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THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF *THE PROSECUTOR v. THOMAS LUBANGA DYILO*

**Public Redacted Version of
ICC-01/04-01/06-3449-Conf**

**OPCV Response to the “Requête de la Défense aux fins de suspension de la
« Décision approuvant les propositions du Fonds au profit des victimes portant
sur la procédure visant à localiser et décider de l’admissibilité aux réparations des
nouveaux demandeurs » rendue le 7 février 2019 par la Chambre de première
instance II”**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for victims (the “Legal Representative”) submits that the Defence Request¹ for suspension of the “*Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure visant à localiser et décider de l’admissibilité aux réparations des nouveaux demandeurs*”² should be rejected (the “Defence Request”).

2. The Legal Representative submits that the ruling of which the Defence seeks suspension, namely the 7 February 2019 Decision, is not the subject of an appeal. Therefore, according to article 82(3) of the Rome Statute (the “Statute”) and rule 156(5) of the Rules of Procedure and Evidence (the “Rules”), there is no legal basis upon which the Appeals Chamber may suspend such ruling.

3. Moreover, the Legal Representative underlines that, following the Trial Chamber’s decision of 7 February 2019, [REDACTED], [REDACTED]. Consequently, the Legal Representative posits that a suspension of the 7 February 2019 Decision at this stage of the proceedings would have negative consequences. The situation of the victims is worsening with the passage of time and needs a prompt response. A further suspension at this juncture would be detrimental to their right to have the ordered reparations measures implemented as soon as possible.

¹ See the “Requête de la Défense aux fins de suspension de la « *Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure visant à localiser et décider de l’admissibilité aux réparations des nouveaux demandeurs* » rendue le 7 février 2019 par la Chambre de première instance II”, [No. ICC-01/04-01/06-3447-Conf](#), 20 March 2019. A public redacted version of the Defence Request has been filed on the same day, see [No. ICC-01/04-01/06-3447-Red](#).

² See the “*Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure visant à localiser et décider de l’admissibilité aux réparations des nouveaux demandeurs*” (Trial Chamber II), [No. ICC-01/04-01/06-3440-Conf](#), 7 February 2019 (the “7 February 2019 Decision”). A public redacted version of the Decision has been filed on 4 March 2019, see [No. ICC-01/04-01/06-3440-Red](#).

II. CONFIDENTIALITY

4. In accordance with regulation 23bis(2) of the Regulations of the Court, this Response is filed confidential, following the level of classification chosen by the Defence in its Request.

III. PROCEDURAL BACKGROUND

5. On 15 December 2017, Trial Chamber II (the “Trial Chamber”) issued a decision setting the size of the reparations award for which Mr Lubanga is liable.³ This decision was appealed by the Defence⁴ and the Legal Representatives of Victims V01 (the “LRV 01”).⁵

6. On 18 May 2018, the Legal Representative filed her consolidated response to the Appeals.⁶

³ See the “Corrected version of the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’” (Trial Chamber II), [No. ICC-01/04-01/06-3379-Red-Corr-tENG](#), 21 December 2017.

⁴ On 15 January and 15 March 2018, the Defence filed its Notice of Appeal, followed by its Appeal Brief. See the “Notice of Appeal by the Defence for Mr Thomas Lubanga Dyilo against the ‘*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*’ Handed Down by Trial Chamber II on 15 December 2017 and Amended by way of the Decision”, [No. ICC-01/04-01/06-3388-tENG A8](#), 15 January 2018; and the “Appeal Brief of the Defence for Mr Thomas Lubanga Dyilo against the ‘*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*’ handed down by Trial Chamber II on 15 December 2017 and Amended by the Decisions of 20 and 21 December 2017”, [No. ICC-01/04-01/06-3394-Conf-tENG A8](#) and [No. 3394-Red-tENG A8](#), 15 March 2018.

⁵ On 16 January and 19 March 2018 respectively, the LRV 01 filed their Notice of Appeal and their Appeal Brief. See the “Notice of Appeal against Trial Chamber II’s ‘*Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu*’ of 15 December 2017”, [No. ICC-01/04-01/06-3387-tENG A7](#), 16 January 2018; and the “Appeal Brief against the ‘*Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu*’ du 15 décembre 2017 de la Chambre de première Instance II”, [No. ICC-01/04-01/06-3396-Conf-Corr-tENG A7](#), 19 March 2018. A corrected version was filed on 5 April 2018, see [No. ICC-01/04-01/06-3396-Corr-Red-tENG A7](#).

