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THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. THOMAS LUBANGA DYILO***

Public

Prosecution's Response to the Defence Appeal against the "Decision establishing the principles and procedures to be applied to reparations"

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Introduction

1. Thomas Lubanga Dyilo (the “Appellant”) is appealing the Decision of Trial Chamber I¹ on the principles and procedures applicable to reparations proceedings before the Court. He argues that the Trial Chamber erred by delegating functions to the Trust Fund for Victims (TFV) and to a newly constituted Chamber and erred in the standards that will define the scope and beneficiaries of reparations awards.

2. The Prosecution requests that the appeal be rejected in its entirety. Nothing in the Court’s basic documents prohibits delegation of specific functions to the (TFV) along with other appropriate experts, nor is such assistance inconsistent with their provisions. Indeed, Article 75 of the Statute gives the Court a great deal of discretion to organize and conduct these proceedings, and Rule 97 expressly permits the Court to appoint experts to assist it in determining the scope and extent of any damage or injury to victims or loss experienced by them, as well as to suggest options on the types and modalities of reparations. It is significant that the Trial Chamber clearly holds that the judiciary remains seized of monitoring and supervising the work of the TFV, to resolve issues as they arise, and to issue a final reparations order.

3. Nor did the Trial Chamber err in determining that a newly constituted Chamber handle the judicial aspects of the reparations proceedings. The reparations proceedings are severable from the trial and do not require first-hand knowledge of the trial record. There is no statutory requirement that the original Trial Chamber oversee reparations, as evidenced by the language of Article 75 requiring oversight in reparations matters by “the Court” in contrast to Articles 74 and 76 specifying that the “Trial Chamber” must preside over the trial and sentencing. Nor has the Appellant advanced sustainable arguments that a different Chamber would be unable to deal with matters related to reparations.

¹ “Decision establishing the principles and procedures to be applied to reparations” ICC-01/04-01/06-2904, 7 August 2012.

Moreover, the terms of all three judges of Trial Chamber I have ended in accordance with the Court's statutory scheme. It is entirely consistent with this scheme, which envisions a replacement of judges over time, that a different Chamber with different judges be tasked with dealing with these distinct and severable issues.

4. The Trial Chamber did not err in determining that the "proximate cause" standard should be applied in determinations of causation. "Proximate cause" is a commonly used test in reparations claims. Nor, contrary to the Appellant's assertion, did the Trial Chamber disregard the use of different standards by some Courts. It reviewed and considered the practices at a number of tribunals before ultimately determining that the "proximate cause" test should be followed at this Court.
5. The Appellant has misconstrued the Decision by suggesting that it removes the onus of proof or that the "wholly flexible" approach as endorsed by the Chamber eliminates all evidentiary standards. The Decision recognizes that when the funds for reparations are not coming from the convicted person, a degree of flexibility toward the evidence used to establish facts in certain cases is appropriate taking into account the extensive and systemic nature of the crimes and the number of victims. This, too, is consistent with the practice of mass claims tribunals and human rights courts.
6. Finally, the Prosecution opposes the Appellant's request for suspensive effect. There is no irreparable prejudice to him if the process commences.

Procedural Background

7. On 7 August 2012, Trial Chamber I ("Trial Chamber") issued its "Decision establishing the principles and procedures to be applied to reparations" ("Decision").²

² ICC-01/04-01/06-2904.

8. On 10 August 2012, the Trial Chamber informed the parties that the Decision does not constitute a reparations order within the meaning of Rule 150.³
9. On 13 August 2012, the Appellant filed a request for leave to appeal the Decision.⁴ On 29 August 2012, the Trial Chamber granted the Appellant leave to appeal the Decision on four issues.⁵
10. On 10 September 2012, the Appellant filed his Document in Support of Appeal, which included a request for suspensive effect.⁶
11. The Prosecution hereby files its Response to the Appellant's Document in Support of Appeal, pursuant to Regulation 65(5), which includes its response to the request for suspensive effect.

