



**SEPARATE OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ
CARRANZA**

In the appeals of Mr Bosco Ntaganda and the victims of the attacks against the decision of Trial Chamber II of 14 July 2023 entitled “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659”

I. PROLEGOMENA

1. I issue this Separate Opinion with the hope that it will contribute to a better understanding of some fundamental concepts that lie at the core of international criminal proceedings. Mr Ntaganda and Victims Groups 2 have appealed, at the reparations phase of the proceedings in the case, from the decision of the Trial Chamber, titled “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” (Impugned Decision or Addendum). Save for one specific issue that has been amended in respect of ground 3 of the Defence Appeal,¹ the Appeals Chamber has unanimously rejected in its Judgment all grounds of appeal of the Defence and the victims (“Common Judgment”). However, in relation to the first ground of appeal filed by the Defence, my respected colleagues have decided to reject that ground of appeal finding that the Trial Chamber committed no error. The present separate opinion concerns this particular finding, as I find that legal and procedural errors were committed.

2. Despite the Appeals Chamber’s clear direction to the Trial Chamber to issue a new Order for Reparations,² the latter issued an Addendum to a decision that had been largely overturned on appeal. In so doing, it left it to the parties’ interpretation as to what elements of multiple previous orders remain valid, what was amended, replaced

¹ The “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” is amended to the extent that it should be read as incorporating paragraphs 185-186 of the “First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations” (ICC-01/04-02/06-2860-Red).

² [2022 Appeals Chamber Judgment](#), p. 11; paras 750, 758-759.

or needed to be read in conjunction with parts of multiple other decisions. The issuance of the Impugned Decision as an Addendum, an auxiliary document outside the legal framework of the Court undermined judicial certainty, affecting the right to fairness and guarantees of due process. In my view, as a result of this procedural course, the proceedings were rendered unreliable.

3. Moreover, a clear instruction from the Appeals Chamber to issue a “new order for reparations” has been disregarded. Decisions of the Appeals Chamber in a case are binding. The Appeals Chamber is the ultimate guardian of the proper administration of justice within the Court. In condoning other chambers’ choice not to follow clear directions, the Appeals Chamber compromises the predictability of the jurisprudence of the Court, the predictability and fairness of the proceedings as well as the efficiency of the administration of justice.

4. In essence, the issues that will be addressed in the present separate opinion involve consideration, and therefore interpretation, of the principles of legality, legal and judicial certainty, the obligation to observe the formalities prescribed by law, the predictability of judicial decisions and the binding nature of the decisions of the Appeals Chamber. All of the above are inherent components of fairness and due process of law. Lack of observance of these guarantees and principles constitute errors of law and procedure that affect the reliability of judicial decisions and trigger the review functions of the Appeals Chamber. Because such fundamental rights are implicated, I find it necessary to issue this separate opinion to clarify certain matters related to the rights in question. to provide guidance for future cases and to streamline ICC proceedings.

5. Although I concur with my colleagues that the first ground of appeal by the Defence should be rejected, I reach this conclusion for separate reasons. I find that the errors committed had no material effect on the Impugned Decision. First, the Trial Chamber has properly addressed the five issues that had been remanded to it in the [2022 Appeals Chamber Judgment](#). Second, the Appeals Chamber undertook to reconstruct, in the Common Judgment, some of the elements of the order for reparations by spelling out cross-references between the Impugned Decision and other decisions of the Trial

Chamber.³ Furthermore, considering the specific nature of reparation proceedings, in which other significant rights must be balanced, I feel compelled to conclude that, despite the unfairness and unreliability caused by the Addendum, any further delays in the current reparations process can no longer be accepted.

6. Indeed, the procedural rights and guarantees discussed herein must be weighed against a fundamental right and consideration: that victims are entitled to timely reparations, as delays hinder the healing process and exacerbate their suffering. This is even more important in circumstances as in the present case, where victims have been awaiting reparations for more than two decades. As I have noted in another context, reparations are a human right, not charity or assistance.⁴

II. KEY FINDINGS

7. Legal certainty means that the law must be certain, foreseeable and easy to understand. Legal certainty ensures that judicial rulings are reasonably predictable and thus calculable. This predictability enables those subject to the law to align their conduct in accordance with anticipated judicial outcomes.

8. That the law is general and mandatory means that its application is not discretionary or a choice. The rigorous application of legal norms, the assurance of due process of law, and respect for the principles of legality are essential to a proper administration of justice. These notions are inherently connected to the reliability of judicial decisions and the right to a fair hearing. Moreover, when the law sets out proceedings, it establishes general norms of binding character, with objective validity, applied impersonally to any individual under the circumstances it defines.

9. Judicial certainty requires the reasoning in any judicial decision to be logical, consistent, complete and unambiguous. This is an essential requirement of fairness.

10. The requirement of a full reasoned, complete and self-explanatory decision constitutes an indispensable element of the appellate process. Indeed, the Appeals

³ The “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” is amended to the extent that it should be read as incorporating paragraphs 185-186 of the “First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations” (ICC-01/04-02/06-2860-Red).

⁴ Separate Opinion of Judge Luz del Carmen Ibáñez Carranza to the “Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, [ICC-01/04-01/06-3466-AnxII](#), 6 Mach 2020, p. 4

Chamber's review is corrective and its functions can only be carried out if it is in a position to understand and review the Trial Chamber's reasoning and findings. Indeed, the Appeals Chamber's review is corrective, and it can only carry out its functions if it is in a position to understand and review the Trial Chamber's reasoning and findings. More fundamentally, the obligation to provide a reasoned, complete and self-explanatory decision is inherent to the guarantees of due process of law, insofar as only a clear reasoned decision enables an understanding of the basis of a judicial determination and the exercise of the right to appeal.

11. Rulings of the Appeals Chamber are *binding* and must be complied with, in their own terms, as this is crucial to maintaining the authority and integrity of the judicial process. Moreover, within the Court's legal framework, the nature of the appeals function is both review-based and corrective. If compliance with decisions of the Appeals Chamber were not mandatory, the review function would lose its purpose and the protections enshrined as part of the judicial architecture would become superfluous. Non-compliance leads to uncertainty and ambiguity, undermining legal certainty and calling into question the very foundation of judicial authority.

