www.avocatparis.org/system/files/worksandcommissions/att5e6i9.pdf>.

¹⁸ See for instance the *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland* (Fourth edition), Published on 4th March, 2013, available at <http://www.jsbni.com/Publications/personal-injury-guide/Documents/Green%20Book.pdf>. See also *The Criminal Injuries Compensation Scheme 2012 made on 13th November 2012* @ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf. Some firms have even published online some tools to assess the compensation that may be awarded for such or such types of harm; see Personal Injury Compensation Calculator - 2016 Update | Quittance available at <https://www.quittance.co.uk/personal-injury-compensation-claims-calculator>.

¹⁹ See above: 'Schadevergoeding door daders van misdrijven', at <https://www.rijksoverheid.nl/onderwerpen/slachtofferbeleid/documenten/brochures/2011/04/05/schade-vergoeding-door-daders-van-misdrijven>. See also 'Aanbevelingen civiele vordering en schadevergoedingsmaatregel m.b.t. de Wet Terwee en de Wet ter versterking van de positie van het slachtoffer', Oktober 2011.

21. It is nonetheless interesting to note that, in such systems, when compensation for the harm caused by a crime is granted by the State, and awarded by a public trust fund because of the indigence of the person convicted for the crime in question, then some limits may be imposed.
22. For instance, in The Netherlands, a public fund for victims of violent crimes has been put in place to compensate victims in cases where the accused is indigent. The maximum amount allocated for material damage is 22700 Euros and for immaterial damage (moral harm) it is 9100 Euros.²⁰
23. In France, a victim may obtain integral reparation in case of “*atteintes graves à la personne*” from the *Fond de Garantie* but the compensation is limited to a maximum of 4116 euros in case of “*atteintes légères à la personne et préjudice matériels résultant du vol, de l'escroquerie, de l'abus de confiance, de l'extorsion de fonds ou de la destruction, de la dégradation ou de la détérioration d'un bien*”.²¹
24. The Criminal Injuries Compensation Authority, similarly, is a government funded scheme designed to compensate blameless victims of violent crime in Great Britain; they consider claims for:
- “mental or physical injury following a crime of violence;
 - sexual or physical abuse;
 - loss of earnings - where you have no or limited capacity to work as the direct result of a criminal injury;
 - special expenses payments - these cover certain costs you may have incurred as a direct result of an incident. You can only ask for the consider special expenses if your injuries mean you have been unable to work or have been incapacitated to a similar extent for more than 28 weeks;
 - a fatality caused by a crime of violence including bereavement payments, payments for loss of parental services and financial dependency; and funeral payments.”²²

²⁰ <https://schadefonds.nl>; <http://www.judex.nl/rechtsgebied/strafrecht/slachtoffer,-getuige-en-deskundige/artikelen/353/slachtoffer-in-een-strafzaak%3A-aangifte-doen-en-schade-verhalen.htm> (Slachtoffer in een strafzaak: aangifte doen en schade verhalen).

²¹ See articles Article 706-3 et s. of the French Code of Criminal Procedure and the *Livret de l'indemnisation des infractions* available @ <https://www.legifrance.gouv.fr/> and <http://www.fondsdegarantie.fr/images/stories/pdf/infraction/livret%20infractions.pdf>

²² See *Criminal injuries compensation: a guide*, available @ <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide#what-is-the-criminal-injuries-compensation-scheme>.

25. Therefore, the Chamber may consider it appropriate to define a maximum amount of compensation that may be granted by applicant and/or by family. This would also be in the interest of a good administration of the public funds, given the indigence of Mr Katanga, the number of applicants, and the limited budget of the Trust Fund for Victims. This would also ensure that there will not be too great a difference of compensation between the applicants, which may provoke some rivalries and conflicts and may not be justified in any event – two applicants may have endured similar harm but given the limited amount of evidence submitted, it is possible that only one of them may be eligible for compensation.
26. The defence stresses that the figures suggested for the compensation of material harm correspond generally to the current prices on the market in Bogoro/Bunia area.²³ Therefore, in the defence submissions, they constitute a maximum that may be allocated to the victims, for the following reasons.
27. First, prices were lower in 2003, given the inflation. The defence was not able to determine the exact average prices in 2003 but notes that the country faced significant inflation between 2009 and 2013.²⁴
28. In addition, the defence underlines that Bogoro was attacked several times before the 24 February 2003 attack, in particular in mid 2002 and at the beginning of 2003. Therefore, at the time of the attack, many of the inhabitants did not have new or undamaged housing. The defence notes that a few applicants submitted a residence certificate but none of these certificates indicates the date of construction or the price of the house. In addition, the statements of the applicants do not specify when the house was built and what was its value at the time. The only details given by the

²³ The defence has identified a website suggesting the average price in Bukavu, in the East of the DRC, which may be relevant for our case: see <https://www.expatistan.com/cost-of-living/comparison/paris/bukavu?>.