The Appellant's Standing

12. The Appeals Chamber has raised the issue of standing in the Appellant's appeal under Article 82(4).⁷ The Prosecution considers that the issue is equally applicable to the present appeal.
13. In its response to the Appellant's request for leave to appeal, the Prosecution argued that because reparations will come solely from resources of the TFV, and not from the Appellant's assets, he is neither prejudiced nor directly affected by the Decision.⁸ In granting the Appellant's leave to appeal request, the Trial Chamber dismissed the Prosecution's argument on standing.⁹ It held that the Appellant is affected by the reparations process even if awards are funded entirely from the TFV because any reparations award will be an expression of the

³ Email communication from the Legal Advisor of the Trial Division to the parties on 10 August 2012 at 16:53.

⁴ ICC-01/04-01/06-2905.

⁵ ICC-01/04-01/06-2911.

⁶ ICC-01/04-01/06-2919 OA3 ("Appellant's Brief").

⁷ ICC-01/04-01/06-2923 OA21, para.2(b).

⁸ ICC-01/04-01/06-2908, 17 August 2012, paras.15-16 and 22.

⁹ ICC-01/04-01/06-2911, paras.21-26.

Court's disapproval and condemnation of his wrongdoing.¹⁰ The Chamber, however, did not cite any authority in support of this statement.

14. Moreover, the sources cited in the Decision for the assertion that reparations "go beyond the notion of punitive justice in order to provide effective remedies to the victims"¹¹ do not support the proposition that a reparations award *not coming from the perpetrator* imposes an additional form of reproach. One source states that various forms of reparations may emphasize different purposes (i.e., an apology serves broader aims of reconciliation/restoration while ordering the perpetrator to build a memorial could serve both as a punishment and reconciliation).¹² Even on a broad reading, this point is distinguishable from the instant case as the Appellant is not ordered to provide any form of reparations to victims now or in the future.¹³
15. Further, even if the Trial Chamber's position is accepted as a correct proposition of the law, it should still be determined whether the general and abstract effect – that a reparations award constitutes judicial disapproval and condemnation over and above the conviction itself -- identified by the Trial Chamber suffices for the purposes of granting the Appellant standing to appeal, or whether the latter requires a more specific and concrete form of prejudice.
16. The Prosecution accordingly submits that the Appeals Chamber should address the Appellant's standing prior to any decision on the merits of the present appeal. Should the Appeals Chamber consider that the Appellant has standing, the Prosecution submits that the appeal should be dismissed for the reasons described below.

¹⁰ ICC-01/04-01/06-2911, para.23.

¹¹ ICC-01/04-01/06-2911, para.23.

¹² Dwertmann, *The Reparation System of the International Criminal Court* (2010), p.43.

¹³ ICC-01/04-01/06-2904, para.269.

Standard of Review

17. The Appellant argues that the Trial Chamber erred in the identification of relevant legal principles to the reparations proceedings and in its interpretation of its powers under the Statute. There are no alleged errors of fact. Where, as here, the appeal raises legal errors, the 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.”¹⁴

The Prosecution’s Response to the First Ground of Appeal

The delegation of functions to the TFV, Registry and experts is consistent with the Statute

18. Contrary to the Appellant’s assertions, the Trial Chamber did not delegate its judicial authority to the TFV. Rather, it decided that *the judiciary* is the body that has responsibility for monitoring and supervising the reparations proceedings;¹⁵ it held that *the judiciary* must be regularly updated on the five-step implementation plan;¹⁶ *the judiciary* will resolve any contested issues arising out of the work and decisions of the TFV;¹⁷ and *the judiciary* will issue the final reparations order.¹⁸ Despite the Appellant’s claims, this mechanism does guarantee protection of his rights as it ensures a judicial forum for him to raise any concerns he may have regarding the work and decisions of the TFV and ensures that the judiciary will resolve his issues.¹⁹

¹⁴ *The Prosecutor v. Banda and Jerbo*, Judgment on Rules 111 and 112, ICC-02/05-03/09-295 OA2, 17 February 2012, para.20.

¹⁵ ICC-01/04-01/06-2904, para.260.

¹⁶ ICC-01/04-01/06-2904, para.286

¹⁷ ICC-01/04-01/06-2904, paras.261, and 289.

¹⁸ ICC-01/04-01/06-2904, paras.262, 282 and 289.