⁶ See the “Réponse consolidée aux Mémoires d’Appel de la Défense et des Représentants légaux des victimes V01 contre la Décision de la Chambre de première instance II du 15 décembre 2017”, [No. ICC-01/04-01/06-3407 A7 A8](#), 18 May 2018.

7. On 2 October 2018 and 4 December 2018 respectively, the Trust Fund for Victims (“TFV”) filed its Fifth Report concerning the implementation of collective reparations⁷ and its Further Information Report.⁸

8. On 31 January 2019, as ordered by the Appeals Chamber, the Legal Representatives⁹ and the Defence¹⁰ submitted additional observations on the Appeals.¹¹

9. On 7 February 2019, the Trial Chamber issued its decision approving the proposals of the TFV on the procedures for locating and assessing new beneficiaries for reparations (the “7 February 2019 Decision”).¹²

10. On 13 February 2019, the Defence filed a request for leave to appeal the 7 February 2019 Decision.¹³ The Defence took issue with the Chamber’s approach that the liability of Mr Lubanga for reparations may include victims that are yet to be identified.¹⁴ The Defence conceded that this issue arose from the 15 December 2017 Decision and was already before the Appeals Chamber as part of the litigation

⁷ See the “Fifth progress report on the implementation of collective reparations as per Trial Chamber II’s orders of 21 October 2016 and 6 April 2017”, [No. ICC-01/04-01/06-3421](#), 2 October 2019, filed with its “Annex A to the Fifth progress report on the implementation of collective reparations as per Trial Chamber II’s orders of 21 October 2016 and 6 April 2017”, Confidential, *ex parte* available to the Registry, the Legal Representatives and the OPCV only, [No. ICC-01/04-01/06-3421-Conf-Exp-AnxA](#).

⁸ See the “Further information on the reparations proceedings in compliance with the Trial Chamber’s order of 16 March 2018”, [No. ICC-01/04-01/06-3399-Red](#), 4 December 2018.

⁹ See the “Observations donnant suite à l’Ordonnance du 2 janvier 2019”, [No. ICC-01/04-01/06-3436 A7, A8](#), 31 January 2019. See also, the “OPCV Further Submissions in the appeals proceedings concerning the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, [No. ICC-01/04-01/06-3437 A7 A8](#), 31 January 2019; and the “Observations des Représentants légaux du groupe des victimes V02 conformément à l’ordonnance ICC-01/04-01/06-3429 de la Chambre d’appel”, [No. ICC-01/04-01/06-3439](#), 31 January 2019.

¹⁰ See the “Observations de la Défense de M. Thomas Lubanga Dyilo déposées conformément à l’ordonnance de la Chambre d’appel ICC-01/04-01/06-3435 ‘Order on the conduct of the proceedings’”, [No. ICC-01/04-01/06-3438](#), 31 January 2019.

¹¹ See the “Order on the conduct of the proceedings” (Appeals Chamber), [No. ICC-01/04-01/06-3435 A7 A8](#), 2 January 2019.

¹² See the “7 February 2019 Decision”, *supra* note 2.

¹³ See the “Requête aux fins d’autorisation d’interjeter appel”, [No. ICC-01/04-01/06-3441-Conf](#), 13 February 2019.

¹⁴ *Idem*, para. 9.

concerning the appeal against said decision.¹⁵ However, it contended that the 7 February 2019 Decision was construed as if the 15 December 2017 Decision was final, violating Mr Lubanga's rights to judicial independence and impartiality.¹⁶

11. On 18 February 2019, the Legal Representative¹⁷ and the LRV 01¹⁸ filed their responses opposing the request for leave to appeal. The response of the LRV 02 was filed on 26 February 2019.¹⁹

12. On 4 March 2019, the Trial Chamber rejected the Defence request for leave to appeal,²⁰ addressing only one element of the relevant test. The Trial Chamber underlined that the Defence had not demonstrated that a decision of the Appeals Chamber may materially advance the proceedings. It ruled that, to the contrary, if the Appeals Chamber were to be seized afresh of a question that is already pending before it for determination, the proceedings would be delayed and not advanced.²¹

13. On 20 March 2019, the Defence filed its Request.²²

14. On 25 March 2019, LRV V01 filed its Response to the Defence Request.²³

¹⁵ *Ibidem*, paras. 11 and 12.

¹⁶ *Ibid.*, paras. 13 and 14.

