

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06

Date: 8 September 2015

**THREE JUDGES OF THE APPEALS CHAMBER APPOINTED FOR THE REVIEW
CONCERNING REDUCTION OF THE SENTENCE**

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Howard Morrison
Judge Piotr Hofmański

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

**Second public redacted version
With public Annexes A, 1 and 2, and confidential Annexes 3-6, with public
redacted versions**

**Second public redacted version of “Observations of the Defence for Mr Lubanga
on a reduction in sentence”, referenced ICC-01/04-01/06-3151-Conf-Exp, of
14 July 2015**

Source: Defence team for Mr Thomas Lubanga Dyilo

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

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– Preliminary remarks

1. It emerges from *ex parte* proceedings which have very recently been brought to the attention of the Defence that the Prosecution means to submit evidence to the Chamber that, in the Prosecution's view, could implicate Mr Lubanga in inappropriate contact with witnesses.¹
2. All of these *ex parte* proceedings have been subject to heavy redaction; in one case, this has concerned almost all of the document's content.
3. Thus far, no specific facts have been alleged against Mr Lubanga; no accusation has been levelled against him. Contrary to what the Prosecution suggests, the measures concerning Mr Lubanga that were ordered by the Chamber hearing the *Ntaganda* case are interim in nature, the Chamber having explicitly underscored that it was not in a position to establish the facts on the basis of the information submitted and that accordingly its findings could only be preliminary.²
4. To date, the only evidence disclosed to the Defence comprises lists of telephone calls that provide no proof of the suspected contact, investigators' notes devoid of probative value and riddled with redactions that severely impede their comprehension and prevent any sort of verification, and three statements made by anonymous witnesses that have been redacted in a manner that makes any meaningful defence impossible.³
5. In this situation, the Defence submits that is not, as matters stand, in a position to file observations on these new and purely conjectural allegations, as that would require it to be able to discuss the allegations with Mr Lubanga after having received all of the unredacted evidence in the Prosecution's custody and the submissions made to the Court in this respect.

¹ ICC-01-04-01/06-3140-Conf-Exp-Red; ICC-01-04-01/06-3141-Conf-Exp-Red.

² [REDACTED].

³ [REDACTED]. ICC-01/04-02/06-603-Conf-Exp-AnxA to AnxC.

– **Applicable law**

6. Article 110 and rules 223 and 224 govern consideration by the Court of a reduction of the sentence.

7. With a view to equitably ensuring that people convicted by the Court are treated in a similar fashion to everyone convicted by other international criminal tribunals, the criteria set out by these provisions must be analysed in the light of the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Mechanism for International Criminal Tribunals (MICT) and the Special Court for Sierra Leone, with regard to reduction of sentence and early release.

8. In this respect, the Presidents of the International Criminal Tribunals (ICTs) have confirmed that there is no difference between the concept of “early release” applied by ICTs and that of “reduction of the sentence” provided for by article 110, early release equating to a reduction or commutation of the sentence.⁴

9. The prospect of early release in connection with a reduction of the sentence seeks to encourage the rehabilitation and social reintegration of those convicted and to encourage their good behaviour while in detention.⁵ Judges must hence be guided by these fundamental objectives when reviewing the sentence.

– **Examination of Mr Lubanga’s situation with regard to the criteria set out by article 110 and rule 223**

a. Two thirds of the sentence

10. An analysis of the case law of international criminal tribunals confirms that, as in many States,⁶ the majority of people convicted have been released after serving

⁴ ICTR, *Bagaragaza*, No. ICTR-05-86-S, Decision dated 24 October 2011, para. 9, citing an internal memorandum written by President Byron dated 20 October 2010. See also the opinion of Mr Schabas, who confirms this interpretation: W. Schabas, *The International Criminal Court – A commentary on the Rome Statute*, Oxford University Press, 2010, p. 1105.

⁵ For example, W. Schabas, *ibid*, p. 1102; J. Fernandez and X. Pacreau, *Statut de Rome de la Cour pénale internationale – commentaire article par article*, Paris: New York, Volume II, 2012, p. 1996.