¹⁹ ICC-01/04-01/06-2904, paras.19, 24.

19. Moreover, the Chamber exercised its judicial function by establishing the principles relating to reparations and the approach to be taken in their implementation in this case.²⁰ Accordingly, it is the Chamber who provided the legal framework within which the TFV and the other experts must work during the course of the implementation process.

20. Importantly, the role of experts is to “assist *the Court*” in the preparation and implementation of a reparations plan.²¹ The functions assigned to the TFV and other experts in the Decision are not themselves judicial, but rather involve the logistical and technical functions of claims evaluation and processing. The TFV is directed to select and appoint appropriate multidisciplinary experts,²² determine the appropriate forms of reparations and implement them,²³ collect relevant information from the victims,²⁴ assess harm, and identify victims and beneficiaries²⁵ pursuant to Regulations 60-65 of the Regulations of the Trust Fund for Victims (“Regulations of the TFV”).²⁶ And, as set out above, the Decision contemplates full judicial oversight of this work.

21. Nothing in the Court’s basic documents prohibits delegation to either the TFV’s expertise or other experts. On the contrary, Article 75 of the Statute gives the Court discretion as to how to organize and conduct reparations proceedings.²⁷ In turn, Rule 97(2) expressly permits the Court to appoint experts to assist in determining “the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations”. This allows the Court to rely on experts for tasks from “assessing the harm caused to individual victims, to suggesting schemes that may

²⁰ ICC-01/04-01/06-2904, para.181 and 182 to259.

²¹ ICC-01/04-01/06-2904, para.263.

²² ICC-01/04-01/06-2904, para.265.

²³ ICC-01/04-01/06-2904, para.266.

²⁴ ICC-01/04-01/06-2904, para.266.

²⁵ ICC-01/04-01/06-2904, para.283.

²⁶ Resolution ICC-ASP/4/Res.3.

²⁷ Henzelin, Heiskanen and Mettraux, “Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes” in *Criminal Law Forum* (2006), p.333.

benefit a whole community” because these functions “will often be difficult and time-consuming”.²⁸ It is precisely these tasks that the TFV and the experts have been directed to perform.

22. Moreover, Article 75(2) explicitly enables the Court to “order that the award for reparations be made *through* the Trust Fund provided for in article 79” (emphasis added). The logistical (and financial) role of the TFV is also borne out by the Trial Chamber’s interpretation of Article 75(2). Trial Chamber I gave the word “through” its ordinary meaning, namely “by means of”.²⁹ The Chamber interpreted this as meaning that “the Court is able to draw on the logistical and financial resources of the Trust Fund in implementing the award”.³⁰ Similarly, Rule 98(3) and (4) of the Rules of Procedure and Evidence empower the Chamber to order an award for reparations “through” the Trust Fund. No error can be found in this interpretation.

23. Finally, Regulations 60-61 of the TFV provide that where the Court has not identified beneficiaries, it is for the TFV to identify victim beneficiaries.

24. The delegation of these tasks to the TFV or experts is consistent with similar delegation in mass claims cases.³¹ Expert assistance ensures efficiency in the reparations process in processing and evaluating claims, bearing in mind the complexity of dealing with mass claims; the need for assistance as to ‘the

²⁸ Peter Lewis and Hakan Friman, *Reparations to Victims*, in Lee, R. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2000), p.484 (“Lewis & Friman”).

²⁹ ICC-01/04-01/06-2904, para.270.

³⁰ ICC-01/04-01/06-2904, para.270.

³¹ In *Hilao v Marcos*, the court appointed a Special Master to make recommendations on the scope of awards. (War Crimes Research Office, “The Case-Based Reparations Scheme at the International Criminal Court”, 2010, p.54 (hereinafter “WCRO”)). The special master (and court-appointed expert) supervised deposition-taking in the Philippines, reviewed claim forms and on instructions of the Court assessed and recommended the validity of claims and the amount of damage awards. (*Hilao v Marcos*, 103 F.3d 767, 771, 774 (9th Cir. 1996)). In the Swiss Banks litigation, US Courts utilized a Special Master to consult potential beneficiaries and develop a reparations plan. The special master could conduct hearings and make determinations of fact and law before developing a plan to allocate and distribute settlement proceeds, requiring judicial approval. See *In Re: Holocaust Victim Assets Litigation*, US District Court Eastern District of New York, Case No. CV 96-4849 (ERK)(MDG)(Consolidated with CV-96-5161 and CV-97-461) ‘Referral to Special Master for Development of Plan to allocate and Distribute Settlement proceeds’. Likewise, the UNCC used ‘Panels of Commissioners’ to evaluate claims and recommend compensation to the Governing Council, see WCRO, “The Case-Based Reparations Scheme at the International Criminal Court”, 2010, p.54.

