



Original: English

No.: ICC-01/04-01/07
Date: 30 December 2016

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

Defence Response to the *Propositions des victimes sur des modalités de réparation dans la présente affaire*

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**

Mr David Hooper Q.C.

Ms Caroline Buisman

Legal Representatives of Victims

Mr Fidel Nsita Luvengika

REGISTRY

Registrar

Mr Herman von Hebel

**Victims Participation and Reparations
Section**

Ms Isabelle Guibal

Other**Fonds au Profit des Victimes**

M. Pieter de Baan, Directeur

INTRODUCTION

1. The defence for Mr Katanga (“the defence”) hereby presents its observations in response to the *Propositions des victimes sur des modalités de réparation dans la présente affaire*, filed by the Legal Representative of Victims on 8 December 2016.¹

DISCUSSION

2. The defence reiterates its observations contained, *inter alia*, in the *Defence Consolidated Response to the Parties, Participants and Other Interested Persons’ Observations on Reparation*;² *Defence Observations on the Victims Applications for Reparation notified between 25 and 30 November 2015*;³ *Second Defence Observations on the Victims Applications for Reparation*;⁴ *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*;⁵ *Defence Observations on the Monetary Value of the Alleged Harm*;⁶ *Defence Response to the Legal Representative of Victims and the Trust Fund for Victims’ Submissions on the Monetary Value of the Alleged Harm*.⁷
3. The defence welcomes the Legal Representative of Victims’ attempt to define the appropriate modalities of reparations in the current case, given that the Trial Chamber’s reparation order must, pursuant to the *Lubanga Appeal Judgement*:⁸
 - specify the type of reparations ordered, either collective, individual or both, pursuant to Rules 97 (1) and 98 of the Rules of Procedure and Evidence (thereafter “RPE”);
 - define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of

¹ ICC-01/04-01/07-3720.

² ICC-01/04-01/07-3564, 16 June 2015.

³ ICC-01/04-01/07-3660-Conf.

⁴ ICC-01/04-01/07-3681-Conf-Exp.

⁵ ICC-01/04-01/07-3699-Conf, 22 June 2016.

⁶ ICC-01/04-01/07-3711 and annexes, 30 September 2016.

⁷ ICC-01/04-01/07-3715, 14 October 2016.

⁸ ICC-01/04-01/06-3129, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012, paras 1, 32.

reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it;

- identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.

Types of reparation

4. The Legal Representative of Victims has identified four measures of reparation for the victims, that he qualifies as collective and that could be combined (para. 12):
 - 1) Housing support, through a “Housing Fund”, to improve their accommodation (for 1000 USD maximum) or build a new one (for 2000 USD maximum), and to obtain some furniture (for 500 USD maximum);
 - 2) Support for an activity which would generate income, through a “*Fonds d’aide à l’élevage et à la formation*”, which would grant a livestock farming kit (for 600 USD maximum) or a professional training kit (for 300 USD maximum);
 - 3) Support for education, through an “Education Fund” which would pay the school fees (180 USD for primary school, 230 USD for secondary school, by year) with a maximal amount of 2500 USD for an entire school cycle (primary and secondary);
 - 4) Psychological support, through a “*Fonds de soutien psychologique communautaire*”, offering community and individual psychological support, such as suggested by the *Rapport d’expertise sur l’évaluation de l’état psychique des enfants victimes de l’attaque de Bogoro du 24 février 2003*⁹.
5. A fifth measure would be the allocation of one symbolic Euro to each victim, paid by Mr Katanga or through the Trust Fund for Victims (thereafter “TFV”) (paras 13, 80-82).
6. The defence submits that these five types of measures and the maximum suggested amount appear appropriate and reasonable in the circumstances of the case, given the standard of life in the DRC. These measures should therefore be favoured since they

⁹ ICC-01/04-01/07-3692-Conf-Anx1-Red, 31 May 2016.

emanate from the Legal representative of victims who has been in direct contact with the applicants.