⁶ *Bagaragaza*, *op. cit.*, para. 8; *Muvunyi*, No. ICTR-00-55A-T, Decision dated 6 March 2012, para. 11.

two thirds of their sentence.⁷ Although convicted persons are not automatically released after two thirds of their sentence, this factor is considered preponderant when examining an application for early release.⁸ Some detained persons have accordingly been released even though none of the other conditions laid down by the legal texts were met.⁹

11. In the instant case, Mr Lubanga will have completed two thirds of his sentence on 17 July 2015, i.e. the equivalent of 112 months of detention.

b. Willingness to cooperate with the Court

12. It is established that no person accused before the ICC can be compelled to plead guilty or to cooperate with the Prosecution if he or she has not pleaded guilty.¹⁰ A convicted person's lack of cooperation cannot therefore of itself impede a reduction of his or her sentence or his or her release, especially when the Prosecution has not requested the detained person to cooperate.¹¹ When asked to rule on an application for early release in such circumstances, the ICT Presidents categorised this factor as "neutral".¹² Many people convicted have accordingly been released or had their sentences reduced even though they have never admitted responsibility.¹³

13. In this case, neither the Prosecution nor any other organ of this Court has ever sought Mr Lubanga's cooperation.

14. Although Mr Lubanga has not admitted his guilt, he has always shown a firm desire to cooperate with the Court despite the difficult circumstances in which his

⁷ See also W. Schabas, *op. cit.*, p. 1102; J. Fernandez and X. Pacreau, *op. cit.*, p. 1996.

⁸ See, for example, ICTY, *Jokić*, No IT-01-42/1-ES, Decision dated 1 September 2008, para. 16.

⁹ For example, ICTY, *Radić*, No IT-98-30/1-ES, Decision dated 9 January 2013, para. 30.

¹⁰ Article 67(1)(g).

¹¹ For example, ICTY, *Naletelić*, No IT-98-34-ES, Decision of 26 March 2013, para. 30.

¹² MICT, *Kordić*, No. MICT-14-68-ES, Decision dated 6 June 2014, para. 26, citing MICT, *Sagahutu*, No. MICT-13-43-ES, Decision dated 13 May 2014, para. 22.

¹³ For example, Mr Muvunyi, Mr Ruzindaza, Mr Ntakirutimana, Mr Žigić, Mr Blagojević, Mr Kovač and Mr Krajišnik.

trial, subject to a considerable delay and two stays in prosecution, was held.¹⁴ Mr Lubanga was placed in a particularly onerous position from a psychological point of view when Trial Chamber I twice ordered his release in connection with stays in prosecution but neither of these decisions was carried out.¹⁵

15. Contrary to the Prosecution's allegations,¹⁶ Mr Lubanga's cooperation in the instant case does not come down to "comportment expected of all the accused" before the Court. The Trial Chamber noted "his consistent cooperation with the Court during the entirety of these proceedings, in circumstances when he was put under considerable unwarranted pressure by the conduct of the prosecution";¹⁷ his conduct was exemplary throughout the trial, and he always cooperated to ensure the smooth conduct of proceedings, despite the particularly onerous circumstances occasioned by the actions of the Office of the Prosecutor.¹⁸

16. As an example, Mr Lubanga left the court room to allow witnesses presented as child soldiers to enter the court room, although the Defence has always firmly contested their status of child soldiers; in the end, however, all of the testimony given by these individuals was excluded by the Trial Chamber.¹⁹

17. [REDACTED].²⁰

18. Although some of these factors were taken into account when the sentence was determined, they could be considered again at this stage.²¹

¹⁴ ICC-01/04-01/06-1401, para. 92 and ICC-01/04-01/06-2517-Red, para. 31. These two stays in proceedings alone caused a delay of 250 days.

¹⁵ ICC-01/04-01/06-1418, ICC-01/04-01/06-T-314-FRA-CT, p.12, lines 22 *et seq.*, in particular pp. 19-20. The execution of these two decisions was suspended by the Appeals Chamber.

¹⁶ ICC-01/04-01/06-3150-Conf-Exp-Red, para. 7.

¹⁷ ICC-01/04-01/06-2901, para. 97.

¹⁸ ICC-01/04-01/06-2901, para. 91.

¹⁹ Judgment, ICC-01/04-01/06-2842, para. 478 *et seq.*

²⁰ [REDACTED].