appropriate types and modalities of reparations, in particular by undertaking consultations and outreach work with the victim communities; and the need for expertise in dealing with “victims and trauma issues”.³²

25. The Chamber specified that the TFV is the appropriate entity to determine suitable forms of reparations and to implement them because it is already conducting extensive activity in the situation country for the benefit of victims - including assessments of harm in communities - and has existing partners/relationships within the relevant communities.³³ Such delegation is important here because the judiciary may not be the most appropriate body to carry out that technical function, as the judges are not usually experts in claims evaluation and were not elected to perform such duties.³⁴ Indeed, delegations during the drafting of the Rome Statute expressed their concern that the reparations scheme not impact on the Court’s primary mandate to prosecute individuals responsible for the gravest crimes.³⁵

Judicial oversight by a newly constituted Chamber is the correct approach

26. The use of a differently constituted Chamber to adjudicate issues arising out of reparations proceedings is correct. There is no need for the Chamber dealing with the reparations claims to have intimate knowledge of the trial record. Reparations proceedings are a distinct and severable process from the trial determination of guilt or innocence and the imposition of a sentence; additionally, while the

³² WCRO, “The Case-Based Reparations Scheme at the International Criminal Court”, 2010, pp.52, 56-57.

³³ ICC-01/04-01/06-2904, para.266, 272, 275, 285. While promulgating Rule 98, State Parties acknowledged that the TFV “is a convenient body to administer collective awards” and that the TFV may call on other organisations “approved by the Trust Fund to carry out tasks on its behalf” (Lewis & Friman, p.487). See also the proposal submitted by Japan, in PNICC/2000/WGRPE(6)/DP.4 (17 March 2000).

³⁴ Henzelin, Heiskanen and Mettraux, “Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes”, in Criminal Law Forum (2006), p.340: “*The International Criminal Court is first and foremost a criminal court and its mandate has been tailored accordingly. It is not a truth and reconciliation commission and, even less, a mass claims resolution body. Its judges have been selected and elected primarily with that mandate and responsibility in mind. Few of them will possess the necessary expertise, or experience, required to deal with mass claims of the sort the Court [is] likely to be faced with.*”

³⁵ WCRO, “The Case-Based Reparations Scheme at the International Criminal Court”, 2010, p.16.

criminal trial and sentence focus primarily on the perpetrator, reparations will primarily focus on the needs and interests of the victims.³⁶

27. The Prosecution further notes that Article 75 and Rules 97 and 98 refer to the obligations of “*the Court*” in handling reparations. This is in contrast to the specific language in Articles 74 and 76 that refer to the obligations of “*the Trial Chamber*” in reaching a final decision and imposing a sentence. If the drafters intended that the Trial Chamber must remain seized of the reparations phase, the Statute would have expressly mandated it, as it does in Articles 74 and 76.

28. Moreover, the Trial Chamber’s decision is consistent with the letter and spirit of the framework of the Court, which obliges a rotation of judicial functions.³⁷ It is a natural consequence of this model that, where appropriate, a differently composed Chamber may preside over reparations issues. The Appellant fails to provide any solid grounds for stating that a different Chamber would be unable to do so. The Trial Chamber has set clear legal and procedural parameters to be followed in reparations proceedings and a detailed Article 74 decision on the wrongful conduct of the convicted person. A newly constituted Chamber is wholly qualified to determine specific issues arising from the implementation of the Decision. It was perfectly appropriate for the Trial Chamber to determine that the process should be conducted by a differently constituted Chamber, instead of taking the extraordinary step of having the judges’ mandate extended pursuant to Article 36 (10) of the Statute, assuming this provision was applicable.³⁸

³⁶ Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010), p.43.