III. INTRODUCTION

12. On 12 September 2022, the Appeals Chamber partially reversed the 2021 Reparations Order and remanded the matter to the Trial Chamber on several crucial issues,⁵ directing the Trial Chamber, given the significance of the remand, to **issue a new order for reparations**.⁶

13. On 14 July 2023, the Trial Chamber II, issued its "Addendum to the Reparations Order of 8 March 2021".³ It decided that the Addendum shall be considered an integral part of the 2021 Reparations Order, to be read in conjunction with it, and be understood as complementing and replacing therefrom only the specific issues that were dealt with in the Addendum.⁷ Against the so called Addendum, the Defence raised thirteen grounds of appeal,⁸ while Victims Group 2 raised three.⁹

⁵ [2022 Appeals Chamber Judgment](#), p. 11.

⁶ [2022 Appeals Chamber Judgment](#), p. 11; paras 750, 758-759.

⁷ [Impugned Decision](#), para. 16 (footnotes omitted).

⁸ [Defence Appeal Brief](#), pp. 5-92.

⁹ [Victims Group 2's Appeal Brief](#), pp. 14-55.

14. Under its first ground of appeal, the Defence submits that, in issuing the Addendum, the Trial Chamber erred in law and procedure by failing to comply with the direction of the Appeals Chamber that it should issue “a new order for reparations”.¹⁰ The Defence submits that the Trial Chamber circumvented a clear direction of the Appeals Chamber.¹¹ As a result, the Defence is required to rely upon several concurrently operative decisions, compromising the reparations process.¹² The Defence requests the Appeals Chamber to correct these errors by issuing “a new, unified, order for reparations”.¹³

15. On 1 November 2024, the Appeals Chamber delivered its unanimous judgment on the appeals of Mr Bosco Ntaganda and the victims of the attacks against the decision of Trial Chamber II of 14 July 2023 entitled “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659”, amending the Impugned Decision on a discrete issue and confirming it in all other respects. In the Common Judgment, the Appeals Chamber has rejected the Defence’s first ground of appeal. My esteemed colleagues concluded that the Trial Chamber: (a) did not err in law and procedure by issuing the Impugned Decision; and (b) that, in any event, the Defence failed to substantiate that any prejudice has been caused by the Trial Chamber proceeding in that manner. I disagree with this reasoning and conclusions, I join my respected colleagues in rejecting this ground of appeal for separate reasons as explained below.

16. Accordingly, this separate opinion is organised in the following manner. At the outset, it specifies the standard of review applied. Subsequently, it indicates the relevant legal questions and the law that is applicable to the present appeal. It then addresses the first ground of appeal, finding that the Addendum was issued outside the legal framework of the court; lacking sufficient reasoning; compromising the right to appeal; and in breach of clear directions of the Appeals Chamber. Finally, it summarises the conclusions reached.

¹⁰ [Defence Appeal Brief](#), paras 8, 22-24; *see generally* paras 22-43.

¹¹ [Defence Appeal Brief](#), paras 22-24; *see also* para. 28.

¹² [Defence Appeal Brief](#), paras 29-33, 35, *referring to* the need to read and reconcile the following: [Impugned Decision](#); [2021 Reparations Order](#); [Decision of 15 December 2020](#); [Decision on the TFV’s IDIP](#); [Decision on the TFV’s Fourth Update Report](#); [Decision on the TFV’s Sixth and Seventh Update Reports](#); [Decision on the TFV’s Ninth to Twelfth Update Reports](#); [First Decision on Implementation](#).

¹³ [Defence Appeal Brief](#), paras 42-43.

17. For ease of reference, the abbreviations and designations used in my opinion are aligned with those set out in Annex B to the Common Judgment and should be understood accordingly.

IV. STANDARD OF REVIEW

18. The present Separate Opinion analyses questions of law and procedure in addition to the exercise of the Trial Chamber's discretion, applying the following standard of review:

19. In relation to alleged legal errors:

[T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.

[An Impugned Decision] is "materially affected by an error of law" if the Trial Chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error".¹⁴

20. With respect to alleged procedural errors:

such errors may occur in the proceedings leading up to an impugned decision. [...] However, as with errors of law, the Appeals Chamber will only reverse [the Impugned Decision] if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the [Impugned Decision] would have substantially differed from the one rendered.¹⁵

21. With reference to alleged errors in discretionary decisions:

The Appeals Chamber recalls that it will not interfere with a Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct

¹⁴ [2022 Appeals Chamber Judgment](#), para. 29, referring to [2019 Lubanga Appeals Chamber Judgment](#), para. 28, referring to [Katanga Appeals Chamber Judgment](#), para. 39, quoting [Lubanga A5 Appeals Chamber Judgment on Conviction](#), paras 18-19 (footnotes omitted).

¹⁵ [2022 Appeals Chamber Judgment](#), para. 33, referring to [2019 Lubanga Appeals Chamber Judgment](#), para. 29, referring to [Katanga Appeals Chamber Judgment](#), para. 40, quoting [Lubanga A5 Appeals Chamber Judgment on Conviction](#), para. 20.

an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.¹⁶

22. In respect of the abuse of discretion, the Appeals Chamber has stated:

[T]he Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to “force the conclusion that the Chamber failed to exercise its discretion judiciously”. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.¹⁷

V. RELEVANT LEGAL QUESTIONS

23. Legal certainty means that the law must be certain, foreseeable and easy to understand. The obligation to apply the law is not discretionary or a choice. The law possesses a general and binding character, with objective validity, applied impersonally to any individual under the circumstances it defines. The obligation to comply with the law means that it does not depend on the will of individuals.¹⁸ When the law clearly prescribes a procedure, judges are under a duty to adhere to it without deviation. Opting for a discretionary alternative, under the premise that it is “not prohibited”, contradicts the principle of strict adherence within a closed legal system, risking the creation of a lacuna where none exists and also risking arbitrariness.¹⁹

24. In this regard, the ECtHR has stated that the law:

[...] must be accessible and foreseeable, in the sense of being sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in

¹⁶ [2022 Appeals Chamber Judgment](#), para. 34, referring to [2019 Lubanga Appeals Chamber Judgment](#), para. 31, referring to [Katanga Appeals Chamber Judgment](#), para. 43, quoting [Kenyatta OA5 Appeal Judgment](#), para. 22, referring to [Kony et al. OA3 Appeal Judgment](#), paras 79-80; [Banda OA5 Appeal Judgment](#), para. 30; [Ongwen OA3 Appeal Judgment](#), para. 35.

¹⁷ [2022 Appeals Chamber Judgment](#), para. 35, referring to [2019 Lubanga Appeals Chamber Judgment](#), para. 32, referring to [Katanga Appeals Chamber Judgment](#), para. 44, quoting [Kenyatta OA5 Appeal Judgment](#), para. 25.