²¹ MICT, *Serushago*, No. MICT-12-28-ES, Decision dated 12 December 2012, paras. 29-30; *Bisengimana*, No. MICT-12-07, Decision dated 11 December 2012, para. 30; ICTR, *Rugambarara*, No. ICTR-00-59, Decision dated 8 February 2012, para. 10.

19. The condition required by article 110(4)(a) is hence fulfilled in the present case.

c. The prospect of resocialisation and resettlement

20. First, an analysis of the convicted person's personal and family situation will above all allow the Panel to assess his or her chances of rehabilitation in the event of resettlement in society.²² It has thus been established that whether a convicted person is married, as well as whether he or she has children and has maintained family ties, is one of the factors militating in favour of a detained person's release.²³

21. Mr Lubanga is married, the father of eight young children, and the guardian of another child. Since his arrival at the Court's detention centre in March 2006, he has kept in contact with his wife and children almost daily. They have visited him regularly and, to the extent that his detention allows, he has continued to take part in his children's upbringing. His family has been informed of his plan if released and is willing to support him.

22. Second, if released Mr Lubanga plans to return to the Democratic Republic of the Congo and to move with his family to Kisangani, where he completed all of his higher education;²⁴ he plans to reintegrate by resuming postgraduate studies of psychology at the University of Kisangani.

23. The Vice-Chancellor of the University of Kisangani confirms that he is not opposed to Mr Lubanga's enrolment as long as he fulfils the admission criteria.²⁵ In this respect, Professor Dr Anicet Tibamwenda confirms that there is no reason

²² ICTR, *Rugambarara*, *op. cit.*, para. 14.

²³ MICT: *Kordić*, No. MICT-14-68-ES, Decision dated 6 June 2014, paras. 22-23; *Bisengimana*, *op. cit.*, para. 25. ICTR: *Bagaragaza*, *op. cit.*, para. 12. ICTY: *Kolundžija*, No IT-95-8-S, Decision dated 5 December 2001; *Šljivančanin*, No. IT-95-13/1-ES, Decision of 5 July 2011, para. 25.

²⁴ Mr Lubanga holds a *licence* [second degree] in occupational psychology.

²⁵ Annex 1: Letter from the Vice-Chancellor of the University of Kisangani dated 19 June 2015.

preventing his enrolment, and he undertakes personally to supervise his DES [postgraduate] studies and thesis.²⁶

24. Lastly, Mr Lubanga had no previous convictions.²⁷

d. Social stability

25. An analysis of “[w]hether the early release of the sentenced person would give rise to significant social instability” should be undertaken cautiously as it rests on conjectures based on unverifiable allegations and opinions regarding a particular social and political situation and the possible ramifications of an individual’s release for this situation.²⁸

26. In this instance, Mr Lubanga plans to settle in the city of Kisangani, capital of Orientale province of the DRC.

27. There is nothing to suggest that Kisangani’s social stability would be likely to be affected by Mr Lubanga moving there. Mr Lubanga’s resettlement in this city located more than 800 km from Bunia cannot, precisely because of this distance, engender a risk of “significant social instability” in Ituri.

28. This is, incidentally, the solution recommended by the individuals with whom the Office of the Prosecutor held meetings and whose statements are appended to its observations.²⁹

29. Furthermore, Ituri’s social, political and security situation has stabilised.³⁰ The populations of Ituri’s various territories, and in particular the Hema and Lendu

²⁶ Annex 2: Letter from Professor Dr Anicet Tibamwenda Basara Byaruhanga dated 3 July 2015.

²⁷ Taken into consideration in: ICTR, *Rugambarara*, *op. cit.*, para. 15.

²⁸ *Travaux préparatoires*: PCNICC/1999/L.5/Rev.1/Add.1, note 127; PCNICC/2000/WGRPE(10)/RT.1, note 5; etc.

²⁹ ICC-01/04-01/06-3150-Conf-Exp-Red, Annexes 2-4.