7. The Legal Representative of Victims suggests that the housing, activity and education funds be administered by a single organism in order to limit costs. Some external control mechanism should be put in place and the DRC authorities should be involved (para. 37).
8. The defence submits that the five measures identified by the Legal Representative of Victims could be administered by a unit, which could be a local desk of the TFV based in Bunia or Kinshasa.

Categories of victims

9. The Legal Representative of Victims has also identified four categories of victims (paras 20 & sec.):
 - Category I: 67 applicants who lost their house and interior, some cattle, some income from livestock farming, including 44 applicants who lost a relative; and 10 applicants who were children at the time of the attack and who lost their parents and their inheritance. They all suffer from a loss of their social status.
 - Category II: 121 applicants who lost their house and interior, including 66 applicants who lost a relative. They all suffer from a loss of their social status.
 - Category III: 42 applicants who were under the responsibility of a relative and who have suffered from a loss of their standard of life, including 30 applicants who lost a relative.
 - Category IV: particular cases: one organisation, applicants who suffered only moral harm, applicants who suffered only a limited material harm (including 5 who lost a relative).
10. The Legal Representative of Victims submits that:
 - The applicants in Category I could combine the housing/activity/education support up to a maximum amount of 8000 USD;

- The applicants in Category II could combine the housing/activity/education support up to a maximum amount of 4000 USD;
 - The applicants in Category III could combine the activity/education support up to a maximum amount of 600 USD;
 - Regarding the applicants in Category IV:
 - The organisation a/0071/08, which is a primary school, asks as collective reparation the construction of a new school including furniture, for an amount of 24 740 USD, which would be used for a secondary school; the Legal Representative of Victims submits that the schools built in Bogoro since 2003 cannot be considered as a form of reparation.
 - The applicants who suffered only moral harm could benefit from psychological support.
 - The applicants who suffered only a limited material harm could combine the activity/education support up to a maximum amount of 150 USD.
 - In addition, all the applicants who lost a relative could obtain the livestock farming kit, given the importance of the cattle in the Hema culture;
 - In addition, all the applicants who suffered sexual harm could obtain the professional training kit;
 - All the applicants should benefit from psychological support and be granted one symbolic euro.
11. The defence agrees with the proposal that all the applicants should be entitled to psychological support and be granted one symbolic euro.
12. However, the defence is uncertain of the interest or logic of the categories of victims identified by the Legal Representative of victims, except to the extent that they give the opportunity to limit the type and amount of reparation to be granted to each applicant.
13. Other categories of applicants could be envisaged, by type of harm; applicants who lost a house/a relative/cattle/their standard of life, etc. It could be envisaged that those

who lost a house can ask for housing support, those who lost their cattle can ask for a livestock farming kit, those who lost a shop can ask for housing or activity support, those who lost a relative can ask for housing, activity or education support, etc., with a maximum amount by applicant.

14. Given that the Legal Representative of victims has not properly explained why he suggests these four categories of victims, he could be asked to do so by the Trial Chamber, in writing or at a hearing. However, the defence notes that the Legal Representative of Victims may be in a better position to identify the applicants' preferences. Therefore, the defence defers to the Chamber's discretion on the issue of the relevance of the determination of categories of victims and their composition.
15. In addition, the defence stresses that it was provided only on 28 December 2016, at its request, the list of applicants contained in each category identified by the Legal Representative of Victims. The defence has not had the time to review this list and cannot comment on it at this stage, except to say that it strongly disagrees with the Legal Representative of Victims' assumption that the harm of his 304 applicants is demonstrated (para. 112 – referring to “*sur la base de la balance des probabilités*”). The defence refers to its previous submissions in this regard.
16. The defence is willing to comment on the Legal Representative of Victims' list if requested to do so by the Trial Chamber. The defence submits that this list should be part of the record of the case given that it is necessary to understand the Legal Representative of Victims' past and current submissions. Therefore, the defence invites the Trial Chamber to ask the Legal Representative of Victims to file this list in the record of the case.