³⁷ See Articles 35, 36, 39 of the Statute.

³⁸ While the Trial Chamber considers reparations to form part of the “overall trial process” (ICC-01/04-01/06-2904, para. 260), it is unclear whether the reparations stage would qualify as “trial” for the purposes of the exception enshrined in Article 36 (10), or whether the latter should be read as referring only to the trial *stricto sensu* (i.e. the process that finishes with decisions made under Articles 74 and 76).

The Prosecution's Response to the Second Ground of Appeal

29. The Trial Chamber correctly imposed the standard of "proximate cause" to assess the link between the harm suffered and the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities, rather than applying a "direct" standard.³⁹
30. The Trial Chamber did not ignore or misstate relevant jurisprudence, as the Appellant claims.⁴⁰ Indeed, it examined the relevant statutory framework at the ICC as well as approaches to causation by international courts. The Trial Chamber considered: (i) that the "damage, loss and injury" forming the basis of the claim must have resulted from the crimes of enlisting and conscripting children under 15 and using them to participate actively in hostilities; (ii) that the Statute and Rules provide no guidance on the precise requirements of the causal link between the crime and the harm suffered for the purpose of reparations; and (iii) that approaches to causation at the international level have varied from requiring a direct link between the harm suffered and the crimes to a standard where the crimes are the proximate cause of the harm for which reparations are sought.⁴¹
31. It is precisely following its review of the various standards applicable at the United Nations Compensation Commission (UNCC),⁴² the European Court of Human Rights (ECtHR)⁴³, the Inter-American Court of Human Rights (IACtHR)⁴⁴ and enunciated by academic commentaries on the subject,⁴⁵ that the Trial Chamber correctly stated that "there is no settled view in international law on the

³⁹ ICC-01/04-01/06-2904, para.249-250.

⁴⁰ ICC-01/04-01/06-2919, para.25 and 30.

⁴¹ ICC-01/04-01/06-2904, para.247-250.

⁴² ICC-01/04-01/06-2904, footnote 433.

⁴³ ICC-01/04-01/06-2904, footnote 433.

⁴⁴ ICC-01/04-01/06-2904, footnote 434.

⁴⁵ ICC-01/04-01/06-2904, footnotes 433-434.

approach to be taken to causation".⁴⁶ It then proceeded to decide which standard ought to be applied at the ICC.

32. As the Trial Chamber found, the Appellant's submission -- that *all* jurisdictions and international bodies handling reparations apply a direct and immediate causal link in assessing claims⁴⁷ -- is inaccurate.⁴⁸ There is significant precedent in international law for the application of the "proximate cause" test to determine causation.⁴⁹ Norbert Wühler, the former head of the legal department at the UNCC, observed that "the most commonly used test in damages claims seems to be whether the act of a state was the 'proximate cause' of the loss suffered, or whether that act was too remote for liability to be imposed".⁵⁰ Similarly, Dinah Shelton states that "[i]n most legal systems, doctrines similar to 'proximate cause' are used to define the extent of liability by excluding more remote consequences where there is an uncertain critical link, or cumulative uncertainties about causation".⁵¹

⁴⁶ ICC-01/04-01/06-2904, paras.248-249 and footnotes 433 and 434. See also: "Although directness is not the only, or even less, a universally accepted standard, it is one of the two principal standards that are generally considered when discussing causation and attributability in international law. The main competing theory is known as the proximate cause (or foreseeability) test." (Heiskanen, The United Nations Compensation Commission in Collected Courses of the Hague Academy of International Law Vol. 296, (Martinus Nijhoff 2002), p.334).

⁴⁷ ICC-01/04-01/06-2919, para.30.

