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TRIAL CHAMBER II

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

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

Public

**Defence Response to the Legal Representative of Victims and the Trust Fund for
Victims' Submissions 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:

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Legal Representatives of Victims

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REGISTRY

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

Ms Isabelle Guibal

1. The defence for Mr Katanga (“the defence”) hereby presents some observations in response to the submissions of the Legal Representative of Victims¹ and of the Trust Fund for Victims (thereafter the “TFV”)² on the monetary value of the harm alleged by the applicants.

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 carried out in Bogoro and Bunia.³
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 the Legal Representative of Victims’ Table describing links between crimes and harm suffered, as a potential list of types of harm alleged.⁴
4. On 23 August 2016,⁵ the Trial Chamber granted the request of the Trust Fund for Victims⁶ to access the *Second Defence Observations on the Victims Applications for Reparation*, and added:

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

¹ ICC-01/04-01/07-3713, *Observations des victimes sur la valeur monétaire des préjudices allégués*, 30 September 2016.

² ICC-01/04-01/07-3714-Red, *Observations in response to the Trial Chamber’s order of 15 July 2016*.

³ ICC-01/04-01/07-3681-Conf-Exp, paras 36-37 and its Annex A.

⁴ ICC-01/04-01/07-3702-tENG, para. 9, with reference to ICC-01/04-01/07-3687-Anx4.

⁵ 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*.

⁶ ICC-01/04-01/07-3703, *Request for access to document ICC-01/04-01/07-3681-Conf*, 12 August 2016.

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 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,⁷ the Trial Chamber extended the deadline to file observations on the monetary value of the alleged harm until 30 September 2016; and to file a consolidated response until 14 October 2016.⁸
6. On 30 September 2016, the defence filed the Defence Observations on the Monetary Value of the Alleged Harm.⁹ The Legal Representative of Victims and the Trust Fund for Victims filed their observations on the same day.

DISCUSSION

7. The TFV asks the question as to whether the legal concept of moral damages could be of relevance in the present case (para. 22). The defence observes that both the Legal Representative of Victims and the defence agree that the applicants can claim compensation for both material and moral harm.
8. The TFV further asks the question as to whether the monetary value for compensation should be assessed on values in the DRC, noting that "an argument can be made that reparation awards should take into account the standard of living and local customs

⁷ 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.

⁸ ICC-01/04-01/07-3708, *Décision accordant une prorogation de délai pour le dépôt des observations sur la valeur monétaire des préjudices allégués*.

⁹ ICC-01/04-01/07-3711.

regarding amounts of monetary awards” but that one could also argue that “the Court should establish standard international monetary values that could apply across cases regardless of in which country the crimes were committed”. The TFV also notes that even with an internationalized court such as the ECHR, different monetary values are reached, depending on the overall context in which the breach occurred, i.e. the local economic circumstances (paras 18-21). The defence submits that an internationalized value is inappropriate and that compensation should not improve the situation of the victim by comparison with his/her situation before the Bogoro attack but should generally seek to put him/her back in the same position as before the attack. Therefore the Chamber should take account of the DRC standard of living in Ituri and not seek to establish an abstract value.

9. The Legal Representative of Victims suggest reliance be placed on the Congolese and Belgian practice of determining the monetary value of the alleged moral harm (para. 11(1)). The defence submits that while the Congolese practice is relevant, the Belgian practice, while useful to determine the principles of reparation, is unsuitable to define monetary value given the striking differences between the DRC and Belgium.

10. The Legal Representative of Victims argues that “*il est approprié que la Chambre adopte une approche flexible quant à la preuve requise pour démontrer la valeur des préjudices subis*” because it would be difficult or impossible to prove certain harm (para 11(2)). He further adds that “*aux fins de répondre aux exigences de la Chambre d’appel (à savoir informer le condamné sur sa responsabilité en matière de réparations et évaluer les préjudices pour déterminer les réparations à octroyer), il n’est pas indispensable dans les circonstances de l’espèce de procéder à une évaluation détaillée dossier par dossier*” (paras 11(3), 74). In the remainder of his submissions, he defines the monetary value of the harm alleged by the applicants globally, without identifying the applicants and without requiring evidence in support of their claims, and submits a total amount of 16,405,490 USD minimum. The defence disagrees with such an approach.

11. As previously submitted, the defence argues that any harm to be compensated must be evidenced. The defence recognizes that there are exceptions— namely, the psychological harm arising from witnessing the Bogoro attack, and the loss of personal belongings, as it can reasonably be presumed that a person present was psychologically affected and that inhabitants suffered pillage.¹⁰ However, the loss of a house, cattle, a family member, suffering a physical injury or trauma must be evidenced by appropriate evidence as not all the applicants suffered these types of harm.