¹⁸ See in this regard Hans Kelsen, *Teoría pura del derecho*, Universidad Nacional Autónoma de México, México 1982, p. 260.

¹⁹ See in this regard Hans Kelsen, *Teoría pura del derecho*, Universidad Nacional Autónoma de México, México 1982, pp. 251-258.

which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention. The law must moreover afford a degree of legal protection against arbitrary interference by the authorities. In matters affecting fundamental rights it would be contrary to the rule of law for a legal discretion granted to the executive to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, so as to give the individual adequate protection against arbitrary interference.²⁰

25. Judicial certainty is a procedural guarantee inherently connected with fairness and due process of law. The rigorous application of legal norms, the assurance of due process, and respect for the principle of legality are essential to a proper administration of justice. A decision cannot be considered reliable unless it complies with due process of law. In order to be valid, a decision needs to be issued in conformity with the forms established by the norms governing the issuance, the “production”, of the decision.²¹

26. The requirement of a reasoned decision is a crucial element of fairness. As I have elaborated in another context,²² legal certainty and clarity are at the core of judicial decision-making. All judicial decisions must reflect the reasoning of the Judges in a clear and unambiguous manner. Certainty and fairness require the reasoning in any judicial decision to be logical, consistent and unequivocal. Without these preconditions, the reasoning used by the judges cannot be analysed to identify correct and incorrect, as well as valid and invalid arguments.²³

27. The parties have a right, as spelled out in more detail below, to fully comprehend the basis and implications of the order for reparations. As emphasized by the IACtHR:

“The obligation to state the reasons for the decision [...] may vary according to the nature of the decision. In each case, it is necessary to assess whether this guarantee has been satisfied. [...]. Hence, the judge must state his or her opinion, respecting adequate and effective guarantees against possible illegalities and arbitrariness in the procedure in question”.²⁴

²⁰ ECtHR, *C.G. and Others v. Bulgaria*, Judgment 24 April 2008, para. 39.

²¹ L. Ferrajoli, *Lógica del derecho, método axiomático y garantismo*, in *DOXA, Cuadernos de Filosofía del Derecho*, 42 (2019), p.27. https://rua.ua.es/dspace/bitstream/10045/99647/1/DOXA_42_01.pdf

²² See Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, Annex 1 to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled “Sentence”, [ICC-02/04-01/15-2023-Anx1](#), 15 December 2022, para. 46.

²³ See in this respect M. Atienza, *Las Razones del Derecho*, Universidad Autónoma de México, 2005, pp. 12-14.

²⁴ IACtHR, *Escher et al. v. Brazil*, Judgment, 6 July 2009, para. 139.

28. Decisions must be self-explanatory, meaning that their grounds and conclusions should be sufficiently clear and understandable without requiring external clarification. This principle applies in particular to decisions that conclude a stage of the judicial process, as the reparations order, which decides on the parties' substantive rights and obligations.

29. The Appeals Chamber's jurisprudence has made it clear that it is essential for judicial decisions to indicate with sufficient clarity the basis of the decision and to identify which facts it found to be relevant in coming to its conclusion.²⁵ This requirement is not only applicable in respect of the decision on the conviction of an accused person, pursuant to Article 74(2) of the Statute, but further in respect to all decisions that could affect a person's human rights, as it derives from the right to a "fair hearing" enshrined in Article 14 (1) of the International Covenant on Civil and Political Rights as well as in Article 10 of the Universal Declaration of Human Rights.

30. The scope of this right has been discussed in the jurisprudence of the ECtHR, which sets out that "courts must indicate with sufficient clarity the grounds on which they based their decision".²⁶ The right to a reasoned decision protects individuals from arbitrariness.²⁷ The IACtHR has insisted that all decisions that "could affect human rights must be duly justified, because, if not, they would be arbitrary decisions".²⁸

31. As I elaborated elsewhere,²⁹ the requirement of a reasoned decision constitutes an indispensable element of the appellate process. Indeed, the Appeals Chamber's review is corrective, and it can only carry out its functions if it is in a position to understand and review the Trial Chamber's reasoning and findings. More fundamentally, the obligation to provide a reasoned, complete and self-explanatory decision is inherent to the guarantees of due process of law, insofar as only a clear

²⁵ [Lubanga OA5 Judgment](#), para. 20; [Said OA Judgment](#), para 41.

²⁶ [Hadjianastassiou v. Greece Judgment](#), para. 33.

²⁷ Council of Europe, Human Rights Handbooks, Protecting the right to a fair trial under the European Convention on Human Rights. Strasbourg 2012, p. 70.

²⁸ [Álvarez and Íñiguez v. Ecuador Judgment](#), para. 107.

²⁹ See Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, Annex 1 to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence", [ICC-02/04-01/15-2023-Anx1](#), 15 December 2022, para. 45.

reasoned decision enables an accused person to understand the basis of a judicial determination and to exercise his or her right to appeal.

32. Judgments of the Appeals Chamber are *binding* and must be complied with, in their own terms, as this is crucial to maintain the authority and integrity of the judicial process.³⁰ Within the Court's legal framework, the nature of the appeals function is both review-based and corrective. There can be no proper review function without enforcement of the review's outcome; in other words, if compliance with decisions were not mandatory, the review function would lose its purpose. The protections enshrined as part of a judicial architecture where the Appeals Chamber has this review power would become superfluous if compliance with its orders is conceived as directional, as opposed to mandatory. Non-compliance leads to uncertainty and ambiguity, undermining legal certainty and calling into question the very foundation of judicial authority.

Applicable law

33. When determining any matter before this Court, it is mandatory to apply the sources of law as stipulated in article 21 of the Statute, observing the order of precedence as set out therein.

34. The interpretation and application of the sources of law set out in article 21(1) and (2) of the Statute must be consistent with internationally recognised human rights and be without any adverse distinction founded, *inter alia*, on those grounds stipulated in article 21(3) of the Statute.

35. According to Article 75 (2) of the Statute, “[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”.

36. Pursuant to article 82 (4) of the Statute, which sets out the “appeals against other decisions”, either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: “[a] legal representative of the victims, the

³⁰ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, [ICC-01/04-01/06-2582](#), 8 October 2010, para. 48.

convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence”.

37. Pursuant to Article 83(2) of the Statute, the Appeals Chamber may reverse, amend or remand a decision if it finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error.