Identification of the victims eligible to benefit from the awards for reparations

17. The Legal Representative of Victims “*est d’avis que la Chambre désigne les personnes éligibles aux réparations comme étant celles dont les demandes de réparation sont fondées* » (para. 86) and has no objection « *à ce que la Chambre envisage la possibilité pour des personnes qui n’auraient pas formulé de demande en réparation de soumettre une telle demande au moment de la mise en oeuvre de réparations* » (para. 88).

18. The defence submits that it would be in the interest of justice that the Trial Chamber identify the victims eligible to benefit from the awards for reparations instead of setting out the criteria of eligibility to be applied by the TFV. This would save time and thus money and the Trial Chamber has already received detailed submissions on the demonstration, or not, of the harm of each applicant.
19. The defence submits that the order of the Trial Chamber should not envisage the possibility for applicants to submit new applications once the reparation measures will be put in place. The reparation order will be issued against Mr Katanga who is entitled to certainty in this regard. These criminal proceedings must come to an end. The TFV will always be able to extend his mandate to other persons if it deems it appropriate.

Reparation already implemented

20. The Legal Representative of Victims submits that the reparations already implemented in Bogoro cannot be considered as reparations of the harm resulting from the crimes committed by Mr Katanga (paras 94-95).
21. The defence reiterates that the reconstruction and other forms of reparation already implemented in Bogoro by the TFV or other public or private entities must be taken into account in determining the extent and the appropriate form of reparations for the applicants.¹⁰
22. In this regard, it should be noted that pursuant to the last TFV's Annual Report, respectively 61 721 and 171 659 DRC inhabitants were the direct and indirect beneficiaries of its projects in 2016.¹¹ The TFV has already implemented, for instance, psychological rehabilitation assistance, taking place at both the individual and community level, which targeted 35 460 DRC victims from July 2015 through June 2016.¹² To date, the TFV has also provided some form of physical rehabilitation services to an estimated 38,442 victims (approximately 21,000 female and 17,500 male victims) in the DRC and northern Uganda. In the 2016 reporting year alone, approximately 1,000 women and young girls were provided with physical

¹⁰ See, for instance, ICC-01/04-01/07-3715, para. 19.

¹¹ TFV, Annual Report Summary 2016, p. 3, Available at http://www.trustfundforvictims.org/sites/default/files/imce/summary_EN_LR_ONLINE.pdf.

¹² TFV, Annual Report Summary 2016, p. 5.

rehabilitative assistance in the DRC.¹³ The TFV has also provided material support assistance, through the following services: 1) supporting economic development initiatives; 2) the provision of education assistance, particularly to orphans and other vulnerable children; and 3) creating employment opportunities for the victims and their family members.¹⁴

23. As already underlined, the reparation proceedings should not lead to the enrichment of the applicants but only return them to the situation in which they were before the perpetration of the crimes for which the accused was convicted.¹⁵
24. Therefore, in the current case, contrary to the Legal representative of Victims' submissions, it does not appear justified to grant to the primary school a/0071/08 the amount of 24 740 USD for the construction of a secondary school.

Sexual harm

25. The Legal Representative of Victims reiterates that some applicants can claim compensation for sexual harm.
26. The defence reiterates its previous submissions that, in light of Mr Katanga's acquittal for the charges of sexual crimes, the applicants cannot obtain compensation for sexual harm and that no sufficient evidence of such alleged crimes and harm have been provided by the applicants to justify any compensation in this regard.¹⁶

Involvement of the DRC and of Mr Katanga

27. The Legal Representative of Victims requests the involvement of the DRC in the implementation of the reparation measures (para. 105). He requests the intervention of the DRC to pay to Mr Katanga his army salary, in order that he be able to contribute to the payment of reparation; he also suggests that the DRC provides the TFV with a financial contribution (para. 106).
28. The defence reiterates its support for the involvement of the DRC in the reparation proceedings and in the reparation measures to be put in place.

¹³ TFV, Annual Report Summary 2016, p. 9.

¹⁴ TFV, Annual Report Summary 2016, p. 10.

¹⁵ ICC-01/04-01/07-3711, para. 8 & sec.

