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

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

*THE PROSECUTOR
v. THOMAS LUBANGA DYILO*

Public

**Prosecution's Consolidated Response to Lubanga's, OPCV's and Legal
Representatives of Victims V01's and V02's observations regarding Thomas
Lubanga's second sentence review**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart, Deputy Prosecutor
Ms Helen Brady

Counsel for Mr Thomas Lubanga

Ms Catherine Mabilile
Mr Jean-Marie Biju Duval

Legal Representatives of Victims V01

Mr Franck Mulenda
Mr Luc Walleyen

Legal Representatives of Victims V02

Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu

The Office of Public Counsel for Victims

Ms Paolina Massidda

States Representatives

The Democratic Republic of the Congo

REGISTRY

Registrar

Mr Herman von Hebel

Other

The Presidency

Introduction

1. The information provided by Mr Thomas Lubanga,¹ the Office of Public Counsel for Victims (“OPCV”)² and the Legal Representatives of Victims V01³ and V02⁴ confirms that there has been no significant change in circumstances since the First Sentence Review Decision. Notably, Lubanga himself does not request his early release.⁵
2. The Prosecution thus reiterates its submission that Lubanga’s sentence should not be reduced.⁶ Lubanga should remain in detention.

Submissions

i. The Parties and Participants have not asked for Lubanga’s early release

3. First, OPCV and the Legal Representatives of V01 and V02 all submit that Lubanga should remain in detention.⁷ None of them argues that there has been a significant change in circumstances since the First Sentence Review Detention that would justify Lubanga’s sentence being reduced.
4. Moreover, Lubanga himself does not request his early release; instead, he takes no position and relies on the Panel’s fairness.⁸ In fact, in his response to OPCV’s and the Legal Representatives’ letter, Lubanga offers not to ask for a reduction of his sentence if “*son maintien en détention jusqu’à l’expiration de sa peine peut en quelque manière être util*

¹ [ICC-01/04-01/06-3365-Red](#) (“Lubanga Observations”). The Prosecution will refer to Mr Thomas Lubanga as “Lubanga” for the purposes of this filing.

² [ICC-01/04-01/06-3367](#) (“OPCV Observations”).

³ [ICC-01/04-01/06-3366](#) (“V01 LRV Observations”).

⁴ [ICC-01/04-01/06-3369](#) (“V02 LRV Observations”).

⁵ [Lubanga Observations](#), para. 58.

⁶ See [ICC-01/04-01/06-3368-Conf](#) (“Prosecution Observations”). A [public redacted version](#) was filed on 18 September 2017.

⁷ [OPCV Observations](#), para. 22 (“*le Représentant légal demande respectueusement aux trois juges de la Chambre d’Appel nommés pour connaître de l’examen de la question d’une réduction de peine de confirmer le maintien de la peine initialement prononcée à l’encontre de M. Lubanga et d’ordonner son maintien en détention*”); [V01 LRV Observations](#), p. 9 (“*Constater que les conditions légales pour une réduction de la sentence ne sont pas réunies actuellement*”); [V02 LRV Observations](#), para. 18 (“*[...] Jen proposant à la Chambre de reporter dans les six mois sa décision sur la réduction de la peine de la personne condamnée, afin de permettre une mise en œuvre effective du processus des réparations et en impliquant toutes les parties ainsi que le Fonds au profit des victimes (TFV).*”). See also paras. 24-25.

⁸ [Lubanga Observations](#), para. 59 (“*Au regard de l’ensemble des éléments évoqués ci-dessus, Monsieur Lubanga s’en remet à l’équité du Collège quant au réexamen de la réduction de sa peine.*”) and p. 12 (“*Par ces motifs, plaise à la Chambre d’Appel, prendre acte des présentes observations*”).

*e à la paix sociale et au bien-être des populations éprouvées par les crimes poursuivis [...]”*⁹

ii. There has been no significant change in circumstances since the First Sentence Review Decision

5. Second, the information provided by Lubanga, OPCV and the Legal Representatives further confirms that there has been no change in circumstances—much less a significant one—since the Panel’s First Sentence Review Decision:

- The letter from Lubanga’s Counsel of 7 September 2017 does not reveal any action, let alone a significant action, taken by Lubanga for the benefit of the victims since the First Sentence Review Decision. In the Letter—responding to a letter from OPCV and the Legal Representatives of V01 and V02—Lubanga’s Counsel simply repeats Lubanga’s statements in the First Sentence Review Hearing¹⁰ and reparations proceedings.¹¹ However, Lubanga’s ambiguous and general apology,¹² his offer to help those who have suffered,¹³ his acknowledgement of his “duty” to participate in the reconciliation process¹⁴ and his stance against recruiting and using children to participate in hostilities¹⁵—were *all* statements considered by the Panel in the First Sentence Review Decision. Noting Lubanga’s avowals, the Panel concluded that “Mr Lubanga has not [...] genuinely dissociated from his crimes”.¹⁶ Nor is Lubanga’s offer to participate in a

⁹ [Lubanga Observations](#), para. 41 and its annex 1, p. 2. The Letter from Lubanga’s Counsel is attached in [Lubanga Observations, annex 1](#); OPCV Observations, annex 2; V01 LRV Observations, annex 2; V02 LRV Observations, annex 2. The Prosecution will refer to it as “Lubanga’s Counsel Letter”.