³⁰ Annex 3 (Declaration by representatives of religious denominations of Ituri).

communities, have overcome the conflicts that divided them and today live in peace.³¹

30. The representatives of the local communities that are members of the *Union des associations culturelles pour le développement de l'Ituri* (UNADI) say that nothing prevents Mr Lubanga, Mr Katanga or Mr Ngudjolo from returning to Ituri. On the contrary, they consider that their return to their native region is in keeping with UNADI's objectives of promoting unity and reconciliation.³² Representatives of the Civil Society of Ituri state that Mr Lubanga's return and resettlement will not upset the peace and reconciliation process but is instead a condition for its completion.³³ According to representatives of Ituri's religious denominations, Mr Lubanga's return will of itself be an important factor in reconciliation and could help to consolidate the pacification process and enhance communities' ability to live together. They add that Mathieu Ngudjolo's release did not cause any trouble.³⁴

31. It follows that Mr Lubanga's return, far from causing "significant social instability", will in fact play an essential role in reconciling the communities.

e. Individual circumstances of the sentenced person

32. Mr Lubanga has not been free since 13 August 2003, the date on which he was placed under house arrest by the Congolese authorities lasting until 19 March 2005. Mr Lubanga's arbitrary detention continued at the *Centre pénitentiaire et de Rééducation* in Kinshasa from 19 March 2005 to 17 March 2006, during which time he was not informed of the charges against him and did not appear before a judge.³⁵ Mr Lubanga has been detained by order of the Court since 17 March 2006. He has

³¹ Annex 6 (Declaration by Iturian traditional leaders) and Annex 3.

³² Annex 4 (Declaration by UNADI representatives).

³³ Annex 5 (Declaration by representatives of the Civil Society).

³⁴ Annex 3.

³⁵ The Congolese judicial authorities confirm that they did not issue any charges against Mr Lubanga and attest that he did not appear before a competent judge during that period. ICC-01/04-01/0653-Conf-Anx5.6, pp. 4-5.

hence been separated from his wife and children since 13 August 2003, which is nearly 12 years.

33. Although the Court considered that this period of detention should not be deducted from the sentence pursuant to article 78(2),³⁶ the years for which Mr Lubanga was deprived of his liberty in DRC must be taken into account at this stage when deciding whether to reduce his sentence.

34. Furthermore, Mr Lubanga served almost two thirds of his sentence, i.e. eight years and nine months, as pre-trial detention before the final judgment; this especially unusual circumstance resulted in particular from the delays caused by the two stays of prosecution ordered by the judges at first instance because of the actions of the Office of the Prosecutor; this circumstance, which is specific to Mr Lubanga, must be taken into consideration as one of the factors weighing in favour of his early release. It is particularly wrong for the Prosecution to cite the unusual delays for which it is responsible³⁷ to support its claim that Mr Lubanga's release six months after his conviction was upheld on appeal would be anathema to the principles of justice.³⁸

f. Conduct while in detention

35. The observations submitted by the Registrar on 3 July 2015³⁹ show that Mr Lubanga abides by the house rules of the Detention Centre and that he obeys instructions. He has behaved well in detention, in particular towards other detainees and the Detention Centre's staff and management. This demonstrates that Mr Lubanga shows signs of rehabilitation.⁴⁰

³⁶ ICC-01/04-01/06-2901, para. 102.

³⁷ See ICC-01/04-01/06-2891-Red, paras. 120-122 and 124.

³⁸ ICC-01/04-01/06-3150-Conf-Exp-Red, para. 3.

³⁹ ICC-01/04-01/06-3144-Conf-Red, para. 4.

⁴⁰ It is established before the ICTs that a detained person's good conduct in detention suggests that he or she is capable of reintegration into society. See, for example, MICT, *Češić*, No. MICT-14-66-ES, Decision dated 28 May 2014, para. 19-21; *Ruzindana*, No. MICT-12-10-ES, Decision dated 13 May 2014, para. 19; *Sagahutu*, *op. cit.*, para. 20; *Ntakirutimana*, No. MICT-12-17-ES, Decision dated 24 April 2014, paras.16-18. ICTY, *Blagojević*, No. IT-02-60-ES, Decision dated 3 February 2012, para. 23.

g. Impact on the victims and their families

36. The statements collected by the Defence and appended to these observations confirm that Mr Lubanga's early release would be entirely acceptable to all of the civilian populations affected by the crimes committed in Ituri district between 2002 and 2003.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

FIND AND DECLARE that Mr Lubanga's sentence may be reduced;

and

ORDER Mr Lubanga's immediate release.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 8 September 2015

At The Hague, the Netherlands