¹⁶ See, *inter alia*, ICC-01/04-01/07-3715, para. 18.

29. The defence also reiterates that Mr. Katanga is willing to assist, to his fullest capacity, in any rehabilitation program suggested by the Chamber or Trust Fund.¹⁷
30. Regarding his financial means, Mr Katanga is still in jail in Kinshasa in the DRC with no perspective of trial and/or of future release. He does not have any income. He does not receive any salary from the army despite his own efforts and the defence efforts in this regard.
31. Therefore, as of now he cannot contribute to any reparation order which would be issued against him. If he were to receive his salary he would need the funds to pay for defence counsel in the pending criminal case initiated against him in the DRC.
32. Given his current detention within the DRC and lack of income, it appears premature to determine, as suggested by the Legal Representative of victims (paras 99-100), a mechanism of debit on any future hypothetical income of Mr Katanga.

Involvement of the Trust Fund for Victims

33. The Legal Representative of Victims, given the lack of means of Mr Katanga, asks the TFV to consider a financial intervention in accordance with Regulation 56 of the Regulations of the TFV (para. 103).
34. The defence supports this approach.
35. The defence recalls that the reparation order should determine the scope and extent of any damage, loss and injury to, or in respect of, victims and state the principles on which it is acting (article 75 of the Statute). Given the lack of means of Mr Katanga, the Trial Chamber will have to order that the award for reparations be made through the Trust Fund (article 75).
36. The defence notes, similarly to the Legal Representative of Victims, that the ICC's legal instruments do not define individual or collective reparation.
37. Pursuant to Rule 97-1 of the RPE, the Trial Chamber may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both. Both solutions are then *a priori* possible in the current case.

¹⁷ ICC-01/04-01/07-3549, Defence Observations on Reparations, para. 97.

38. However, Rule 98-1 seems to define some practical limitations to individual or collective reparations. Pursuant to Rule 98-1, individual awards for reparations shall be made directly against a convicted person. Pursuant to Rule 98-2, the Trial Chamber may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. Pursuant to Rule 98-3, it may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate. Pursuant to Rule 98-4, it may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund. Pursuant to Rule 98-5, other resources of the Trust Fund may be used for the benefit of victims, subject to the provisions of Article 79.
39. In the current case, given the lack of means of Mr Katanga, the Trial Chamber would have to rely on Rule 98-3, referring to reparations through the TFCV and to collective award. Thus it seems that only a collective award could be envisaged in the current case.
40. This is confirmed by Chapters III & IV of the Regulations of the TFCV.
41. Chapter III of the Regulations of the TFCV is untitled “INDIVIDUAL AWARDS TO VICTIMS PURSUANT TO RULE 98(2)” and refers to the hypothesis where the Trial orders that an award for reparations against a convicted person be deposited with the Trust Fund. In such case the reparation would be individual.
42. Chapter IV of the Regulations of the TFCV is untitled “COLLECTIVE AWARDS TO VICTIMS PURSUANT TO RULE 98(3)” and refers to the hypothesis where the Trial Chamber orders that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate; in this case, Regulations 69 of the Regulations of the TFCV draft implementation plan set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for its/their implementation.
43. Regulation 50 of the Regulations of the TFCV indicates that the TFCV can be seized when the Board of Directors considers it necessary or when the Trial Chamber makes

an order for reparations against a convicted person and orders that the award be deposited with or made through the Trust Fund in accordance with rule 98, sub-rules 2 to 4 of the RPE.