²⁴ See the country overview on the World Bank website, @ <http://www.worldbank.org/en/country/drc/overview>:

“Economic Overview

After an economic slump in 2009 that brought the growth rate down to 2.8% due to the global financial crisis, the DRC posted an annual average economic growth rate of 7.7% during the 2010-2014 period, and of 7.7% in 2015, both of which are well above the average in Sub-Saharan Africa. This performance is driven by robust extractive industries and related investments despite the global economic slowdown and the decline in the demand and price for minerals exported by the DRC. Public investments have also helped spur growth. Inflation, which posted a staggering 53% in 2009, has been maintained around 1% over the period 2013-2015, down from 3% in 2012 and 10% in 2010 as a result of the implementation of prudent fiscal and monetary policies.”

applicants relate to the type of house (straw/”en dure”) or the number of rooms – however this information has not been corroborated.

29. Therefore, the monetary assessment of the material harm submitted by the defence, which corresponds to the prices of current new goods or properties, is on the high side and should be considered as the very maximum that could be allocated.
30. The defence notes that it has not come across a single applicant who provided evidence of lost fields; therefore no compensation should be allocated on this ground.
31. Similarly, only very few applicants submitted some evidence relating to the loss of their cattle, but such evidence generally did not provide any detail on the lost cattle. The defence reiterates that only the applicants having provided documentary evidence of cattle pillaged during the 2003 Bogoro attack can claim compensation for such losses. Accordingly, when the certificate does not provide details as to the animals lost, then only a limited amount may be allocated to the applicant.
32. Once again the defence stresses that Bogoro was attacked and pillaged many times before the attack of 24 February 2003, in 2001, 2002, and 2003, and that the area was already very poor before the attack. Therefore, compensation for any material harm should be allocated only on the basis of documentary evidence of the applicants' claims. The ICC reparation proceedings are only meant to cover the damage caused by the crimes of which Mr Katanga has been convicted in connection with the 2003 Bogoro attack, and not to repair all the consequences of a long-term conflict in Ituri.
33. Regarding the compensation of harm linked to sexual crimes, the defence has submitted a general assessment of its monetary value in the DRC on the basis of the DRC jurisprudence. However, in the current case, the defence reiterates that in light of Mr Katanga's acquittal for the charges of sexual crimes, the applicants cannot obtain compensation for sexual harm. In any event, no sufficient evidence of such alleged crimes and harm have been provided by the applicants to justify any compensation in this regard.

34. Similarly, in the current case, the defence does not accept the principle of compensation for « *traumatisme transgénérationnel* »; this concept is not clear and the report and transcripts of the hearing relied upon by the Legal Representative of Victims on this issue in his previous observations²⁵ are not conclusive. The defence reiterates its previous submissions according to which children born after the 24 February 2003 should be authorised to claim compensation only because of the death of one or more parents, or brothers and/or sisters, during the Bogoro attack.²⁶

35. Regarding the compensation for the psychological or material harm linked to the lack of opportunity to go to school, the defence submits that such compensation should be limited only since most of the schools in the area were closed before the attack of 24 February 2003. Therefore, such harm cannot be blamed on Mr Katanga.

CONCLUSION

36. The defence respectfully requests the Trial Chamber to give due consideration to the defence observations.

Respectfully submitted,



David Hooper Q.C.

Dated this 30 September 2016,
London.

²⁵ ICC-01/04-01/07-3692-Red2, *Transmission du « Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003 »*; ICC-01/04-01/07-3698-Conf, *Addendum au document intitulé Transmission du « Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003 »* (ICC-01/04-01/07-3692-Conf-Red), 10 June 2016.

²⁶ ICC-01/04-01/07-3699-Conf, *Defence Observations on the Legal Representative of Victims' Transmission du « Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003 »* and its *Addendum*; ICC-01/04-01/07-3681-Conf, *Second Defence Observations on the Victims Applications for Reparation*, para. 31; ICC-01/04-01/07-3605, *Defence Consolidated Response to the Legal Representative of Victims' Request and the Registry's Observations*, para. 11, 2 October 2015.