



**Original: English**

**No. ICC-01/04/01/06  
Date: 19 August 2015**

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

**Public document**

**Decision on Mr Lubanga's request to have two filings from the Prosecutor  
declared inadmissible**

**Decision 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

**Counsel for Mr Thomas Lubanga Dyilo**  
Ms Catherine Mabilie  
Mr Jean-Marie Biju Duval

**Legal Representatives of Victims V01**  
Mr Franck Mulenda  
Mr Luc Walley

**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 Massida

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel

**Other**  
The Presidency

The three judges of Appeals Chamber of the International Criminal Court,

In the review by the Court concerning reduction of sentence of Mr Thomas Lubanga Dyilo pursuant to article 110 of the Statute,

Noting the procedure for the review concerning reduction of sentence set out in rule 224 (1) of the Rules of Procedure and Evidence,

Having before it the “Requête de la Défense de M. Lubanga pour faire déclarer irrecevable la « *Confidential redacted version of Prosecution’s third notice regarding potentially relevant information to Thomas Lubanga Dyilo’s sentence review, 14 August 2015* » et la « *Prosecution’s notice regarding material to be used at the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo* »” of 17 August 2015 (ICC-01/04-01/06-3162-Conf-Exp),

Render unanimously

## DECISION

The “Requête de la Défense de M. Lubanga pour faire déclarer irrecevable la « *Confidential redacted version of Prosecution’s third notice regarding potentially relevant information to Thomas Lubanga Dyilo’s sentence review, 14 August 2015* » et la « *Prosecution’s notice regarding material to be used at the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo* »” (ICC-01/04-01/06-3162-Conf-Exp) is rejected.

## REASONS

### I. PROCEDURAL HISTORY

1. On 14 March 2012, Trial Chamber I convicted Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) of war crimes<sup>1</sup> and, on 10 July 2012, sentenced him to 14 years imprisonment.<sup>2</sup>

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<sup>1</sup> “[Judgment pursuant to Article 74 of the Statute](#)”, ICC-01/04-01/06-2842.

<sup>2</sup> “[Decision on Sentence pursuant to Article 76 of the Statute](#)”, ICC-01/04-01/06-2901.

2. On 15 June 2015, the three judges appointed by the Appeals Chamber for the review concerning reduction of sentence of Mr Lubanga issued a scheduling order,<sup>3</sup> in which they requested, *inter alia*, that Mr Lubanga and the Prosecutor file written submissions, of no more than 10 pages, on the criteria for review concerning reduction of sentence by Friday, 10 July 2015.<sup>4</sup>

3. On 10 July 2015, the Prosecutor filed her observations.<sup>5</sup> On 14 July 2015, after being granted an extension,<sup>6</sup> Mr Lubanga filed his observations.<sup>7</sup>

4. On 7 August 2015, the three judges issued an order with regard to the conduct of the sentence reduction review hearing scheduled for 21 August 2015 (hereinafter: “Further Order of 7 August 2015”),<sup>8</sup> stating, *inter alia*, that “[t]he participants may address any relevant issues pertaining to this review without exceeding those raised in their or other participants’ written submissions”.<sup>9</sup>

5. On 14 August 2015, the Prosecutor filed two notices: (i) “Prosecution’s notice regarding material to be used at the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo” (hereinafter: “Prosecutor’s Notice of Material”);<sup>10</sup> and (ii) “Prosecution’s third notice regarding potentially relevant information to Thomas Lubanga Dyilo’s sentence review” (hereinafter: “Prosecutor’s Third Notice”).<sup>11</sup>

6. On 17 August 2015, Mr Lubanga requested that the Prosecutor’s two notices be declared inadmissible and that the Prosecutor not be permitted to use the documents

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<sup>3</sup> [“Scheduling order for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”](#), ICC-01/04-01/06-3137 (hereinafter: “Scheduling Order”).

<sup>4</sup> Scheduling Order, paras 3-4.

<sup>5</sup> “Prosecution’s submissions regarding Thomas Lubanga Dyilo’s sentence review”, ICC-01/04-01/06-3150-Conf-Exp; a confidential *ex parte* version was registered on 10 July 2015 (ICC-01/04-01/06-3150-Conf-Exp-Red).

<sup>6</sup> “Public redacted version of Order for the reclassification of documents and extension of the time limit for the filing of submissions”, 6 July 2015, ICC-01/04-01/06-3145-Red, p. 3.

<sup>7</sup> “Observations of the Defence for Mr Lubanga on a reduction in sentence”, ICC-01/04-01/06-3151-Conf-Exp-tENG.

<sup>8</sup> [“Order rescheduling the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”](#), 8 July 2015, ICC-01/04-01/06-3148.

<sup>9</sup> [“Further order setting the timetable regarding the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”](#), ICC-01/04-01/06-3155, p. 4

<sup>10</sup> ICC-01/04-01/06-3159.