⁴⁸ See n. 46, above. Even at the UNCC, the ECtHR, and the IACtHR, standards vary: Andrea Gattini, "The UN Compensation Commission: Old Rules, New Procedures on War Reparations, in European Journal of International Law 13 (2002), p.175. and Veijo Heiskanen, The United Nations Compensation Commission in Collected Courses of the Hague Academy of International Law Vol. 296, (Martinus Nijhoff 2002), p.335 : "[T]he Governing Council often seems to have relied on the more policy-oriented proximate cause test as the applicable standard." E. Dwertmann, The Reparations System of the International Criminal Court: Its Implementation, Possibilities and Limitations (2010), pp.142-145. *Castillo Paez, Reparations*, Judgment of 27 November 1998, para.76 where despite being unable to establish the causal nexus between Castillo-Paez's disappearance and the consequences alleged to have followed from it, the IACtHR still ordered reparations. In *Aloeboetoe et al. v. Suriname*, Reparations, Inter-American Court of Human Rights, 27 November 1998, Ser. C, No. 15, para.54, the Court applied the *presumption* that moral damages necessarily follow certain human rights violations, even in the absence of evidence demonstrating moral harm.

⁴⁹ See footnotes 48-54, *supra*. Curiously, the Appellant relies on an article that ultimately supports the 'but/for' test: "The test's extensive pedigree has made it well-respected by a judicial system that places great emphasis on precedent, and great value on judicial certainty. The logic of "but/for" is conceptually clear enough to be grasped by finders of fact of any level of sophistication.", John D. Rue, "Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Casual Analysis in the American Law Institute's Proposed Restatement (Third) of Torts", Fordham Law Review, Vol. 71, Issue 6, 1-1-2003, p.2722-2723.

⁵⁰ Norbert Wühler, "Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission, in the United Nations Compensation Commission, R.B. Lillich, ed. 1995, at p.232.

⁵¹ Dinah Shelton, *Remedies in International Human Rights Law*, (Oxford University Press, 2001), p. 316. See also p.317.

33. The Eritrea-Ethiopia Claims Commission (EECC) criticized and rejected the directness standard and adopted proximate cause for the determination of reparations.⁵² The EECC noted the use by some tribunals of a foreseeability test and held that "...the necessary connection is best characterized through the commonly used nomenclature of 'proximate cause'".⁵³ The Iran-US Claims Tribunal has also evaluated claims using the 'proximate cause' standard.⁵⁴
34. The "proximate cause" standard is neither vague nor prejudicial, as demonstrated by its regular application in mass claims proceedings. In fact, contrary to the Appellant's position, the "directness" standard as been criticized as "inapt, inaccurate and ambiguous".⁵⁵

The Prosecution's Response to the Third Ground of Appeal

35. The Appellant argues that permitting victims of sexual and gender-based violence to make claims for reparations violates the principle that a convicted person can only be held to make reparations for harm resulting from the crimes for which he was found guilty. On this point, the Appellant's arguments are misguided and fail to demonstrate any error in the Decision.⁵⁶
36. The Prosecution does not quarrel with the proposition that a convicted person cannot be ordered, in the criminal case, to make reparations to persons whose harm did not flow from the crimes of conviction. But here, the Appellant is not facing the possibility that he will be ordered to make reparations payments at all.

⁵² EECC, "Decision No.7 – guidance regarding jus ad bellum liability", July 27, 2007, paras.10-11, citing the umpire in the *War-Risk Insurance Premium Claims* case.

⁵³ EECC, "Decision No.7 – guidance regarding jus ad bellum liability", July 27, 2007, paras.12-13. In 2009, the EECC reiterated its decision of 27 July 2007 on causation: Final Award, Eritrea's Damages Claims, EECC, August 17, 2009, para.39

⁵⁴ *Hoffland Honey Co. v. National Iranian Oil Co.*, Award of 26 January 1983, 2 Iran-US CTR 41.

⁵⁵ WCRO, "The Case-Based Reparations Scheme at the International Criminal Court", 2010, p.39. The German-United States Mixed Claims Commission held, "[t]he proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of *that act* must have been the loss, damage, or injury suffered...this is but an application of the familiar rule of proximate cause – a rule of general application both in private and public law." (Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 2006), pp.242-243.

⁵⁶ Appellant's Brief, para.33-35.