¹⁷ See the "Réponse à la Requête de la Défense aux fins d'autorisation d'interjeter appel de la Décision rendue le 7 février 2019 (ICC-01/04-01/06-3440-Conf)", [No. ICC-01/04-01/06-3442](#), 18 February 2019.

¹⁸ See the "Réponse des Représentants légaux des victimes V01 à la « Requête de la Défense aux fins d'autorisation d'interjeter appel de la Décision rendue le 7 février 2019 »", [No. ICC-01/04-01/06-3443-Conf](#), 18 February 2018.

¹⁹ See the "Réponse des représentants légaux du groupe des victimes V02 à la Requête de la Défense aux fins d'autorisation d'interjeter appel de la Décision rendue le 7 février 2019 (ICC-01/04-01/06-3441-Conf)", [No. ICC-01/04-01/06-3444-Conf](#), 26 February 2019.

²⁰ See the "Décision sur la demande de l'équipe de la défense de Thomas Lubanga Dyilo aux fins d'autorisation d'interjeter appel de la décision rendue le 7 février 2019" (Trial Chamber II), [No. ICC-01/04-01/06-3445](#), 4 March 2019.

²¹ *Idem*, para. 22.

²² See the "Defence Request", *supra* note 1.

²³ See the "Réponse des Représentants légaux des victimes V01 à la requête de la Défense aux fins de suspension de la « Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure visant à localiser et décider de l'admissibilité »", [No. ICC-01/04-01/06-3448-Conf](#), 25 March 2019.

IV. SUBMISSIONS

15. Article 82(3) of the Statute and rule 156(5) of the Rules provide for the possibility for the Appeals Chamber to suspend a decision. In accordance with said provisions, the Appeals Chamber may suspend a decision that is the subject of a direct appeal or a decision on which leave to appeal has been granted. In line with this legal framework, it is the jurisprudence of the Appeals Chamber that: “[s]uspension involves the non-enforcement of a decision, the subject of an appeal”.²⁴

16. The relief sought in the Defence Request is the suspension of the 7 February 2019 Decision²⁵ in that it directs the TFV [REDACTED].²⁶ However, the Defence requested leave to appeal said decision and its request was not granted.²⁷ Clearly therefore, the 7 February 2019 Decision is not *on appeal* and, consequently, the statutory provisions dealing with a possible suspension of a ruling do not confer upon the Appeals Chamber the power to suspend it. The Defence intends to support its request by a *mutatis mutandi* application of the power to rule on issues that arise during the course of the trial. But this argument is unconvincing. The possibility to suspend a ruling is regulated in “the primary sources of law of the Court”²⁸ and the Defence has failed to address, let alone justify, whether and why the Appeals Chamber’s lack of explicit power to suspend decisions not under appeal constitutes “a lacuna”.²⁹

²⁴ See the “Decision on suspensive effect” (Appeals Chamber), [No. ICC-01/04-02/06-1968 OA6](#), 19 June 2017, para. 9; see also the “Decision on the Prosecutor’s ‘Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review’” (Appeals Chamber), [No. ICC-02/04-01/05-92 OA01](#), 13 July 2006, para. 3.

²⁵ See the “Defence Request”, *supra* note 1, page 6.

²⁶ *Idem*, paras. 16 and 18.

²⁷ See the “Décision sur la demande de l’équipe de la défense de Thomas Lubanga Dyilo aux fins d’autorisation d’interjeter appel de la décision rendue le 7 février 2019”, *supra* note 20, para. 22.

²⁸ See the “Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute” (Appeals Chamber), [No. ICC-01/05-01/13-2276-Red](#), 8 March 2018, para. 76.

²⁹ *Idem*.

17. Furthermore, the Defence concedes that the question of Mr Lubanga's liability for reparations benefiting unidentified victims arises from the 15 December 2017 Decision, setting the size of the reparations award for which the latter is liable.³⁰ The Defence argued that the 7 February 2019 Decision was construed as if the 15 December 2017 Decision setting the size of the reparations award was final, despite being on appeal.³¹ However, although available, the Defence chose not to request suspensive effect of the 15 December 2017 Decision.³² It is uncontroversial that, without suspensive effect, the decision was enforceable and the 17 February 2019 Decision does exactly that, it enforces said decision. The lateness of the Defence's Request is also noticeable, six weeks after the issuance of the 7 February 2019 Decision and two weeks after the Trial Chamber's ruling rejecting its Request for Leave to Appeal.