<sup>11</sup> ICC-01/04-01/06-3160-Conf-Exp.

referred to in these two notices during the hearing for the review concerning reduction of sentence (hereinafter: “Mr Lubanga’s Request”).<sup>12</sup>

## II. SUBMISSIONS BY THE PARTIES

7. With respect to the Prosecutor’s Notice of Material, the Prosecutor indicates that she will refer to extracts of two United Nations (hereinafter: “UN”) documents appended to her notice that are not in the record of the case.<sup>13</sup> The first document is a report of the Secretary-General on the UN Organization Stabilization Mission in the Democratic Republic of the Congo dated 26 June 2015.<sup>14</sup> The second document is a MONUSCO press briefing dated 8 July 2015.<sup>15</sup> The Prosecutor argues that both documents are from “open sources and address issues raised by the Parties in their written submissions”<sup>16</sup> as indicated in the Further Order of 7 August 2015<sup>17</sup> and therefore, she argues, her “reliance on these documents at the hearing complies with the [Further Order of 7 August 2015]”.<sup>18</sup>

8. As to the Prosecutor’s Third Notice, the Prosecutor submits that she “does not propose to refer to the content of [this filing and documents referred to therein or any related filings] during the hearing, but only to their existence [...]”.<sup>19</sup>

9. Mr Lubanga submits that the Prosecutor’s Third Notice has been heavily redacted, which as a result, prevents him from properly understanding the content of this notice.<sup>20</sup> Mr Lubanga argues that, given the redactions, he is not in a position to respond to the allegations raised in the notice<sup>21</sup> and that it would be unfair if such information would be taken into account without him having the opportunity to

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<sup>12</sup> “Requête de la Défense de M. Lubanga pour faire déclarer irrecevable la « Confidential redacted version of Prosecution’s third notice regarding potentially relevant information to Thomas Lubanga Dyilo’s sentence review, 14 August 2015 » et la « Prosecution’s notice regarding material to be used at the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo »”, ICC-01/04-01/06-3162-Conf-Exp, para. 8, p. 6.

<sup>13</sup> Prosecutor’s Notice of Material, para. 1.

<sup>14</sup> Annex A to the Prosecutor’s Notice of Material, ICC-01/04-01/06-3159-AnxA.

<sup>15</sup> Annex B to the Prosecutor’s Notice of Material, ICC-01/04-01/06-3159-AnxB.

<sup>16</sup> Prosecutor’s Notice of Material, para. 2, referring to “Prosecution’s submissions regarding Thomas Lubanga Dyilo’s sentence review”, ICC-01/04-01/06-3150-Conf-Exp, para. 19; “Observations of the Defence for Mr Lubanga on a reduction in sentence”, ICC-01/04-01/06-3151-Conf-Exp-tENG, para. 29.

<sup>17</sup> Prosecutor’s Notice of Material, para. 2, referring to Further Order of 7 August 2015, p. 4.

<sup>18</sup> Prosecutor’s Notice of Material, para. 2.

<sup>19</sup> Prosecutor’s Third Notice, para. 10.

<sup>20</sup> Mr Lubanga’s Request, para. 5.

<sup>21</sup> Mr Lubanga’s Request, para. 10.

respond to it.<sup>22</sup> Regarding the Prosecutor's Notice of Material, Mr Lubanga argues that the Prosecutor had until 10 July 2015 to present her observations on the review of reduction of sentence.<sup>23</sup>

10. Mr Lubanga avers further that by filing both notices only days prior to the hearing without requesting leave to do so, the Prosecutor's notices exceed the time and page limits that were set out in the order of 15 June 2015.<sup>24</sup> Mr Lubanga submits that the Prosecutor had the documents annexed to her Third Notice in her possession since 16 July 2015.<sup>25</sup> Therefore, in Mr Lubanga's view, the Prosecutor was not justified in waiting for one month before communicating this information to the three judges and notifying him of her intention to use this information during the hearing.<sup>26</sup> Mr Lubanga argues that the same applies for the two UN documents appended to the Prosecutor's Notice of Material, which, he submits, were available to the Prosecutor prior to the filing of her observations on 10 July 2015.<sup>27</sup>

### III. MERITS

11. With respect to the Prosecutor's Third Notice and the documents referred to therein, the three judges note that the Prosecutor expressly indicated that she will not refer to the content of this filing and these documents.<sup>28</sup> At most, she stated that she will only refer to their existence. Therefore, Mr Lubanga's assumption that the Prosecutor may possibly refer to these documents is incorrect, and accordingly Mr Lubanga's Request in this regard is rejected.

12. Turning to the Prosecutor's Notice of Material and the two UN documents appended to this notice, the three judges observe that the Prosecutor submits that these documents relate to issues raised by the participants in their written submissions, in accordance with the Further Order of 7 August 2015.<sup>29</sup> In support of her submission, the Prosecutor refers to paragraph 29 of Mr Lubanga's observations of 14 July 2015 and to paragraph 19 of her submissions of 10 July 2015, which relate to the social,

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<sup>22</sup> Mr Lubanga's Request, para. 12.

<sup>23</sup> Mr Lubanga's Request, para. 13.

<sup>24</sup> Mr Lubanga's Request, para. 14.

<sup>25</sup> Mr Lubanga's Request, para. 16.

<sup>26</sup> Mr Lubanga's Request, para. 16.

<sup>27</sup> Mr Lubanga's Request, para. 17.

<sup>28</sup> See Prosecutor's Third Notice, para. 10.

<sup>29</sup> See Prosecutor's Notice of Material, para. 2, referring to Further Order of 7 August 2015, p. 4.

political and security situation in Ituri and whether Mr Lubanga's early release would give rise to significant social instability.<sup>30</sup> The three judges find that these submissions and reference to the two UN documents fall squarely within the scope of the issues raised by the parties in their written submissions and are therefore in compliance with the Further Order of 7 August 2015. In this same regard, Mr Lubanga's argument that the Prosecutor is attempting to present new information and thereby circumvent the time and page limits set out in the order of 15 June 2015 is also incorrect. Accordingly, this second part of Mr Lubanga's Request is also rejected.

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

  

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**Judge Silvia Fernández de Gurmendi**  
**Presiding Judge**

Dated this 19th day of August 2015

At The Hague, The Netherlands

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<sup>30</sup> Prosecutor's Notice of Material, footnote 2.