38. According to Rule 150 of the Rules, “1. [...] an appeal against a [...] reparation order under article 75 may be filed not later than 30 days from the date on which the party filing the appeal is notified of the decision, the sentence or the reparation order. [...] 4. If an appeal is not filed as set out in sub-rules 1 to 3, the [...] reparation order of the Trial Chamber shall become final”.

39. As provided for in Rule 153 (1) of the Rules, “The Appeals Chamber may confirm, reverse or amend a reparation order made under article 75”.

40. Article 10 of the Universal Declaration of Human Rights states that “[e]veryone is entitled in full equality to a fair [...] hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

41. According to Article 14 (1) of the International Covenant on Civil and Political Rights “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair [...] hearing by a competent, independent and impartial tribunal established by law”.

VI. FIRST GROUND OF APPEAL

42. The Defence submits that the Trial Chamber circumvented the direction of the Appeals Chamber to issue “a new order for reparations”,³¹ contesting the reasons given by the Trial Chamber for issuing the Addendum; the Impugned Decision,³² including its consideration that it was following previous practice,³³ and that it was sufficient for

³¹ [Defence Appeal Brief](#), paras 22-24; *see also* para. 28.

³² [Defence Appeal Brief](#), paras 23-24.

³³ [Defence Appeal Brief](#), para. 25.

the parties to be able to appeal the Impugned Decision as opposed to a new order for reparations.³⁴

43. The Defence argues that the Trial Chamber's failure to issue a new order for reparations has caused prejudice, making it necessary to rely upon several concurrently operative decisions, which complicates and compromises the reparations process and is untenable.³⁵ It avers that the Impugned Decision does not indicate which parts of the 2021 Reparations Order remain operative and which have been modified or overturned,³⁶ referring to the section addressing the amount of the award as an example of it being impossible to read those two decisions together.³⁷ The Defence submits that it is unsustainable that the eligibility assessment of potential victims is now based upon four decisions,³⁸ referring to the third ground of Victims Group 2's appeal in this context as an example of the "concrete prejudice" of the failure to issue a new order for reparations.³⁹

44. The Defence contends that the errors identified by the Appeals Chamber were global in nature and therefore could not be corrected and inserted back into the original order for reparations, using the previous failure of the Trial Chamber to examine at least a sample of applications as an example.⁴⁰ The Defence argues that the Trial Chamber could not find any paragraphs of the 2021 Reparations Order to be operative unless they were included in a new order for reparations; and it requests the Appeals Chamber to correct this error by issuing "a new, unified, order for reparations".⁴¹

45. As noted above, in the Common Judgment, the Appeals Chamber has rejected unanimously the first ground of appeal. My esteemed colleagues concluded that the Trial Chamber: (a) did not err in law and procedure by issuing the Impugned Decision; and (b) that, in any event, the Defence failed to substantiate that any prejudice has been

³⁴ [Defence Appeal Brief](#), paras 27-28.

³⁵ [Defence Appeal Brief](#), paras 29-33, 35, referring to the need to read and reconcile the following: [Impugned Decision](#); [2021 Reparations Order](#); [Decision of 15 December 2020](#); [Decision on the TFV's IDIP](#); [Decision on the TFV's Fourth Update Report](#); [Decision on the TFV's Sixth and Seventh Update Reports](#); [Decision on the TFV's Ninth to Twelfth Update Reports](#); [First Decision on Implementation](#).

³⁶ [Defence Appeal Brief](#), para. 33.

³⁷ [Defence Appeal Brief](#), para. 34.

³⁸ [Defence Appeal Brief](#), paras 35-36, referring to the following: [Impugned Decision](#); [2021 Reparations Order](#); [Decision on the TFV's Fourth Update Report](#); [Decision of 15 December 2020](#).

³⁹ [Defence Appeal Brief](#), paras 37-38.

⁴⁰ [Defence Appeal Brief](#), paras 39-41.

⁴¹ [Defence Appeal Brief](#), paras 42-43.

caused by the Trial Chamber proceeding in that manner. I respectfully disagree with these findings and conclusions. Nonetheless, I reject the ground of appeal for separate reasons, as spelled out below.

46. At the outset, I underline that the Appeals Chamber could not have been clearer in relation to the instruction it provided to the Trial Chamber, leaving no room for discretion. The Appeals Chamber directed the Trial Chamber to issue “a new order for reparations”, as follows:

“JUDGMENT

- 1) The “Reparations Order” is partially reversed [...]
- 2) The matter is therefore remanded to Trial Chamber II, which is **directed to issue a new order for reparations**, taking into account the terms of this Judgment”.⁴²

47. The Appeals Chamber was not seeking to uphold an irrelevant formality or impose a certain “title” to the decision of the Trial Chamber. It rather expressed that issuing a new order for reparations was necessary in view of “the significance of the remand, and the changes required”.⁴³ This is the true “context” in which the Impugned Decision was issued; that is to say: although the 2021 Reparations Order was “*partially overturned*”, the scope of the remand concerned multiple crucial issues, as virtually all essential elements of an order for reparations were involved, given that the Trial Chamber was found to have failed to:

- (i) make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number; (ii) provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda; (iii) assess and rule upon victims’ applications for reparations; (iv) lay out at least the most fundamental parameters of a procedure for the Trust Fund for Victims to carry out the eligibility assessment; and (v) provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm, the assessment of harm concerning the health centre in Sayo and the breaks in the chain of causation when establishing harm caused by the destruction of that health centre, and the presumption of physical harm for victims of the attacks.⁴⁴

48. The Appeals Chamber further underlined that it required a new order for reparations with a view to providing a *solid foundation* for the overall reparations

⁴² [2022 Appeals Chamber Judgment](#), p. 11; paras 750, 758-759.

⁴³ [2022 Appeals Chamber Judgment](#), para. 758.

⁴⁴ [2022 Appeals Chamber Judgment](#), p. 11.

process and avoid unnecessary disruptions, given that it had reversed fundamental aspects of the 2021 Reparations Order:

In light of the findings of the Appeals Chamber that require fundamental aspects of the [2021 Reparations Order] to be reversed, the objective at this stage of the proceedings must be to correct the errors identified in a way that both enables the order for reparations to be based upon an appropriately solid foundation and that causes minimum disruption to the overall reparation process.⁴⁵

49. Instead of proceeding, as instructed, to issue a new order for reparations, the Trial Chamber issued an Addendum, a procedural step that is not provided for in the legal framework of the Court and fell outside its discretion. The word “addendum” is defined as “a thing to be added, esp. because of omission, an appendix, an addition, additional matter at the end of a book”.⁴⁶ Decisions that, by their legal nature, determine substantive rights and obligations for both the defence and the victims must be accompanied by a set of procedural guarantees. Decisions that conclude a stage of the judicial process, such as reparations orders, cannot be issued as an addendum as such a course would downgrade them to an appendix. It would deprive them of the guarantees that have been embedded in the order for reparations, including, predictability of the proceedings and judicial certainty.