And the Decision in any event requires a nexus between the crimes of conviction and the harm for which reparations may be awarded. If the Appeals Chamber accepts that the Trial Chamber did not err in imposing the proximate cause standard - and the Prosecution submits that it did not - then it also did not err in holding that its decision permits applications for reparations by victims of sexual and gender-based violence. The Trial Chamber explained that such claims will not automatically lead to an award for reparations; whether claims are ultimately successful depends on whether the facts have been established to the relevant standard and it is shown that the crimes of enlisting and conscripting children under the age of 15 or using them to participate actively in the hostilities are *the proximate cause* of the sexual violence.⁵⁷

37. Thus, the possibility of victims of sexual crimes obtaining reparations is not a foregone conclusion, and it certainly will not be unlimited. Rather, under the system established in the Decision, there will be a process whereby applicants claiming reparations on the basis of sexual violence will have to establish a connection with the crimes for which the Appellant has been convicted on the basis of the “proximate cause” standard. Ultimately, assuming the Chamber agrees that he has standing, the Appellant will be able to exercise full appeal rights if any order is rendered for victims of sexual violence.

38. Furthermore, the fact that the Trial Chamber has held that reparations must flow from the crimes committed by the Appellant does not exclude claims where the harm suffered could in its own right have amounted to additional crimes attributable to him. Reparations will address the proximate consequences of the crimes that he has been found to have committed. By logical extension, if Thomas Lubanga’s child soldiers pillaged, murdered and raped, the individuals who suffered such harm as a result of the enlistment, conscription and use of these child soldiers should be permitted to apply for reparations. The fact that the

⁵⁷ ICC-01/04-01/06-2911, para.32.

Appellant was not charged with the separate crimes of pillaging, murder or rape is inconsequential.

39. Moreover, the Appellant's argument that he did not present evidence to defend against sexual violence charges at trial⁵⁸ has no bearing on the issue of whether reparations should be awarded to these claimants. The reparations procedure is distinct and separate from the trial on guilt or innocence, with different standards and a different purpose.

The Prosecution's Response to the Fourth Ground of Appeal

40. First, there is no merit in the Appellant's assertion that the Trial Chamber has removed the onus that is on a claimant to prove his/her claims.⁵⁹
41. Rather, in endorsing a flexible approach, the Trial Chamber acknowledged the simple reality that persons claiming reparations in countries affected by war and displacement may no longer possess or have access to official documents to prove aspects of their claim.⁶⁰ This approach is consistent with the recent practice of numerous reparations programs.
42. The Appellant has misconstrued the decision by suggesting that the flexible approach endorsed by the Chamber eliminates all standards.⁶¹ To the contrary, the Decision simply allows for additional forms of proof to substantiate claims. Its approach is consistent with Rule 94(1) of the Rules of Procedure and Evidence and endorses a process that is similar to the practice at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and in many other reparations programs.⁶²

⁵⁸ Appellant's Brief, paras.35-36.

⁵⁹ ICC-01/04-01/06-2919, paras.46, 51-52.

⁶⁰ See ICC-01/04-01/06-2904, para.198.

⁶¹ ICC-01/04-01/06-2919, para.59.

⁶² As noted in the Max-Planck Encyclopedia of Public International Law: "*The pressure of processing and deciding very large numbers of claims, coupled with the desire to speed payments of compensation and the difficulties that victims often face in finding documentary evidence, have led to major innovations in the procedures of some of the more recent mass claims processes. One such innovation was to introduce the concept*

43. In rendering its appeal judgment, the Supreme Court Chamber of the ECCC noted that other reparations claims programs overcome obstacles that victim-claimants might otherwise face due to the unavailability of official or formal documents by allowing other reliable evidence that may directly or indirectly support the applicant's claim.⁶³
44. Similarly, the First Claims Resolution Tribunal for Dormant Accounts ("CRT I and II") adopted a "plausibility" test that accommodated the difficulties of proving a claim after the destruction of the Second World War and the long period of time that lapsed since the opening of the dormant accounts. Claimants were required to produce documents and information as could "be reasonably expected to be produced in view of the particular circumstances"; hence, the type of acceptable information was broadened to help claimants.⁶⁴
45. The plausibility standard was also applied by the International Commission on Holocaust Era Insurance Claims (ICHEIC), bearing in mind the destruction of World War II, the Holocaust, and the lengthy period of time that had passed since the insurance policies were obtained.⁶⁵

