

Annex

Opinion of Judge Herrera Carbuccia

1. I disagree with the three decisions issued by the majority of the Chamber for several reasons.¹ The aim of my opinion is to show, with all due respect for my colleagues, that the Chamber must find a solution that is practical and realistic in the specific circumstances of the present case. Given the limited resources of the Trust Fund for Victims (“the TFV”) and the declared indigence of Thomas Lubanga, the Chamber must strive to ensure that the reparations are not seen as a mirage.²

The relevance of a hearing

2. At this stage of the proceedings, a reparations hearing is not necessary as it would needlessly prolong the limited mandate of this Chamber as described by the Appeals Chamber, namely: (a) to approve the implementation of the plan proposed by the TFV; (b) to determine the monetary amount of Mr Lubanga’s liability; and (c) to monitor the implementation of the reparations proceedings.³ In reality, given that the crimes for which Thomas Lubanga was convicted in 2012 were committed 14 years ago, when the victims were younger than 15 years old, additional proceedings, as proposed by my colleagues, are contrary to the interests of justice. This is because the swift implementation of reparations is essential for regaining the confidence of the victims, who have been waiting for justice to be done for over a decade.⁴

¹ ICC-01/04-01/06-3217; ICC-01/04-01/06-3218; and ICC-01/04-01/06-3219.

² Cryer, Robert *et al*, *An Introduction to International Criminal Law and Procedure*, 2nd edition (2012), Cambridge, p. 492.

³ In the judgment, the Appeals Chamber determined that “the duties assigned to the newly constituted Trial Chamber, namely the approval of the draft implementation plan and the hearing of any contested issues, are limited”, ICC-01/04-01/06-3129, para. 235.

⁴ The Chamber must evaluate whether the observations are “desirable for the proper determination of the case” and if they relate to “any issue that the Chamber deems appropriate”, ICC-01/04-01/06-3129, para. 247. The Chamber has in fact already invited interested States and organisations to submit to it observations on these proceedings. Only two organisations have done so, whereas the Government of the Democratic Republic of the Congo has not responded to this invitation. See: ICC-01/04-01/06-3179 and ICC-01/04-01/06-3198.

The role of symbolic reparations

3. The Appeals Chamber determined that the reparation modalities that are appropriate in the circumstances of the instant case are: (a) restitution; (b) compensation; (c) rehabilitation; and (d) “others with a symbolic, transformative and preventative value”.⁵ It also found that “determining the nature and/or size of the reparation award is an appropriate task of the Trust Fund,”⁶ in consultation with the victims.⁷
4. Symbolic reparations are therefore appropriate but they should not be distinguished (in terms of being seen as the only reparations to be implemented) from other collective reparation modalities, as preferred by the victims.⁸ The majority of the Chamber did not provide the reasoning underlying their decision for making such a distinction and for only implementing symbolic reparations, and thus giving them priority, without taking into account other collective reparations which would be, in my opinion and given the views of the victims, more appropriate in the circumstances of the present case.⁹

The procedure to be followed

5. On 1 July 2016, the Chamber received all the observations it required to issue a decision and order the TFV to implement its reparations programme. On the basis of all the observations the Chamber must make a decision on two issues, without delay: (a) the TFV request for reconsideration;¹⁰ and (b) the approval

⁵ ICC-01/04-01/06-3129, para. 201.

⁶ *Ibid.*, para. 203.

⁷ *Ibid.*, para. 204.

⁸ Following consultations with the victims, the Trust Fund for Victims informed the Chamber that the victims requested reparations above all in relation to medical and psychological care, formal and informal schooling, socio-economic development, fostering employment, community reconciliation and awareness-raising; ICC-01/04-01/06-3177-Conf, para. 68.

⁹ ICC-01/04-01/06-3129, paras. 1, 32, 81, 101 and 200.

¹⁰ ICC-01/04-01/06-3208, para. 10.

of the implementation of the TFV plan, in the light of the files transmitted to the Chamber and the observations which have already been filed.

6. Even if the Chamber does not reverse its decision of February 2016, the implementation must go ahead, despite the small number of victims currently identified and the lack of precision with regard to the implementation programme.
7. To accelerate the procedure, the Chamber should have ordered the TFV to promptly present it with specific projects so that it could approve their implementation, incorporating the group of victims already identified. Even though this group of victims (currently 42)¹¹ is extremely small, not to say “symbolic”, the TFV could include a larger number of victims when implementing subsequent collective reparations programmes. On the basis of the 42 files already completed by the TFV and of the conclusions presented by the Trial Chamber in the judgments rendered pursuant to articles 74 and 76, as well as the experience of the TFV in the field, the Chamber could have instructed the TFV to initiate implementation of its reparations plan, which should have incorporated collective reparations such as those described by the Appeals Chamber (for example, training, reparations of a psychological and medical, financial and/or symbolic nature, and reparations to promote reconciliation and deterrence).¹²
8. Such a procedure would comply with the judgment in which the Appeals Chamber determined that the TFV, with the assistance of the Registry, the Legal Representatives of the victims and the Office of Public Counsel for Victims, and in consultation with the victims, could identify the beneficiaries of a reparations plan.¹³ The procedure would also enable the TFV to offer

¹¹ ICC-01/04-01/06-3208; and ICC-01/04-01/06-3216.

¹² ICC-01/04-01/06-3208, para. 99; and ICC-01/04-01/06-3129, para. 240.

¹³ ICC-01/04-01/06-3129, para. 156; and paras. 220-228.

Thomas Lubanga the possibility to review the screening process of victims during the implementation, as ordered by the Appeals Chamber.¹⁴ Lastly, the implementation of the reparations plan could encourage other potential victims to come forward. Prolonging these proceedings can only have the opposite effect. It should be noted that, although the TFV estimates that the potential number of victims is 3,000, only 151 victims have been granted participation rights in the proceedings and there are only 42 complete files. For these reasons we should now begin to implement the reparations plan, so that other victims can be added during the implementation.

9. If we had gone along with my proposal, the TFV would have been able to begin implementation of a reparations project, as should have been the case a long time ago. On 31 December 2016, after beginning the reparations project, the TFV would have been able to transmit to the Chamber a consolidated list of individuals identified as victims of Thomas Lubanga, an overall assessment of the extent of the harm caused to the victims identified, the anticipated amount of Thomas Lubanga's liability, and the revised monetary amount that the TFV would have planned to advance in order to implement the reparations.
10. After having received the above information, the Chamber could have issued an appealable decision without delay and could have determined the monetary amount of Thomas Lubanga's liability. It is on this contentious issue that the Chamber would then have been able to order that a hearing be held.¹⁵

¹⁴ ICC-01/04-01/06-3129, para. 167; ICC-01/04-01/06-3208, para. 127.

¹⁵ ICC-01/04-01/06-3129, para. 235.

Done in English and French, the French version being authoritative.

[signed]

Judge Olga Herrera Carbuca

Dated this 15 July 2016

At The Hague, the Netherlands