



**Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez
Carranza to the “Decision on various procedural issues”**

I. INTRODUCTION

1. Despite the fact that no public hearing was held by Trial Chamber VI in the reparations phase, and regardless of the factual and legal complexities raised by the appeals before us, my esteemed colleagues of the Appeals Chamber did “not deem it necessary to hold a hearing at this stage”.¹ They considered such a hearing to be conditional upon “further deliberations”.² While I concur with other determinations in the Appeals Chamber’s decision, such as receiving further submissions from the Trust Fund for Victims and the Defence,³ I am unable to hold that the hearing in this case is dispensable. Therefore, with all due respect for my colleagues, I must partly dissent from them in this decision.

2. In my view, the right to be heard in a public hearing, in the determination of a person’s rights and obligations, is an internationally recognised human right as well as a guarantee for the proper administration of justice, which especially safeguards the due process of law. Any rule or practice at this court must be applied and interpreted consistently with that right, in accordance with article 21(3) of the Rome Statute (hereinafter: “Statute”). This is especially the case in the appeals before us because the issues raised on appeal do not justify dispensing with the hearing.

3. I highlight that the appeals before us are not interlocutory. The appeals concern a final order for reparations against Mr Ntaganda for USD 30 million.⁴ The rights at stake

¹ [Decision on various procedural issues](#), 9 September 2021, ICC-01/04-02/06-2708, (hereinafter: “Decision”), para. 30.

² [Decision](#), para. 30.

³ [Decision](#), paras 19, 29.

⁴ [Reparations Order](#), 8 March 2021, ICC-01/04-02/06-2659 (hereinafter: “Reparations Order”), p. 97.

pertain to thousands of victims and, importantly, the resulting obligations of Mr Ntaganda.

4. In the case at hand, there was no public hearing in the first instance of the reparations proceedings,⁵ and the appeals before us raise complex factual and legal issues that will require the Appeals Chamber to make final determinations on the victims' rights and Mr Ntaganda's resulting obligations. Such issues include the questions of whether children born out of rape and sexual slavery are direct victims of the crimes of which Mr Ntaganda was convicted,⁶ whether transgenerational harm should be recognised, and if so, the extent to which it is applicable,⁷ and, importantly, whether fairness and due process was affected in this case as per Mr Ntaganda's allegations that many of his submissions were overlooked, that he was not granted a sufficient opportunity to address allegations made against him,⁸ and that he did not have a proper opportunity to challenge the eligibility of victims to benefit from reparations, as he neither had access to the applications of potential beneficiaries nor the opportunity to make observations.⁹ In the circumstances of this case, a public hearing cannot be considered to be dispensable.

5. For the reasons that follow, I partly dissent from this decision. Section II of this partly dissenting opinion will elaborate upon the reasons why, in my view, the Appeals Chamber should have held a hearing at this stage without making it conditional upon further deliberations. It will present the applicable human rights law and jurisprudence that, in my view, grant the victims and convicted person the right to be heard in a public hearing in the determination of their rights and obligations, including in civil cases relating to reparations. Section III will summarise the conclusions of my analysis.

II. REASONS

6. As indicated below, the right to be heard in a public hearing, in the determination of a person's rights and obligations, is an internationally recognised human right. Under article 21(3) of the Statute, hearing the victims and the convicted person in the determination of their rights and obligations is mandatory and should not be conditional

⁵ [Reparations Order](#), paras 10-22.

⁶ [Defence Appeal Brief](#), para. 107.

⁷ [Defence Appeal Brief](#), p. 39, paras 118-120.

⁸ [Defence Appeal Brief](#), paras 5-7; ground 1.

⁹ [Defence Appeal Brief](#), ground 1; grounds 10-15, heading II.

upon further deliberations of the Appeals Chamber. This is because the realisation of this human right is not subject to the judges' or any other authority's discretion; as a human right, its realisation is unconditional. I am of the view that this right is intrinsically linked to the guarantee of due process of law.