of 'relaxed standards of proof' for fact-finding based on a test of what is 'plausible', instead of applying traditional legal standards of proof such as those requiring facts to be established by a preponderance of the evidence." (Howard M Holtzmann, Mass Claims, Max-Planck Encyclopedia of Public International Law, online edition (R Wolfrum gen ed., Oxford University Press), para.16. See also, International Mass Claims Processes: Legal and Practical Perspectives, Howard M. Holtzmann and Edda Kristjánsdóttir (eds), 2007, at 211. Also, Jacomijn J. van Haersolte-van Hof notes that "recent practice shows that the role of evidence and the standard of proof in proceedings before [mass claims] tribunals has been redefined [...] A number of tribunals and their rules refer in this context to a 'plausibility' standard', or to a more relaxed standard of proof". "Innovations to Speed Mass Claims: New Standards of Proof", Redressing Injustices Through Mass Claims Processes, (The International Bureau of the Permanent Court of Arbitration, ed), 2006, p.13.

⁶³ Kaing Guek Eav ("Duch"), 001/18-07-2007/ECCC/SC, Appeal Judgment, 3 February 2012, paras. 520-526. At para 520, the ECCC cites Heike Niebergall: 'the majority of recent mass claims programmes have developed and applied relaxed standards of proof, in order to facilitate the claimants' task of proving their claims.': "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", in Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Carla Ferstman et. al., (eds.) 2009, p.155.

⁶⁴ The CRT I and II standards are canvassed in Kaing Guek Eav ("Duch"), 001/18-07-2007/ECCC/SC, Appeal Judgment, 3 February 2012, para.521 and Heike Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", in Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Carla Ferstman et. al., (eds.) 2009, p.155-157.

⁶⁵ Heike Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", in Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Carla Ferstman et. al., (eds.) 2009, p.158. See further ICHEIC, Relaxed Standard of Proof Guide, Rule A 1, available at www.icheic.org/docs-documents.htm.

46. In short, the flexible approach as permitted by Rule 94 is feasible and fair to applicants. Indeed, the Appellant appears to concede that it may be difficult for certain victims to obtain official documentation in support of their applications for reparations, thereby permitting an applicant to prove the claim by way of other evidence, provided that the evidence is reliable.⁶⁶

47. Moreover, the Trial Chamber's flexible approach creates no demonstrable prejudice to the Appellant in cases where reparations are awarded from the resources of the TFV or from any other source. If the Appellant disputes the validity of a claim, he can bring contradictory evidence to the attention of the TFV or to the Chamber for review and ultimately appeal any reparations order of the Chamber under Article 82(4).

The Prosecution's Response to the Request for Suspensive Effect

48. The Prosecution opposes the Appellant's request for suspension of proceedings pursuant to Article 82(3).⁶⁷ The implementation of the Decision will not have irreparable consequences⁶⁸ warranting suspension.⁶⁹

49. The Appellant has not demonstrated irreparable prejudice if the Appeals Chamber grants any of the issues that are the subject of the appeal. In the short period prior to a determination by the Appeals Chamber, it is not likely that the final reparations order will be rendered. In any event, the Appellant retains the right to appeal and, if successful, reverse any such reparations order or interim decisions. Nor, contrary to the statement of the Appellant, does the finding that

⁶⁶ ICC-01/04-01/06-2919, paras.62 and 65.

⁶⁷ Appeal Brief, para.29.

⁶⁸ Appeal Brief, para.73.

⁶⁹ The continuation of the proceedings under the terms of the impugned decision will not create an irreversible situation or render the object of the appeal moot. The Appeals Chamber has ruled that "when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances." In that case, the Appeals Chamber considered "whether the implementation of the Impugned Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant" (*Prosecutor v. Lubanga*, ICC-01/04-01/06-1290 OA11, Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, 22 April 2008, paras.7-8).

reparations impact him (in the decision granting leave to appeal) justify suspension.⁷⁰

Relief Sought

50. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber deny this appeal in its entirety.



Fatou Bensouda
Prosecutor

Dated this 21st day of September 2012
At The Hague, The Netherlands

⁷⁰ Appeal Brief, para.73.