50. The Trial Chamber integrated the Impugned Decision in the former, largely overturned, 2021 Reparations Order. In so doing, the Trial Chamber left it open to the parties to reconcile, read in conjunction with and replace parts of the different decisions at stake, to discern what the order for reparations is.⁴⁷ My colleagues indicate that “in principle, all of the essential elements required to make up an order for reparations should be contained in a single, unified document. That is the ordinary and preferable course. However, there is no legal prohibition on having those elements contained in more than one document, particularly in circumstances such as the present one, in which there has been a partial reversal”.⁴⁸ In my view, this course is not only the normal and

⁴⁵ [2022 Appeals Chamber Judgment](#), para. 757.

⁴⁶ *See* Oxford Dictionary, fifth edition, Oxford University Press 2002.

⁴⁷ [Impugned Decision](#), para. 16 (footnotes omitted) “Accordingly, and following previous practice, the present Addendum shall be considered an integral part of the [2021 Reparations Order], to be read in conjunction with it, and be understood as complementing and replacing therefrom only the specific issues that are dealt with hereafter”.

⁴⁸ [Common Judgment](#), para. 49.

preferable course but the mandatory and the only one in line with the legal framework of the Court.

51. In my view, where the law clearly prescribes a specific procedure, judges are obliged to adhere strictly to that provision without deviation. A clear norm, of general application, eliminates judicial discretion, confining the judge to the framework provided. Accordingly, judges cannot opt for an alternative discretionary procedure on the grounds that it is “not prohibited” without contravening the principle of exhaustive applicability within a closed legal system. Opting for an alternative, under the premise that it is “not prohibited”, risks the creation of a lacuna where none exists and the arbitrary affectation of guarantees.⁴⁹ The legality of procedures requires that all judicial activities be conducted according to a legally pre-established procedure. Any deviation therefrom renders the decision null and void.⁵⁰

52. Proceeding to issue a new reparations order was the only legal avenue by which reparations could continue in accordance with the Court’s procedural framework, and the underlying *principle of legality*. Indeed, the only means by which a convicted person can be held accountable for reparations, pursuant to the legal framework of the Court, is through a reparations order. Article 75 (2) of the Statute sets out, with regard to reparations, that the Court should proceed to make an order, i.e. “[t]he Court may make an order”, directly against a convicted person. This framework does not include an “Addendum” or any other ancillary document of that nature.

53. When the law sets out proceedings, it establishes general norms of binding character, with objective validity, applied impersonally to any individual under the circumstances it defines. The obligation to comply with the law means that it does not

⁴⁹ See in this regard Hans Kelsen, *Teoría pura del derecho*, Universidad Nacional Autónoma de México, México 1982, pp. 251-258.

⁵⁰ L. Ferrajoli, *Derecho y Razón, Teoría del Garantismo Penal*, Trotta 1998, p. 606. Accordingly, “Los procedimientos de verificación aportados por la epistemología acusatoria o falsacionista tienen, así, su fundamento en el método de la prueba y refutación —por modus ponem y por modus tollens— [...] la transposición procesal se realiza a través de la separación y el reparto de papeles entre los tres sujetos del proceso: las dos partes, acusación y defensa, a quienes competen respectivamente la prueba y la refutación, y el juez tercero, al que corresponde la decisión. De este modo resulta una estructura triádica o triangular, normativamente asegurada por [...] garantías [como ser] la legalidad de los procedimientos, que exige que todas las actividades judiciales se desarrollen, bajo pena de nulidad, según un rito legalmente preestablecido; la motivación, que para cerrar el sistema documenta y garantiza su carácter cognoscitivo, es decir, la fundamentación o falta de fundamentación de las hipótesis acusatorias formuladas a la luz de las pruebas y contrapruebas”.

depend on the will of individuals; rather, the norm remains valid as long as it is applied and observed in practice.⁵¹ Non-observance of the forms prescribed by the law, as noted above, make the procedural act null and void.⁵²

54. The reason, in my view, is clear. The issue is, as noted, not the title of the decision but its content, or lack thereof. Whether it is called “reparations order” or otherwise, the law requires this critical procedural step to be surrounded, first and foremost, with sufficient guarantees of due process to ensure *judicial certainty and fairness* towards the parties. As I have emphasized in another context, logical, consistent and unambiguous reasoning is at the heart of any judicial decision and a fundamental aspect of fairness:⁵³

“the reasoning in any judicial decision must be logical, consistent and unambiguous. Such reasoning is one that is structurally consistent, and from which only one conclusion can be drawn – in other words, this is the requirement of certainty, with which any judicial decision must comply”.⁵⁴

55. Judicial decisions must be self-explanatory, meaning that their grounds and conclusions should be sufficiently clear and understandable without requiring external clarification. This principle applies in particular to decisions that conclude a stage of the judicial process, as the reparations order, which decides on the parties’ substantive rights and obligations.

56. Although the Statute provides for the right to a fair hearing in relation to criminal proceedings, as opposed to reparations proceedings, given that the application of the Statute must be consistent with internationally recognised human rights, the Defence is entitled to the right to fairness, a “fair hearing”,⁵⁵ throughout all phases of the proceedings. As a fundamental procedural right, “fairness” is required in all proceedings conducted at the ICC including reparations.

⁵¹ Hans Kelsen, *Teoría pura del derecho*, Universidad Nacional Autónoma de México, México 1982, p. 260.

⁵² L. Ferrajoli, *Derecho y Razón, Teoría del Garantismo Penal*, Trotta 1998, p. 606.

⁵³ See Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, Annex 1 to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled “Sentence”, [ICC-02/04-01/15-2023-Anx1](#), 15 December 2022, para. 45.

⁵⁴ See Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, Annex 1 to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled “Sentence”, [ICC-02/04-01/15-2023-Anx1](#), 15 December 2022, para. 37.

⁵⁵ Article 14 ICCPR and Article 10 UDHR.

