

**Annex**

**Opinion of Judge Herrera Carbuccion**

## Opinion of Judge Herrera Carbuccia

1. I again disagree with the majority of the Chamber on the approach taken in these proceedings. Now that the Chamber has held a hearing and the participants have submitted their observations, I am compelled to insist on my earlier opinion,<sup>1</sup> namely that the Chamber must without delay make a decision on two issues. These issues are (a) the request for reconsideration submitted by the Trust Fund for Victims;<sup>2</sup> and (b) approval of full implementation of the overall draft plan of the Trust Fund for Victims, and not merely the part concerning symbolic reparations.<sup>3</sup>
  
2. The Chamber should have rejected the request of the Office of Public Counsel for Victims ("the OPCV") in view of the observations filed by the Registry, which warned against blurring the line between its outreach work and the process of collecting information for reparations forms. Although the Registry did not oppose the request, it did express concerns about such an initiative on the part of the OPCV (specifically regarding unrealistic expectations, the Registry's role in receiving and transmitting files, and the well-being and privacy of the victims participating in outreach efforts). The OPCV's role should not be confused with that

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<sup>1</sup> "Opinion of Judge Herrera Carbuccia", ICC-01/04-01/06-3217-Anx-tENG.

<sup>2</sup> "First submission of victim dossiers", ICC-01/04-01/06-3208.

<sup>3</sup> "Filing on Reparations and Draft Implementation Plan", ICC-01/04-01/06-3177-Conf; "Filing regarding symbolic collective reparations projects", ICC-01/04-01/06-3223-Conf, paras. 13 and 14. The TFV submitted that "a symbolic reparations project is indeed feasible as long as it is not conceived as a stand-alone undertaking, disconnected from forthcoming service-based reparations awards. [...] Therefore, the Trust Fund respectfully submits that it will be important to launch the service-based collective reparations during the implementation of the symbolic reparations project, in order to not lose the momentum and in particular keep both the communities and victims engaged regarding the purpose and benefits of the entire Court-ordered collective reparations programme. Conversely, any inadvertent disconnect between the implementation of symbolic and service-based collective reparations projects will greatly diminish the value and efficiency and effectiveness of both."

of the Registry's Victims Participation and Reparations Section. Nor must it be forgotten that the TFV, first and foremost, is responsible for identifying the beneficiaries of the programmes it will implement. Likewise, at this stage of the proceedings, all means and resources must be focused on reparations for the victims and affected communities – not on a prolongation of the proceedings, which would only result in further victimisation.

3. Moreover, in acceding to the OPCV request, the majority of the Chamber modified – and therefore reviewed – its decision of 9 February 2016 by conferring on the OPCV the mandate which the Appeals Chamber and this Chamber had assigned to the TFV. It could just as well have reconsidered its decision or clarified it, as the OPCV was in fact requesting.<sup>4</sup> Owing to the widespread nature of the crimes committed, a rigid interpretation of what is needed to begin implementing the collective reparations plan would only lead to impunity for Thomas Lubanga (in civil liability terms) and injustice for the victims, who have been waiting 10 years since the start of the proceedings. The TFV must do better, but it is above all incumbent on the Chamber – despite the challenges at hand – to find a solution that urgently addresses the needs of the victims.<sup>5</sup>
4. In view of all the difficulties that have been encountered in identifying victims potentially eligible to benefit from reparations within the meaning of this Chamber's Order of 9 February 2016,

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<sup>4</sup> “[P]rompt clarification of the arrangements for identifying potential beneficiaries and of proper conduct of the reparations proceedings in the instant case is crucial both in view of the growing expectations of the affected communities on the ground and in order for her to be able to discharge her mandate.” OPCV Request, ICC-01/04-01/06-3222-tENG, para. 15.

<sup>5</sup> Transcript of the hearing of 13 October 2016, ICC-01/04-01/06-T-368-Red-FRA ET, pp. 23 and 70; OPCV Request, ICC-01/04-01/06-3222-tENG, para. 23.

and given the particular circumstances of the case, a review of that decision has become necessary to prevent an injustice.<sup>6</sup>

5. It appears that the decision as it stands is impossible to execute. Consequently, in the interests of justice and out of respect for the victims' fundamental right to prompt and effective reparation,<sup>7</sup> the Chamber must revisit its decision to reach a solution that is fair, reasonable and just for the parties and for the TFV (which is responsible for implementing the plan).<sup>8</sup>
6. It should be stressed that all the parties participating in the reparations proceedings are entitled to a fair hearing. In the specific context of this civil matter, equality of arms implies a fair balance between the rights of the convicted person and the interests of the victims. Moreover, we must also bear in mind the interests of the communities affected by Thomas Lubanga's crimes, as well as the interest of the Court.<sup>9</sup>
7. It should also be noted that the Appeals Chamber held as follows:<sup>10</sup>

When only collective reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations. The determination that it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards.