7. The Chambers Practice Manual requires the Appeals Chamber to determine whether an oral hearing will be held in appeals against reparations orders within one month of the filing of the responses to the appeal brief:

In respect of appeals against conviction, acquittal or reparations orders, the Appeals Chamber shall determine, within one month of the filing of the response to the appeal brief, whether an oral hearing will be held.¹⁰

8. I am of the view that the right to have a public hearing is in particular applicable in appeals against reparations orders, because this constitutes that last opportunity for the parties to make submissions before a final order is issued. This is supported by rule 156(3) of the Rules of Procedure and Evidence, which stipulates that, in interlocutory appeals, "appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing". *A contrario sensu*, on final appeals, a hearing would in principle be mandatory. In this regard, I note that the former composition of the Appeals Chamber did indeed schedule hearings in final appeals before it.¹¹

9. Moreover, in interpreting and applying paragraph 90 of the Chambers Practice Manual, as with any other provision of the Court's statutory framework, article 21(3) of the Statute requires that its interpretation and application be consistent with internationally recognized human rights:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any

¹⁰ [Chambers Practice Manual](#), 2019, para. 90.

¹¹ While a hearing was initially scheduled in the *Lubanga* reparations appeals entertained in 2018-2019, the hearing was rescheduled a couple of times, and ultimately vacated due to the impossibility for one of the legal representatives of victims to attend the hearing (see [Annex A 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'](#), 18 July 2019, ICC-01/04-01/06-3466-AnxA, paras 10-13; see also [Demande des Représentants légaux des victimes de reconsidérer le « Scheduling order for hearing before the Appeals Chamber »](#), ICC-01/04-01/06-3433 A7 A8, 4 January 2019, ICC-01/04-01/06-3434-Red, paras 4-5). See also *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Order scheduling a hearing before the Appeals Chamber and setting a time limit for any request for leave to reply](#), 20 March 2020, ICC-02/11-01/15-1318, p. 3; *The Prosecutor v. Bosco Ntaganda*, [Scheduling order for a hearing before the Appeals Chamber](#), ICC-01/04-02/06-2486, p. 3.

adverse distinction founded on grounds such as gender [...], age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

10. The human right to be heard in a public hearing is recognised in different treaties at the international and regional level. It is reflected in article 14(1) of the International Covenant on Civil and Political Rights (hereinafter: “ICCPR”), article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: “ECHR”), article 7 of the African Charter on Human and Peoples’ Rights, and article 8(1) of the American Convention on Human Rights.¹²

11. As for the second sentence of article 14(1) of the ICCPR, the Human Rights Committee (hereinafter: “Committee”) has observed that it “entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges *or if their rights and obligations are determined in a suit at law*”.¹³ According to the Committee, the determination of “rights and obligations in a suit at law” “encompasses [*inter alia*] judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law”.¹⁴

12. Importantly, “[t]he notion of fair trial includes the guarantee of a fair and public hearing”.¹⁵ The Committee is of the view that “[t]he publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large”.¹⁶

13. Certainly, in my view, public hearings ensure that cases are conducted in keeping with the due process of law, which includes the principles of orality, immediacy and publicity, as safeguards for the proper administration of justice. Due process of law

¹² See United Nations, General Assembly, [International Covenant on Civil and Political Rights](#), 16 December 1966, 999 United Nations Treaty Series 14668, article 14(1); Council of Europe, [Convention for the Protection of Human Rights and Fundamental Freedoms](#), 4 November 1950, 213 United Nations Treaty Series, article 6(1); African Union, [African Charter on Human and Peoples’ Rights](#), 27 June 1981, 1520 United Nations Treaty Series 26363, article 7; Organization of American States, [American Convention on Human Rights](#), 22 November 1969, 1144 United Nations Treaty Series, article 8(1).

¹³ Human Rights Committee, [General Comment No. 22: Article 14: Right to equality before courts and tribunals and to a fair trial](#), 23 August 2007, CCPR/C/GC/32 (hereinafter: “General Comment No. 22”), para. 3 (emphasis added).

¹⁴ [General Comment No. 22](#), para. 16.

¹⁵ [General Comment No. 22](#), para. 25.

¹⁶ [General Comment No. 22](#), para. 28.

encompasses, among others, the fair trial rights of the defence and especially the right to have a public hearing.

14. Public hearings further ensure the accountability of judges. In this regard, public hearings are not simply an avenue for judges to clarify the issues at stake, but they ensure that the parties express their views and concerns publicly and that the judges are present and under public scrutiny in hearing such views and concerns. Public hearings are thus a safeguard for the principle of immediacy, which requires that the evidence be heard in court by the judges, and the principle of transparency, which requires publicity of the proceedings.