57. The Appeals Chamber has noted the requirements of a reasoned opinion in this case, in the context of appeals filed under rules 154 and 155 of the Rules, as follows:

The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.⁵⁶

58. The Appeals Chamber found that this interpretation, which was developed in the context of appeals against decisions on the criminal liability of an accused, apply equally in the context of reparations proceedings.⁵⁷

59. The Appeals Chamber also had the opportunity to consider the *requirement of a reasoned decision* in the *Said Case*. It stated that “[a] reasoned decision is paramount to the exercise of the right to a fair trial”.⁵⁸ The Appeals Chamber made it clear that it is essential for judicial decisions to indicate with sufficient clarity the basis of the decision and to identify which facts it found to be relevant in coming to its conclusion.⁵⁹

60. Given that, as noted above, the requirement of a full reasoned decision is a crucial element of procedural fairness, it is also important to recall some relevant human rights jurisprudence on the matter. The IACtHR has underlined that “[t]he duty to state grounds is a guarantee linked to the proper administration of justice, protecting the right of citizens to be tried for the reasons provided by Law, and giving credibility to the legal decisions adopted in the framework of a democratic society”.⁶⁰ The IACtHR has also indicated that all decisions that “could affect human rights must be duly justified, because, if not, they would be arbitrary decisions”.⁶¹ The right to a reasoned decision protects individuals from arbitrariness.⁶² The ECtHR underlined that it is not only an established case-law principle but also a reflection of the proper administration of

⁵⁶ [2022 Appeals Chamber Judgment](#), para. 58.

⁵⁷ [2022 Appeals Chamber Judgment](#), para. 60.

⁵⁸ [Said OA Judgment](#), para 41.

⁵⁹ [Lubanga OA5 Judgment](#), para. 20; [Said OA Judgment](#), para 41.

⁶⁰ [Aptiz Barbera et al. v. Venezuela Judgment](#), para. 77.

⁶¹ [Álvarez and Íñiguez v. Ecuador Judgment](#), para. 107.

⁶² Council of Europe, Human Rights Handbooks, Protecting the right to a fair trial under the European Convention on Human Rights. Strasbourg 2012, p. 70.

justice, that judgments of courts and tribunals should adequately state the reasons on which they are based.⁶³

61. Although entered in the context of a decision pursuant to article 74(2) of the Statute, the conclusions I reached in the *Gbagbo and Blé Goudé* Case on the matter of *judicial decision making and reasoning* are, as procedural guarantees arising from the right to a fair hearing, applicable to the present case. I therefore recall that “the decision making process includes two sides of the same coin that judges must conduct concomitantly”⁶⁴ and that “[o]ne side is the internal process [internal discovery] where the trial judges assess all the evidence, both separately and holistically considered, along with the entire proceedings”, indicating that:

“[t]his is the internal side where judges engage in a deliberative and dynamic process, through which it is possible to make findings and conclusions from the evidence”.⁶⁵

62. As observed in that opinion, “[t]he other side is the act of putting such findings and conclusions into writing”, explaining in this regard that “writing the final judgment is the external side of the decision-making process [external justification]”.⁶⁶ I stated in that opinion and re-state now in this case that “[b]oth sides run concurrently. Only through this twofold process is it possible to obtain a *reliable decision* for all parties and participants” thus providing judicial certainty.⁶⁷

63. With regard to lack of “reliability” as a potential ground of appeal, Article 81 1(b) of the Statute enumerates grounds of appeal available for the convicted person or the Prosecutor acting on that person’s behalf, which includes at paragraph 1(b)(iv) “any other ground that affects the fairness or reliability of the proceedings or decision”. Paragraph 1(a) enumerates the grounds of appeal available for the Prosecutor, making reference to “reliability”. In turn, pursuant to Article 83(2), lack of reliability is incorporated as a consequence of unfairness “(…) the proceedings appealed from were unfair in way that affected the reliability of the proceedings”. As noted in academic

⁶³ See e.g., [Garcia Ruiz v. Spain Judgment](#), para. 26: “The Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based”.

⁶⁴ [Gbagbo and Blé Goudé Dissenting Opinion](#), para. 207.

⁶⁵ [Gbagbo and Blé Goudé Dissenting Opinion](#), para. 207.

⁶⁶ [Gbagbo and Blé Goudé Dissenting Opinion](#), para. 207.

⁶⁷ [Gbagbo and Blé Goudé Dissenting Opinion](#), para. 207.

commentary, while the language of the chapeau of Article 83(2) echoes that in article 81(1)(b)(iv), it “at the same time narrows things slightly”.⁶⁸ In the end, “article 83(2) makes the initial issue of fairness alone”⁶⁹, with the unreliability of the decision being a result. Judges should assess these particular nuances in the context and circumstances of a concrete case.

64. For the purpose of Article 82(4), victims are considered parties to the proceedings and not participants.⁷⁰ Parties should not be precluded from raising any grounds that may be germane to the legal correctness or procedural fairness of a reparations order. They should be able to invoke unfairness causing lack of reliability, and the Appeals Chamber may make findings in this respect.

65. The findings and conclusions that are put in writing, which must invariably reflect the internal process, ought to be clear, consistent and unambiguous in a judicial decision. Certainty and clarity are at the core of judicial decision-making. All judicial decisions must reflect the reasoning of the Judges in a clear and unambiguous manner. This is an indispensable requirement of fairness.

66. Accordingly, the parties were entitled to a single and self-explanatory decision containing all the reasons underpinning the essential elements of a reparations order, as well as the Trial Chamber’s determinations concerning these elements. Requiring the parties to discern these elements by reading the Addendum in conjunction with several other rulings and to construe it by complementing and replacing therefrom only the specific issues that are dealt with in the Addendum falls short of these requirements. The parties were left to discern essential elements of the reparations order by piecing together different overlapping segments of decisions, undermining the due process guarantees. The reasoning and conclusions of the Trial Chamber were not clearly and unambiguously articulated, compromising the judicial certainty, the fairness and the reliability of the proceedings.

⁶⁸ W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 953.

⁶⁹ W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 953.

⁷⁰ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings](#), 14 December 2012, ICC-01/04-01/06-2953, para. 67.

67. The absence of a proper reparations order, surrounded by the aforementioned due process guarantees also compromised their *right to appeal*. Notably, pursuant to article 82 (4) and Rules 150 (1) and (4) and 153 (1) of the Rules, the statutory framework provides for a (direct) appeal against a “reparations order”, as opposed to an arrangement of different rulings that read somehow together make the reparations order as is the present case. The Trial Chamber’s failure to provide a consolidated, clear reparations order compromised the parties right to appeal.