12. Cognizant of the difficulty in gathering evidence, the Chambers have already shown appropriate flexibility, for instance by accepting proof of a fact or an identity *etc.*, by corroborating the assertion through the submission of statements by two witnesses instead of requiring official certificates, *etc.* Indeed, the requested practice was followed by most applicants who were able to submit certificates of residence, kinship, death, *etc.*, signed by two witnesses. Several expert analyses were conducted and several applicants have submitted medical certificates. The defence submits that any further expertise does not appear justified, particularly given the late stage of the proceeding.

13. The defence submits that to grant compensation to all the applicants on the basis of their claims without requiring a minimum level of evidence would be unfair and prejudicial to the convicted person. Orders are intended to apply to him for the rest of his life. A reparation order requires an assessment of the harm alleged by the applicants on a case by case basis, which is the only effective procedure that will allow a convicted person to challenge the financial burden to be imposed upon him.

14. The defence stresses that the ICC is a criminal Court; it is not a State nor an Association. Its mandate is to bring justice according to the rule of law and to grant compensation to victims on the basis of evidence linking the harm done to the crimes for which a person is convicted. The Chamber cannot order Mr Katanga to

¹⁰ See, *inter alia*, ICC-01/04-01/07-3681-Conf, paras 27-35; ICC-01/04-01/07-3711, paras 14, 30-31.

compensate applicants for harm other than that which is directly linked to the crimes for which he was convicted and sufficiently demonstrated

15. Once the Chamber has issued any reparation order against Mr Katanga, the DRC government and the TFV may complement the order by such measures they deem appropriate. The defence notes that, over the past twelve years since the attack, several NGOs and the TFV have put in place measures in Ituri, and in particular in relation to Bogoro and its inhabitants which has been the focus of much NGO activity.
16. The defence submits that the Chamber, given the expressed wish of the applicants in their reparation forms, should grant compensation to applicants on an individual basis, subject to there being a sufficiency of evidence. The defence objects to an approach which consists of submitting a global assessment of all the harm alleged by all the applicants.
17. The defence reiterates that it does not accept the principle of compensation for «*traumatisme transgénérationnel* »¹¹ in the current case as submitted by the Legal Representative of Victims and the TFV. The examples quoted by the TFV relate mainly to administrative schemes of reparation which do not observe the same rules as judicial decisions and do not follow the same objectives. The harm alleged is unclear and too remote to the crimes for which Mr Katanga was convicted to justify compensation before the current Court.
18. The Legal Representative of Victims argues that three applicants were raped and asks for a compensation of 10,000 USD for sexual harm. The defence reiterates that in light of Mr Katanga's acquittal for the charges of sexual crimes¹² the applicants cannot obtain compensation for sexual harm and that no sufficient evidence of such

¹¹ ICC-01/04-01/07-3711, para. 34; 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.

¹² ICC-01/04-01/07-3436, *Jugement rendu en application de l'article 74 du Statut*, p. 710.

alleged crimes and harm have been provided by the applicants to justify any compensation in this regard.¹³

19. Regarding the applicant a/0071/08 and his alleged claim regarding the *école primaire d'application* of Bogoro, the defence requests that the Chamber take into account the fact that, in his form, the applicant indicated that the school had ceased activity in 2002 because of insecurity and had moved to Bunia;¹⁴ several schools were rebuilt in Bogoro after the 2003 attack;¹⁵ and the current chief of Bogoro and COOPI have stated that there are currently five primary schools in Bogoro¹⁶ while CARITAS mentioned two;¹⁷ therefore it is necessary to ensure that this school has yet not been rebuilt in Bogoro.

Respectfully submitted,



David Hooper Q.C.

Dated this 13 October 2016,
London.

¹³ ICC-01/04-01/07-3711, para. 33.

¹⁴ ICC-01/04-01/07-3660-Conf-Exp-AnxA, p. 13.

¹⁵ ICC-01/04-01/07-3714-Anx3, p. 4, question n° 8.

¹⁶ ICC-01/04-01/07-3714-Anx2, p. 4, question n° 6, and ICC-01/04-01/07-3714-Anx4, p. 3, question n° f, with reference to Dodoyi, Pagaya, Nyakeru, Talieba.

¹⁷ ICC-01/04-01/07-3714-Anx3, p. 2, question n° f.