15. According to the European Court of Human Rights (hereinafter: “ECtHR”), the right to a public hearing protects litigants against secrecy in the administration of justice and ensures a fair trial.¹⁷ While not absolute,¹⁸ this right is not limited to oral testimony,¹⁹ but article 6(1) of the ECHR entitles parties to an “oral hearing”²⁰ unless “exceptional circumstances” make such a hearing dispensable.²¹ The Grand Chamber of the ECtHR found that such “exceptional circumstances” include cases “(a) where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the case file”; “(b) in cases raising purely legal issues of limited scope [...], or points of law of no particular complexity”; and “(c) where the case concerns highly technical issues”, taking, for instance, into consideration “the technical nature of disputes concerning social-security benefits, which may be better dealt with in writing than in oral argument”.²²

¹⁷ ECtHR, Grand Chamber, [Malhous v. the Czech Republic](#), 12 July 2001, Application no. 33071/96, paras 55-56.

¹⁸ ECtHR, Grand Chamber, [De Tommaso v. Italy](#), 23 February 2017, Application no. 43395/09, para. 163.

¹⁹ ECtHR, Grand Chamber, [Ramos Nunes de Carvalho e Sá v. Portugal](#), 6 November 2018, Applications nos. 55391/13, 57728/13 and 74041/13, para. 187.

²⁰ ECtHR, Chamber, [Fredin v. Sweden \(No. 2\)](#), 23 February 1994, Application no. 18928/91, paras 21-22; ECtHR, Chamber, [Allan Jacobsson v. Sweden](#), 19 February 1998, Application no. 8/1997/792/993; para. 46; ECtHR, Grand Chamber, [Göç v. Turkey](#), 11 July 2002, Application no. 36590/97, para. 47; ECtHR, Chamber, [Selmani and Others v. the former Yugoslav Republic of Macedonia](#), 9 February 2017, Application no. 67259/14, paras 37-39.

²¹ ECtHR, Chamber, [Hesse-Anger and Anger v. Germany](#); 6 February 2003, Application no. 45835/9; ECtHR, Chamber, [Mirovni Inštitut v. Slovenia](#), 13 March 2018, Application no. 32303/13, para. 36.

²² ECtHR, Grand Chamber, [Ramos Nunes de Carvalho e Sá v. Portugal](#), 6 November 2018, Applications nos. 55391/13, 57728/13 and 74041/13, para. 190.

16. Of particular importance for the appeals before us, the ECtHR has observed that “[p]rovided a public hearing has been held at first instance, the absence of such a hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue”.²³ In this regard, it has noted that “leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court”.²⁴

17. In light of the foregoing, absent the abovementioned exceptional circumstances,²⁵ in proceedings that do not only include questions of law, the right to a public hearing requires that a hearing be conducted at the appellate stage if not conducted before.²⁶

18. In the case at hand, no public hearing was held in the first instance of the reparations proceedings,²⁷ and the appeals before us raise complex factual and legal issues that do not fall within the exceptional circumstances that may justify the dispensability of a public hearing. While this case entails complex legal and factual issues, it does not concern “highly technical issues”.²⁸ The issues raised on appeal include the questions of whether children born out of rape and sexual slavery are direct victims of the crimes of which Mr Ntaganda was convicted²⁹, whether transgenerational harm should be recognised and if so, the extent to which it is applicable,³⁰ among others.

²³ ECtHR, Plenary, [Helmets v. Sweden](#), 29 October 1991, Application no. 11826/85, para. 36.

²⁴ ECtHR, Chamber, [Miller v. Sweden](#), 8 February 2005, Application no. 55853/00, para. 30.

²⁵ See *supra* para. 14.