68. In the *Said* Case, the Appeals Chamber emphasised “the importance of reasoning in allowing the accused person to usefully exercise available rights of appeal”, requiring “that courts ‘indicate with sufficient clarity the grounds on which they based their decision’”.⁷¹ It found that “[a] Chamber’s provision of reasons in decisions also ‘enables the Appeals Chamber to clearly understand the factual and legal basis upon which the decision was taken and thereby properly exercise its appellate functions’”.⁷² In this regard, the ECtHR has stressed that “courts must indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him”.⁷³

69. More fundamentally, the obligation to provide a full reasoned opinion is a crucial element of fairness and thus of the guarantees inherent in the due process of law, insofar as only a clear reasoned opinion enables an accused person to understand the basis of a judicial determination and to exercise his or her right to appeal. Therefore, logical, consistent and unequivocal reasoning is at the heart of any judicial decision and a fundamental aspect of the right to fairness.

70. As elaborated elsewhere,⁷⁴ the requirement of a reasoned decision constitutes an indispensable element of the appellate process. Indeed, the Appeals Chamber’s review is corrective, a function that can only be carried out if the Appeals Chamber is in the position to understand and review the Trial Chamber’s reasoning and findings. This is all the more important in circumstances in which the Appeals Chamber is called to

⁷¹ [Said OA Judgment](#), para 42.

⁷² [Said OA Judgment](#), para 43.

⁷³ [Hadjianastassiou v. Greece Judgment](#), para. 32.

⁷⁴ See Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, Annex 1 to the Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled “Sentence”, [ICC-02/04-01/15-2023-Anx1](#), 15 December 2022, para. 45.

review alleged errors of law, as under these circumstances, and as stated in the standard of review above, the Appeals Chamber will not defer to the Trial Chamber's interpretation of the law but rather it will arrive at its own conclusions as to the appropriate law.⁷⁵

71. Moreover, I disagree with my esteemed colleagues with respect to their reliance on the *Lubanga* precedent, which is invoked to justify the acceptance of the addendum in the circumstances of the present case.⁷⁶ In the *Lubanga* case, the Appeals Chamber issued an amended order for reparations and thereafter directed the amount of the award to be determined subsequently. It was a discrete and self-contained issue that could therefore be read as a part of the order. All other essential elements of the reparations order were otherwise ruled upon, clearly, in one single decision.⁷⁷ Conversely, the Impugned Decision adds to an initial order for reparations which was overturned in five fundamental aspects, cutting across various essential elements of the reparations order.

72. Judgments of the Appeals Chamber are *binding* and must be complied with, as this is crucial to maintaining the authority and integrity of the judicial process. When the Appeals Chamber confirms, reverses or amends an order for reparations pursuant to rule 153 (1) of the Rules. Its decisions, orders and instructions are of mandatory implementation. The Appeals Chamber has been clear in its jurisprudence that judicial decisions are binding for the parties and must be implemented, unless suspended, reversed or amended by the Appeals Chamber:

73. Under the Statute, the Trial Chamber, subject only to the powers of the Appeals Chamber, is the ultimate guardian of a fair and expeditious trial. Article 64 (2) of the Statute provides that it is the Trial Chamber which shall ensure that the trial is conducted fairly, expeditiously and with full respect for the rights of the accused.

48 [...] This is a fundamental criterion for any trial to be fair. The Appeals Chamber fully endorses the statement of the Trial Chamber that "[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations". **Orders of a Trial Chamber are binding orders, to be implemented unless and until they are suspended, reversed or amended by the Appeals**

⁷⁵ [2022 Appeals Chamber Judgment](#), para. 29, referring to [2019 Lubanga Appeals Chamber Judgment](#), para. 28, referring to [Katanga Appeals Chamber Judgment](#), para. 39, quoting [Lubanga A5 Appeals Chamber Judgment on Conviction](#), paras 18-19 (footnotes omitted).

⁷⁶ [Common Judgment](#), paras 52-53.

⁷⁷ Order for Reparations, 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#).

Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber.⁷⁸

74. Non-compliance with appellate decisions, orders and instructions, in their own terms not only undermines the procedural rules of the Court but also contributes to jeopardizing judicial and legal certainty. Legal certainty demands that once a matter is adjudicated, the parties can expect that the adjudicating judgment will be complied with. By disregarding the appellate ruling, the Trial Chamber introduced confusion and ambiguity, weakening trust in the predictability and reliability of the process. It set a dangerous precedent according to which compliance appears optional or discretionary. Such deviations create unpredictability, undermine the finality of legal proceedings, and erode the authority of the ICC judicial system.⁷⁹

75. In light of the above, I disagree with the finding in the Common Judgment that the Trial Chamber did not err.⁸⁰ In my view, the Trial Chamber erred in law and procedure when, in disregard of a clear instruction to hand down a new reparations order, it instead issued an addendum to a decision that had been largely reversed, contrary to articles 75 (2) and 82 (4) of the Statute, rules 150 and 153 of the Rules, article 10 of the Universal Declaration of Human Rights, and article 14 (1) of the International Covenant on Civil and Political Rights, affecting the reliability of the Impugned Decision.

Material effect

76. I note that my colleagues have dedicated several pages of the Common Judgment to justify that the Impugned Decision caused no prejudice to the Defence. In my view, if the Trial Chamber committed no errors, as concluded in the Common Judgment, there was no need to analyse whether any such errors caused prejudice.

⁷⁸ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, [ICC-01/04-01/06-2582](#), 8 October 2010, para. 48. *See*, in relation to the background of this decision, Appeals Chamber, Guariglia/Batros/Gallmetzer/Mugwanya, Oxford 2018, p. 13 *et seq.*

⁷⁹ Decisions of lower courts can be reversed higher courts. They remain valid until they are overturned. There is however no procedure to eliminate the validity of a decision of higher courts. Where there is no procedure to eliminate the validity of a decision from the higher court, such validity becomes final; *see* Hans Kelsen, *Teoría pura del derecho*, Universidad Nacional Autónoma de México, México 1982, p. 276.

⁸⁰ [Common Judgment](#), paras 39-40.

77. Pursuant to Article 83(2) of the Statute, the Appeals Chamber may reverse, amend or remand a decision if it finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, *or* that the decision or sentence appealed from was materially affected by error of fact or law or procedural error.