44. In the current case, the TFV would be seized through Rule 98-3.
45. Regulation 54 then requires the Secretariat of the TFV to prepare a draft plan to implement the order of the Court, to be approved by the Board of Directors.
46. Pursuant to Regulations 56, the Board of Directors should determine whether to complement the resources collected through awards for reparations with “other resources of the Trust Fund” and shall advise the Court accordingly. In this regard, it is expressly stated that “the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards.”
47. Therefore, in the current case, the TFV should be strongly invited by the Trial Chamber to use its “other resources” to implement the Trial Chamber reparation order to be delivered.
48. The defence submits that the five types of measures proposed by the Legal Representative of Victims could be qualified as collective since they would benefit to a collectivity of victims or several groups of victims and would be administered through a collective fund. This does not exclude an individual benefit for each applicant; indeed, the TFV itself stresses, in its last Annual Report, that “reparations proceedings at all stages should be organized in such a manner that a victim’s participation therein has reparative value to that individual.”¹⁸
49. Indeed, these measures could be implemented by the TFV itself, which could and should dedicate a specific fund and a specific team to the *Katanga* reparation proceedings.
50. Despite the discrete position of the TFV in this regard, it seems that it has already provisioned certain funds for the *Katanga* case; its Regulations require it to do so. The defence notes that pursuant to the last TFV’s Annual Report Summary,¹⁹ its funds

¹⁸ TFV, Annual Report Summary 2016, p. 12.

¹⁹ TFV, Annual Report Summary 2016, p. 3.

include, inter alia, “€5 million reserved for reparations” and “€1 million reserved for Lubanga reparations order”. More precisely, in April 2016, the TFV Board of Directors approved the obligation of €2,378,015 for assistance projects in the Democratic Republic of the Congo as well as an increase of the TFV reparations reserve, which allows the Board to complement the payments of reparations awards to victims in convicted cases before the ICC, with €200,000 to make it a total of €5,000,000.²⁰ The TFV should be asked to clarify the funds available for the *Katanga* case. If such “other resources” of the TFV were not allocated to the *Katanga* reparation proceedings, all this exercise would be pointless; all the proceedings since the sentencing judgement of 2014 would have been useless.

51. According to Regulations 57, the TFV should submit to the relevant Chamber, via the Registrar, the draft implementation plan for approval and consult the relevant Chamber, as appropriate, on any questions arising in connection with the implementation of the award.

Hearing

52. The Legal Representative of Victims asks the Trial Chamber to convey a hearing to discuss the modalities of reparation.
53. The defence supports this proposal given the novelty and the complexity of the matter, in particular regarding the form of reparations and the involvement of the TFV. An oral exchange of views between the Legal Representative of Victims, the TFV, the Registry, the defence and eventually the DRC authorities would allow the Chamber to clarify what is feasible or not and what are the most appropriate solutions in the current case. By efficiency, the Chamber could provide in advance to the parties and participants an agenda identifying the relevant issues to be discussed during the hearing.
54. Last, the defence reiterates that:

²⁰ Trust Fund for Victims Board of Directors 14th Annual Meeting, The Hague, 18 - 21 April 2016, List of Decisions, available at http://www.legal-tools.org/uploads/tx_ltpdb/List_of_Decisions_-_ENGLISH_03.pdf.

80. The Trial Chamber's order on reparations should be as detailed as possible and should, to the extent possible, not delegate, the power of decision to the Trust Fund, as this would be unfair to the convicted person who can appeal only the decisions of the Trial Chamber.

89. Irrespective of any reparation order directed against Mr. Katanga personally, the defence requests the Chamber to invite the Trust Fund to exercise its discretion, under Regulation 50 of the Regulations of the Trust Fund, to provide assistance not only to victims of crimes found by Trial Chamber II to have occurred in the course of the Bogoro attack, but for which Mr. Katanga was not convicted, but also to consider extending its resources to assist the neighboring Ngiti, Lendu and Bira communities. These communities have suffered greatly as a result of the war in Ituri, of which the Bogoro attack formed part.

96. The Chamber should encourage the Trust Fund to adopt measures aimed at promoting reconciliation, as underlined by the Registry.²¹

CONCLUSION

55. For these reasons, the defence respectfully requests the Trial Chamber:

- to give due consideration to the defence observations;
- to convey a hearing to discuss the financial assessment and the modalities of reparation that should be adopted in the current case.

Respectfully submitted,



David Hooper Q.C.

Dated this 30 December 2016,
London.

²¹ ICC-01/04-01/07-3549, Defence Observations on Reparations.