¹⁰ Compare [T-366-Red](#), p. 27, ln. 17 to p. 29, ln. 5, with [Lubanga’s Counsel Letter](#) of 7 September 2017, p. 1 and [Lubanga Observations](#), paras. 43-46.

¹¹ Compare [ICC-01/04-01/06-3196-Red2](#) (“Lubanga Observations Draft Implementation Plan”), para. 97 and [T-367](#), p. 84, lns. 15-21 with [Lubanga’s Counsel Letter](#), p. 2 and [Lubanga Observations](#), paras. 47-48.

¹² Compare [T-366-Red](#), p. 27, lns. 19-22 (“I believe I am accountable to the community at two levels. First of all, speaking on my behalf and speaking on behalf of the organisation that I led at that time, I offer my sincere apologies to all the victims for the suffering that they endured”) and [Lubanga’s Counsel Letter](#), p. 1 (“*C’est ainsi qu’il a déclaré lors de l’audience du 21 août 2015 qu’il se sentait redevable et qu’il a présenté, en son nom et au nom de son organisation de l’époque, ses excuses les plus sincères pour toutes les victimes faites en son sein et la souffrance qui leur a été infligée*”).

¹³ Compare [T-366-Red](#), p. 27, lns. 23-25 (“I sincerely hope that I can be of service to all of those who have suffered, and at the appropriate time I am ready and willing to devote my efforts to them once I am released”) and [Lubanga’s Counsel Letter](#), p. 1 (“*Lors de l’audience du 21 août 2015, Monsieur Lubanga a exprimé son souhait sincère de se rendre utile à tous ceux qui ont souffert et être prêt à y consacrer sa liberté retrouvée*”).

¹⁴ Compare [T-366-Red](#), p. 28, lns. 1-2 (“As I look to our common future, I have a duty as part of the reconciliation process”) and [Lubanga’s Counsel Letter](#), p. 1 (“*Plus précisément, il a reconnu le devoir qui était le sien dans le processus de réconciliation [...]*”).

¹⁵ Compare [T-366-Red](#), p. 28, ln. 28 to p. 29, lns. 1-5 (“there is no place in an army for children [...]. Thus, I stand alongside all those who have taken a public position against this practice [...]”) and [Lubanga’s Counsel Letter](#), p. 1 (“*Il a finalement déclaré qu’il était de son devoir de prendre position publiquement contre la pratique de l’utilisation des enfants dans les conflits armés [...]*”).

¹⁶ [First Sentence Review Decision](#), para. 46.

traditional reconciliatory ceremony with the victims¹⁷ a significant change in circumstances, as already submitted in the Prosecution Observations.¹⁸ As such, Lubanga's Counsel Letter does not constitute a "significant change in circumstances".

- With respect to his prospects of resocialisation and successful resettlement, Lubanga submits that, since his transfer to Makala prison he has maintained his links with his family and his project of resuming his psychology studies.¹⁹ He argues that this project could be an essential element in the reconciliation process between the Hema and Lendu communities and constitute an "*apport personnel*" for his sentence review.²⁰ However, unlike Katanga,²¹ Lubanga has yet to contribute in any manner to the reconciliation process. A hypothetical contribution resulting from some future studies cannot now be considered to reduce Lubanga's sentence. In any event, Lubanga's desire to study psychology, and the purported finality of those studies, were already considered by the Panel in the First Sentence Review Decision.²² Accordingly, there has been no significant change in circumstances underpinning the rule 223(b) factor since the First Sentence Review Decision.
- Lubanga further argues that the fact that "*le droit de Monsieur Lubanga de purger sa peine sans risque d'atteinte à son intégrité physique a été violé*" should be considered in his sentence review.²³ However, since paragraphs 55 to 57 of Lubanga's Observations are redacted, the Prosecution is not in a position to comment on the basis supporting Lubanga's assertion. Moreover, it would appear that the attack against Makala prison in May 2017²⁴ does not, in itself and in light of all relevant known factors, justify Lubanga's early release.

¹⁷ [Lubanga's Counsel Letter](#), p. 2. Lubanga has clarified that this proposal does not depend on his release.

¹⁸ [Prosecution Observations](#), paras. 17-18.

¹⁹ [Lubanga Observations](#), para. 33.

²⁰ [Lubanga Observations](#), para. 34.

²¹ [Katanga Sentencing Decision](#), para. 144 ("The second factor [...] relates to Germain Katanga's personal and active support to the process of disarming and demobilising child soldiers which was rolled out in Ituri and which demonstrates his undisputed sense of responsibility in that respect. [...]"). cited in [Lubanga Observations](#), fn. 26.

²² [First Sentence Review Decision](#), paras. 48 (summarising Lubanga's submissions) and 52-53.

²³ [Lubanga Observations](#), para. 58.