78. The jurisprudence of the Appeals Chamber, quoted above, has set up a standard according to which a legal or procedural error materially affects the Impugned Decision “if the Trial Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error”.⁸¹ Upon thoroughly examining the Impugned Decision, I conclude that the Trial Chamber adequately addressed the five remanded issues, complying with the directions of the Appeals Chamber to reconsider those issues that were reversed in the 2022 Appeals Chamber Judgment.

79. The Impugned Decision addresses each of the issues that the Appeals Chamber remanded.⁸² There is also, *inter alia*, a comprehensive confidential annex, which comprises the Trial Chamber’s findings on the 171 victims’ dossiers that it analysed in compliance with the direction of the Appeals Chamber for it to obtain and rule upon a sample of victims in this case.⁸³ Even if a full and self-contained order for reparations had been issued, there would have been no “substantial” changes as to elements remanded.

80. Whilst the issuance of the Addendum introduced unnecessary confusion and contributed to judicial uncertainty and unreliability, the Appeals Chamber, in the Common Judgment, has made efforts to reconstruct the essential elements of the reparations order, or to establish how such reconstruction may be undertaken, based on

⁸¹ [2022 Appeals Chamber Judgment](#), para. 29, referring to [2019 Lubanga Appeals Chamber Judgment](#), para. 28, referring to [Katanga Appeals Chamber Judgment](#), para. 39, quoting [Lubanga A5 Appeals Chamber Judgment on Conviction](#), paras 18-20 (footnotes omitted).

⁸² The clear exception is the procedure for the judicial approval of administrative screenings that find beneficiaries eligible to benefit from reparations and for the possibility for those who are found not to be eligible to be able to challenge those findings before the Trial Chamber.

⁸³ The fact that the Trial Chamber addressed each of the matters remanded to it is clear when comparing what was decided in the Impugned Decision and its aforementioned annex with what the Appeals Chamber remanded to the Trial Chamber, whether by reference to either: (i) the five issues listed in the “Judgment” and the “Summary of Conclusions” section of the 2022 Appeals Chamber Judgment (*see* [2022 Appeals Chamber Judgment](#), p. 11, para. 1; paras 744-749); or (ii) the long footnote in the “appropriate relief” section of that Judgment which, in effect, set out the steps that the Trial Chamber would need to take to address the matters that were being remanded to it (*see* [2022 Appeals Chamber Judgment](#), para. 757, fn 1672).

a number of cross-references.⁸⁴ These efforts are the result of the commitment to ensure that the lapse of time does not continue to prejudice the victims' right prompt and effective reparations. With these efforts in place, even if a full and self-contained order for reparations had been issued, there would have been no "substantial" changes as to the elements remanded. Accordingly, in application of the aforementioned standard of review, I find that the errors have caused no material effect on the Impugned Decision.

81. I have concluded above that the Addendum caused unfairness and unreliability. However, taking into account the specific nature of reparation proceedings, where other important rights must be weighed, I feel compelled to balance the procedural rights and guarantees to judicial certainty, fairness and reliability discussed in this separate opinion against a fundamental and substantive right and entitlement to the prompt implementation of reparations.

82. Indeed, further delays in the present reparations proceedings can simply no longer be accepted. Victims have a right to timely reparations. Delays in the reparations process not only prolong the suffering but also hinder the healing process. This concern is even more pronounced in cases like the present one, where the victims have been waiting for reparations for more than two decades. Any further delays in the delivery of reparations would only exacerbate the harm suffered by the victims. Reparations are not merely acts of charity or assistance; they constitute a fundamental human right.⁸⁵

83. In balancing the rights and considerations which are specific to this case, I find it inappropriate to introduce further obstacles to the prompt implementation of reparations. However, future reparation proceedings must adhere to the legal guarantee of fairness and rigorously apply the court's legal framework.

84. Accordingly, I agree with my colleagues that the first ground of the Defence's appeal must be rejected.

⁸⁴ [Common Judgment](#), footnote 71.

⁸⁵ Separate Opinion of Judge Luz del Carmen Ibáñez Carranza to the "Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'", [ICC-01/04-01/06-3466-AnxII](#), 6 Mach 2020, page 4

VII. CONCLUSION

85. Save for a specific issue that has been amended,⁸⁶ the Appeals Chamber has unanimously rejected all grounds of appeal of the Defence and the victims. However, I recapitulate here the main conclusions reached in this opinion to serve as guidance for this and future cases:

- a. the Trial Chamber committed errors of law and procedure in the issuance of the Addendum, instead of a new order for reparations:
 - i. Compromising legal and judicial certainty as inherent components to guarantee fairness and due process of law, as provided for in article 10 of the Universal Declaration of Human Rights, article 14 (1) of the International Covenant on Civil and Political Rights;
 - ii. Contradicting an express statutory provisions, article 75 (2) of the Statute, which sets out that the only means by which a convicted person can be held accountable for reparations is through an *order of reparations*;
 - iii. Failing to issue a complete and self-explanatory decision, which ensures that the reasoning be logical, consistent and unambiguous;
 - iv. Affecting the right to appeal, enshrined in article 82 (4) and rules 150 (1) and (4) and 153 (1) of the Rules; and
 - v. Disregarding the appellate ruling, which lead to uncertainty and ambiguity, weakening trust in the predictability and reliability of the judicial process.
- b. Such errors did not materially affect the Impugned Decision, as even if a full and self-contained order for reparations had been issued, there

⁸⁶ The “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” is amended to the extent that it should be read as incorporating paragraphs 185-186 of the “First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations” (ICC-01/04-02/06-2860-Red).

would have been no “substantial” changes as to the five essential elements of the reparations. I reach this conclusion considering that:

- i. the Trial Chamber properly considered the five points concerned in the Appeals Chamber’s remand; and
 - ii. The Appeals Chamber made cross-references between the Addendum and other decision issued by the Trial Chamber, to reconstruct the elements of the Reparations Order and to establish how such reconstruction may be undertaken.
- c. Taken into account the specific nature of reparations proceedings, the unfairness, uncertainty and lack of reliability caused by the Trial Chamber’s failure to issue a new order for reparations is outweighed, upon a careful balance of the rights involved, by the victims’ right to receive timely reparations.

86. Given the above conclusions, I join my respected colleagues in finding that the first ground of Appeal by the Defence must be rejected.

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



**Judge Luz del Carmen Ibáñez
Carranza**

Dated this 1st day of November 2024

At The Hague, The Netherlands