

Pillage, the Katanga judgment, gravity and the value of 'ordinary' household items

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I came across a notable and positive development in the Katanga judgment (http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/court%20records/chambers/trial%20chamber%20ii/Pages/3436.aspx) while I was updating my book (<http://bit.ly/ESCRinICL>) manuscript on international crimes and violations of economic, social and cultural rights. Much has been written in the blogosphere about problematic issues of the judgment against Germain Katanga (such as the recharacterisation of charges and the interpretation of the policy requirement for crimes against humanity). See e.g. here (<http://humanrightsdoctorate.blogspot.ch/2014/03/some-thoughts-on-katanga-judgment.html>) and here (<http://dovjacobs.com/2014/03/07/breaking-katanga-found-guilty-in-third-icc-judgment/>) with an interesting response here (<http://dovjacobs.com/2014/03/20/guest-post-the-iccs-end-days-not-so-fast/>). I want to focus on another particular aspect of the judgment. It concerns the *actus reus* of pillage as a war crime.



Gravity and the value of everyday items

Trial Chamber II emphatically pointed out that kitchen items, furniture, food, iron sheets, cattle and other goods can be essential for the daily life of survivors and are thus of great value in the specific context of the case (para. 953).

Why is this important? Pillage is one of the oldest prohibitions criminalised as a war crime. Despite the available criminal provisions, pillage continues to be a frequent occurrence in armed conflicts and is often committed with impunity. The crime has attracted renewed attention in recent years and there are ongoing initiatives to prosecute (corporate) plunder during war (e.g. see [here \(http://www.opensocietyfoundations.org/reports/corporate-war-crimes-prosecuting-pillage-natural-resources\)](http://www.opensocietyfoundations.org/reports/corporate-war-crimes-prosecuting-pillage-natural-resources) and [here \(http://www.stop-pillage.org/swiss-criminal-case/\)](http://www.stop-pillage.org/swiss-criminal-case/) for a case currently pending in Switzerland).

Pillage sometimes tends to be relegated to the background, considered merely to give context to other war crimes. If, for instance, a victim of rape also complains that perpetrators stole her household goods, the conventional reaction is usually to classify the victim as a victim of sexual violence 'only'. As I argue in my forthcoming book, past approaches have tended to conceptualise abuses primarily affecting survivors' socioeconomic well-being merely as the landscape against which abuses of civil and political rights are committed.

Yet, why not examine if the victim should be considered a victim of rape as well as of pillage, and hence, as a victim of a war crime which can overlap with violations of economic and social rights? The problem is that the pillaged property in many armed conflicts



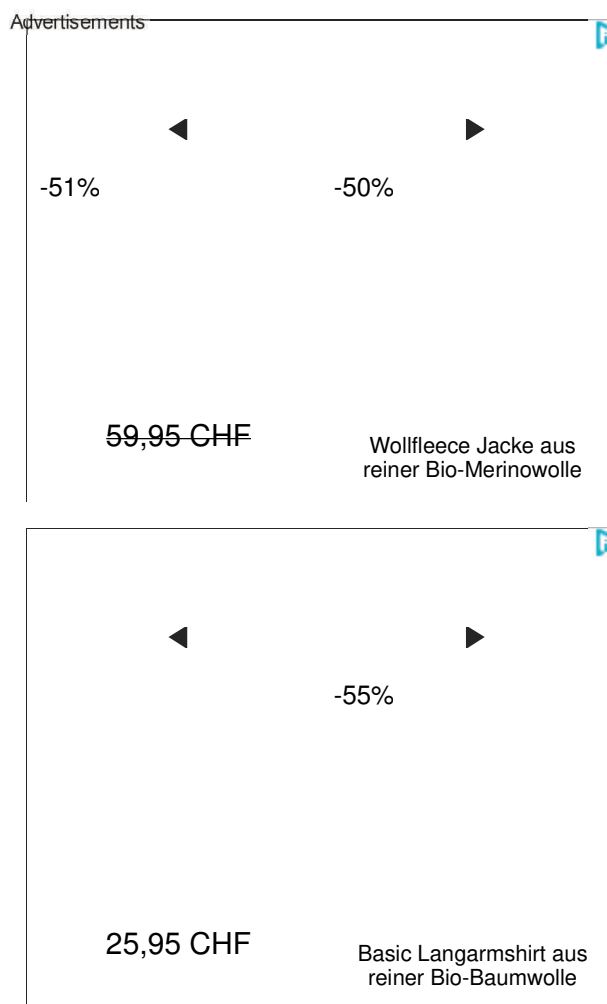
may at first sight seem of marginal value to the lawyers involved in determining what abuses deserve what kind of attention. At a closer look, 'ordinary' household items or a chicken can be of important practical value. Victims might desperately need their household


utensils to carry drinking water from the well or the theft of livestock may have deprived victims of their only sources of protein.

Yet, some have argued that only the theft of items of a certain value are subject to ICC jurisdiction because war crimes are crimes of concern to the international community as a whole and pillaging items of 'marginal value' would not be covered. The added value of the clarification by Trial Chamber II in *Katanga* is the recognition that care must be taken to assess the practical value of property for victims. This is particularly important when the property played an important role in victims' enjoyment of rights such as the right to food, water or shelter, including as the underlying determinants of

health. The finding by the ICC Trial Chamber is a continuation of statements made by the same Trial Chamber in *Bemba* (Decision on the Charges, 15 June 2009, para. 317) after the ICTY in *Gotovina* stressed that 'a case-by-case assessment is necessary' (Trial Judgment, 15 April 2011, para. 1672). This evolution of the case-law on pillage demonstrates that judges recognise the gravity of the theft of livestock and 'ordinary' household items.

The ICC will have further opportunities to address allegations of pillage in the case against Congolese rebel leader Ntaganda as well as in the situation of Mali, where the Prosecutor currently investigates the looting of food reserves, shops and hospital equipment.



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