²⁴ See [Lubanga Observations](#), paras. 53-54.

iii. Lubanga's opposition to 474 applicants for reparations does not constitute 'cooperation' within article 110(4)(a)

6. Third, Lubanga's continuous and wholesale opposition to the 474 applicants for reparations does not constitute 'cooperation' within article 110(4)(a).²⁵ Notwithstanding Lubanga's right to defend his interests, his blanket opposition to *all* applications does not assist the efficient administration of justice.²⁶ To the contrary, Lubanga has prolonged the reparations proceedings by effectively requiring the Legal Representatives and OPCV to reply to Lubanga's observations.²⁷ Moreover, as the Prosecution noted in its Observations, it is hardly conceivable that *none* of the 474 potential victim-applicants is entitled to reparations in this case.²⁸ Thus, by opposing all victims' applications, Lubanga cannot be said to be assisting Trial Chamber I's determination.²⁹

iv. The Panel's decision should not be postponed six months

7. Fourth, there is no basis to postpone the Panel's decision. Although the Legal Representatives of V01 submit that the conditions for Lubanga's early release are not met,³⁰ they suggest that the Panel's decision be postponed for six months so that a meeting can be organised between Lubanga and a delegation of participating victims to discuss how Lubanga could publicly apologise for the crimes.³¹ Further, although the Legal Representatives of V02 appear to oppose Lubanga's early release at this point, they propose a new round of

²⁵ *Contra* [Lubanga Observations](#), paras. 19-25.

²⁶ Contrary to Lubanga's assertion, his observations in the reparations proceedings (where he has opposed all victims' applications) are not comparable to Katanga's withdrawal of his right to appeal. *See* [Lubanga Observations](#), fn. 18 referring to [Katanga Sentence Review Decision](#), para. 34.

²⁷ *See e.g.* [ICC-01/04-01/06-3296](#) ("V01 V02 LRVs Reply Lubanga Response 1st Transmission"); [ICC-01/04-01/06-3316](#) ("OPCV Request Reply to Lubanga Response 4th Transmission"); [ICC-01/04-01/06-3325](#) ("OPCV Reply Request to Lubanga Response 5th and 6th Transmissions"); [ICC-01/04-01/06-3333](#) ("OPCV Reply to Lubanga Response 4th, 5th and 6th Transmission"); [ICC-01/04-01/06-3349](#) ("OPCV Reply to Lubanga Response 8th Transmission"). *Compare to* [Katanga Sentence Review Decision](#), para. 34 ("[...] the Panel observes that should a convicted person choose not to exercise this right as a result of acknowledging that he or she is guilty of the crimes committed and publicly apologising therefor, as is the case with Mr Katanga when he chose to withdraw his appeal, such an act prevents the unnecessary prolongation of the proceedings. It furthermore brings finality to the proceedings against him or her and allows the reparations phase of a case to commence in a timely manner, a factor which is of particular importance in the context of the ICC. The Panel therefore considers that a withdrawal of an appeal, in the circumstances described in the present case, advances the efficient administration of justice post-sentence in the same manner as a guilty plea prior to a sentence, and accordingly can be considered to demonstrate cooperation with the Court within the meaning of article 110 (4) (a) [...]").

²⁸ [Prosecution Observations](#), para. 22.

²⁹ As for Lubanga's complaints about the level of redactions applied to the victims' applications (*see* [Lubanga Observations](#), para. 23), the Prosecution notes that Trial Chamber I has stated that "the redactions [are] reasonable and justified" and that "despite the redactions, the forms disclose enough information for the Defence to meaningfully exercise its right to respond to the files of Potentially Eligible Victims". *See* [ICC-01/04-01/06-3275](#) ("Lubanga Transmission Dossiers Order"), paras. 14-19.

³⁰ [V01 LRV Observations](#), p. 9.

³¹ [V01 LRV Observations](#), para. 19.

submissions six months after the Panel's second review decision to enable an effective implementation of the reparation process.³² The OPCV simply opposes Lubanga's early release.³³

8. The Prosecution submits that the Panel should decide on the basis of the information currently available and should not postpone its decision. Lubanga's Counsel Letter merely repeats Lubanga's earlier statements which the Panel considered in its First Sentence Review Decision. Nor does Lubanga's offer to engage in a traditional reconciliatory ceremony with the victims constitute a significant change in circumstances. In any event, if there is a significant change after the Panel's decision and before Lubanga's 14-year sentence expires, Lubanga can always apply for a review under rule 224(3) of the Rules of Procedure and Evidence.³⁴

Conclusion and Relief Sought

9. The Prosecution respectfully submits that Lubanga's sentence should not be reduced.



Fatou Bensouda, Prosecutor

Dated this 21st day of September 2017

At The Hague, The Netherlands

³² [V02 LRV Observations](#), paras. 18, 24-25.

³³ [OPCV Observations](#), para. 22.

³⁴ Rule 224(3): "[...] In case of a significant change in circumstances, those three judges may permit the sentenced person to apply for a review within the three-year period or such shorter period as may have been set by the three judges".