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<sup>6</sup> *Ruto and Sang*, ICC-01/09-01/11-1813, para. 19 and footnote 42.

<sup>7</sup> "Order for Reparations", ICC-01/04-01/06-3129-AnxA, para. 44.

<sup>8</sup> "Observations of Dr. Golden, Mr. Higson-Smith, Professor Ní Aoláin and Dr. Wühler", ICC-01/04-01/06-3240-Anx9.

<sup>9</sup> "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations'", ICC-01/04-01/06-3129 ("Judgment on Reparations"), paras. 7 and 148-157.

<sup>9</sup> Observations of the United Nations (ICC-01/04-01/06-3240-Anx15, paras. 12 and 13) and Observations of Cooperazione Internazionale, ICC-01/04-01/06-3234, para. 21.

<sup>10</sup> Judgment on reparations, ICC-01/04-01/06-3129, paras. 7 and 148-157.

8. In the light of this conclusion and the fact that the parties and participants are almost unanimous in their belief that the reparations projects must benefit the victims and affected communities in general,<sup>11</sup> the Chamber could approve the implementation of the TFV's draft plan on the condition that it takes into account the views and consent of victims as well as the real needs of the communities concerned.<sup>12</sup>
  
9. To the extent possible, the TFV could: (a) include the victims it has already identified (of whom there are currently 42), who participated in the proceedings and whose applications for reparations have already been submitted (see the observations filed by the Legal Representatives where the V01 team mentions 14 victims and the V02 team mentions 129 victims already identified, as well as another 400 potential victims);<sup>13</sup> (b) identify, during implementation, victims potentially eligible for reparations who could assist the Chamber in determining Thomas Lubanga's liability under article 75(2) of the Statute; and (c) take into account the proposals of the parties, participants and amici curiae (for example, to include all the localities concerned and mentioned in the judgment of the Appeals Chamber in relation to the Judgment pursuant to article 74 of the Statute). We cannot wait until 3,000 victims have been identified just because the TFV has estimated this to be the total number of victims potentially eligible to receive

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<sup>11</sup> Observations of the United Nations, ICC-01/04-01/06-3240-Anx15, paras. 12 and 13; Observations of Cooperazione Internazionale, ICC-01/04-01/06-3234, para. 21.

<sup>12</sup> ICC-01/04-01/06-3129-AnxA, paras. 29-32 and 79.

<sup>13</sup> The TFV could accomplish this with the assistance of the Registry, the Legal Representatives of Victims, and the OPCV, and in consultation with the victims and some NGOs which participated in the proceedings. See ICC-01/04-01/06-3217-Anx-tENG, para. 8; ICC-01/04-01/06-3177-Conf, paras. 29 and 239.

reparations.<sup>14</sup> Given the nature of the crimes committed, such an individual identification process would be unfeasible or, at best, more costly (not only budget-wise but also in terms of victim well-being) than the available reparations.

10. In short, the Chamber could have issued a non-contentious, *pro forma* decision of fact approving the entire plan. Such a decision should have been issued promptly (under the conditions below), as unanimously requested by all the parties and participants in these proceedings. The TFV could have identified victim beneficiaries while implementing the plan, and then it would have been able to provide the Chamber with a more exhaustive victim list containing the information required to make a determination on the one remaining point of contention in this case.

11. After receiving the consolidated list, the Chamber could have issued an appealable decision of law, as delegated to it by the Appeals Chamber, determining Thomas Lubanga's civil liability with respect to the victims of the crimes of which he was convicted.

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

[signed]

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**Judge Olga Herrera Carbuccion**

Dated this 25 October 2016

At The Hague, Netherlands

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<sup>14</sup> "Observations de la Ligue pour la Paix, les Droits de l'Homme et la Justice (LIPADHOJ) présentées conformément à l'ordonnance de la Chambre de céans du 15 juillet 2016 rendue en application de la règle 103 du règlement de procédure et de preuve", ICC-01/04-01/06-3232, para. 23.