²⁶ ECtHR, Chamber, [Fischer v. Austria](#), 26 April 1995, Application no. 16922/90, para. 44; ECtHR, Chamber, [Salomonsson v. Sweden](#), 12 November 2003, Application no. 38978/97, para. 36. While, in [Salomonsson v. Sweden](#), the ECtHR ultimately observed that “[d]epending on the circumstances of the case, it might therefore be acceptable to reject a request for a hearing upon appeal, although no such hearing has been held at first instance”, it clarified that “disputes concerning benefits under social-security schemes are generally rather technical and their outcome usually depends on the written opinions given by medical doctors”. See ECtHR, Chamber, [Salomonsson v. Sweden](#), 12 November 2003, Application no. 38978/97, paras 37-38. Precisely, the ECtHR has noted that cases concerning “technical issues”, particularly “the technical nature of disputes concerning social-security benefits”, fall within one of the exceptional circumstances that justify dispensing with a hearing. See ECtHR, Grand Chamber, [Ramos Nunes de Carvalho e Sá v. Portugal](#), 6 November 2018, Applications nos. 55391/13, 57728/13 and 74041/13, para. 190. Therefore, in my view, this does not mean that a hearing can be rejected in the appellate stage if no hearing was held in first instance, but that it is not necessary in exceptional circumstances.

²⁷ [Reparations Order](#), paras 10-22.

²⁸ ECtHR, Grand Chamber, [Ramos Nunes de Carvalho e Sá v. Portugal](#), 6 November 2018, Applications nos. 55391/13, 57728/13 and 74041/13, para. 190.

²⁹ [Defence Appeal Brief](#), para. 107.

³⁰ [Defence Appeal Brief](#), p. 39, paras 118-120.

This certainly is not a case “raising purely legal issues of limited scope [...], or points of law of no particular complexity”.³¹ Hearing the victims and the convicted person would, in my view, assist the Appeals Chamber in making determinations on those issues.

19. Furthermore, this is not a case where there are no “contested facts which necessitate a hearing”.³² On the contrary, the Defence and the victims have made conflicting submissions on factual issues. For example, the Defence submits that, contrary to the assertion of Victims Group 1, it did not have access to all victims’ application forms.³³

20. In the circumstances of this case, where the appellate stage is the only remaining instance at which a hearing could be held to settle the issues on appeal, a hearing must take place,³⁴ regardless of whether or not the parties requested such a hearing. Indeed, the abovementioned contested facts, as well as the fundamental and complex factual and legal issues at stake, show a need to assess whether the facts were correctly established, and to obtain clarification on certain points of the impugned decision.³⁵

III. CONCLUSIONS

21. On the basis of the foregoing, I find that:

- a. The right to be heard in a public hearing, in the determination of a person’s rights and obligations, is an internationally recognised human right and is intrinsically linked to the guarantee of due process of law. It cannot be conditional upon further deliberations when no hearing was held in first instance and the case is not limited to simple legal issues.

³¹ ECtHR, Grand Chamber, [Ramos Nunes de Carvalho e Sá v. Portugal](#), 6 November 2018, Applications nos. 55391/13, 57728/13 and 74041/13, para. 190.

³² ECtHR, Grand Chamber, [Ramos Nunes de Carvalho e Sá v. Portugal](#), 6 November 2018, Applications nos. 55391/13, 57728/13 and 74041/13, para. 190.

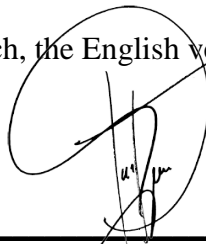
³³ [Defence Request for Leave to Reply](#), paras 20-22, referring to [Victims Group 1’s Response](#), para. 43.

³⁴ ECtHR, Grand Chamber, [Ramos Nunes de Carvalho e Sá v. Portugal](#), 6 November 2018, Applications nos. 55391/13, 57728/13 and 74041/13, para. 191 (emphasis added).

³⁵ ECtHR, Grand Chamber, [Ramos Nunes de Carvalho e Sá v. Portugal](#), 6 November 2018, Applications nos. 55391/13, 57728/13 and 74041/13, para. 191.

- b. Under article 21(3) of the Statute, the Chambers Practice Manual, as any norm of the Court's statutory framework, must be read in light of this internationally recognised human right, especially, the jurisprudence providing that a hearing must be conducted absent the following extraordinary circumstances:
- i. There are no issues of credibility or contested facts;
 - ii. The issues are purely legal, they are not complex, and their scope is limited; and
 - iii. The case concerns highly technical issues.
- c. Considering that there was no public hearing at first instance in the reparations proceedings of this case, and that the appeals before us raise complex factual and legal issues, including contested facts, a hearing is necessary in the circumstances of this case, regardless of whether or not the parties requested such a hearing.

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



Judge Luz del Carmen Ibáñez Carranza

Dated this 10th day of September 2021

At The Hague, The Netherlands