18. The 7 February 2019 Decision merely approves the proposals of the TFV as to the location and identification of potential new beneficiaries for reparations.³³ It deals with the "logistics" relevant to the implementation of matters adjudicated during the reparations proceedings well before said ruling. Importantly, the Appeals Chamber rejected, in its 3 March 2015 Judgment, the submission that new and unidentified victims cannot partake in the reparations proceedings.³⁴ Such conclusion followed

³⁰ See the "Defence Request", *supra* note 1, para. 17; see also the "Requête aux fins d'autorisation d'interjeter appel", [No. ICC-01/04-01/06-3441-Conf](#), 13 February 2019, paras. 9 and 11.

³¹ See the "Requête aux fins d'autorisation d'interjeter appel", [No. ICC-01/04-01/06-3441-Conf](#), 13 February 2019, paras. 13 and 14.

³² For the criteria to be met with respect to requests for suspensive effect, see the "Decision on the Prosecutor's request for suspensive effect" (Appeals Chamber), [No. ICC-01/13-81 OA 2](#), 31 January 2019, para. 10; referring, *inter alia*, to the "Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges'" (Appeals Chamber), [No. ICC-01/05-01/08-817 OA 3](#), 9 July 2010, para. 11.

³³ See the "7 February 2019 Decision", *supra* note 2, paras. 19-30.

³⁴ See the "Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2" (Appeals Chamber), [No. ICC-01/04-01/06-3129 A01 A02 A03](#), 3 March 2015, paras. 163 et seq.

extensive litigation before the Appeals Chamber, during which the Defence had and used the opportunity to make the same arguments that it now reiterates.³⁵

19. Moreover, pursuant to rule 156(5) of the Rules, a party may request that the appeal have suspensive effect “*when filing the appeal*”. It is the jurisprudence of the Appeals Chamber that any request for suspensive effect must be made with the first filing of the appellant before the Appeals Chamber.³⁶ If this does not occur, the appellant must provide an explanation as to why he or she did not file the request for suspensive effect within the time limit.³⁷ The Defence Request to suspend the 7 February 2019 Decision - when in reality it aims at the suspension of the 15 December 2017 Decision - clearly circumvents the applicable timelines and is contrary to the law and the cited jurisprudence.

20. Furthermore, the Legal Representative contends that a suspension at this stage would have negative consequences.³⁸ Experience shows that operations such as those endorsed by the 7 February 2019 Decision can be conducted only when the situation in the field so allows. In field missions conducted in 2016 and 2017, the Legal Representative’s team was able to meet potential beneficiaries from 73 localities,³⁹ which was not possible anymore in the past year due to the particularly volatile security situation in Ituri and the Ebola outbreak which banned any field missions in the region for months. [REDACTED].⁴⁰

³⁵ See “Mr Thomas Lubanga’s appellate brief against the *Decision establishing the principles and procedures to be applied to reparations* issued by the Trial Chamber on 7 August 2012”, [No. ICC-01/04-01/06-2972-tENG](#), 9 October 2014, paras. 38 and 39.

³⁶ See the “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, *supra* note 32, para 8.

³⁷ *Idem*, para. 10.

³⁸ See *supra*, para. 3.

³⁹ See the “Information regarding the Issues as well as the Concerns and Wishes of the Potentially Eligible Victims in the Reparations Proceedings”, [No. ICC-01/04-01/06-3293-Red-tENG](#), 25 April 2017, para. 8.

⁴⁰ See also the “Further information on the reparations proceedings in compliance with the Trial Chamber’s order of 16 March 2018”, *supra* note 8, para. 19.

21. In this regard, it is important to underline that in the course of field missions it has become apparent that the situation of the victims is worsening with the passage of time. The physical injuries, psychological distresses and/or economic harm have not been addressed since the commission of the crimes in 2002-2003; some victims have died and others have lost all hope in the Court. Due to the transgenerational impact of many of the harms suffered, many more victims are in need of support compared to the situation at the time. The Legal Representative therefore respectfully requests these matters to be addressed as expeditiously as feasible. A further suspension at this juncture risks further: (i) delaying or even annihilating the victims' effective access to reparations; (ii) worsening their already extremely precarious situations; and (iii) eroding their fragile trust in the Court's processes since victims have been waiting for over 16 years to see the reparations process come to fruition.

V. CONCLUSION

22. For the above mentioned reasons, the Legal Representative respectfully requests the Appeals Chamber to reject the Defence Request.



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Dated this 1st day of July 2019

At The Hague, Netherlands