Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/06**
Date: **20 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 CONGO

IN THE CASE OF

THE PROSECUTOR
v. THOMAS LUBANGA DYILO

Public Redacted
With
Confidential, EX PARTE, Annex 1 and Public Redacted Annexes 2 to 4

Second public redacted version of Prosecution's submissions regarding Thomas Lubanga Dyilo's sentence review, 10 July 2015, ICC-01/04-01/06-3150-Conf-Exp

Source: **Office of the Prosecutor**

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

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Introduction

1. Thomas Lubanga Dyilo has not earned the privilege of early release. He has failed to discharge his burden, under article 110 of the Statute and rule 223 of the Rules of Procedure and Evidence, to demonstrate that he merits a reduction in his sentence.

2. First, Lubanga fails to meet the conditions for early release under articles 110(4)(a) and 110(4)(b). Lubanga has not shown "early and continuing willingness" to cooperate with the Court in its investigations and prosecutions; nor has he voluntarily assisted the Court to enforce its judgements and orders in other cases. Indeed, he has not co-operated with or assisted the Court in any manner.

3. Second, Lubanga also fails to establish "a clear and significant change of circumstances" under article 110(4)(c) and rule 223 to justify early release. To the contrary, his suspected involvement in witness interference in the *Bosco Ntaganda* case from the ICC detention centre strongly militates against any such early release. Not only does this activity suggest that he retains a propensity for criminal activity, but that his early release at this stage—absent any monitoring conditions—would put Lubanga out of the Court's reach and could further jeopardise cases at this Court. At the least, Lubanga's suspected criminal activity at this stage requires that the Panel defer its decision pending additional information. Further, the gravity of Lubanga's crimes—which exploited the vulnerability of children—cannot be overlooked. His early release will likely adversely impact the victims, their families and the stability of the region. In these circumstances, Lubanga's early release—hardly six months after his conviction was affirmed on appeal—would be anathema to the very justice this Court seeks to uphold.

4. The Office of the Prosecutor ("Prosecution") opposes Lubanga's early release. If and when it receives additional information on Lubanga's suspected involvement in witness interference, it remains ready to make further submissions.

Level of Confidentiality

5. The Prosecution, under regulation 23*bis*(1) and 23*bis*(2) of the Regulations of the Court, files this submission on a confidential *ex parte* basis. It will file redacted versions.

Submissions

A. Lubanga bears the burden of showing that he merits reduction of his sentence

6. Early release at the two-thirds mark of a sentence is not automatic. It has to be earned. Lubanga bears the burden of demonstrating that he merits such early release. The text of article 110 is clear. Only the review of the sentence at the two-thirds mark is mandatory; the Panel retains the discretion to deny early release, regardless if conditions are met.[1] Commentators on the Statute also confirm this understanding.[2] Indeed, the Panel cannot pardon, commute or grant parole—concepts that are antithetical to the seriousness of the offences within the Court's jurisdiction.[3] Instead, Lubanga must convince the Panel on objective considerations that he is eligible for such early release. As shown below, he fails to meet this burden.

B. Lubanga fails to meet any of the specified criteria which may warrant early release

i. Lubanga has not cooperated with the Court in its investigations and prosecutions

7. Lubanga has not shown any "early and continuing willingness" to co-operate with the Court in its investigations and prosecutions. Notwithstanding that the Trial Chamber found that Lubanga "was respectful and cooperative throughout the proceedings",[4] this Panel must make a different determination. Indeed, article 110(4)(a) requires the Panel to go beyond the Accused's mere civil behaviour in the proceedings against him—comportment expected of all accused before this Court. Instead, the Panel must consider his willingness to cooperate with investigations and prosecutions, in other words, to further the Court's work in general. The plain text of article 110(4)(a) supports this understanding: it is broadly framed and is not limited to the proceedings against an accused. Any other interpretation would lead to absurd consequences. In particular, if the Panel were to consider Lubanga's "notable cooperation", which the Trial Chamber limited to his behaviour at trial,[5] every convicted person at this Court—even if he or she only displayed a modicum of decorum during the court proceedings—would be eligible for a reduction in sentence once the person has served two-

[1] Articles 110(3) and 110(4).
[2] *See e.g.*, Schabas, W, p.1105; *See* Chimimba, T, p.355 (the Court may consider the gravity of the crimes).
[3] *See* Chimimba, T, p.355; Bassiouni, C, pp.741-742, fn.829.
[4] ICC-01/04-01/06-2901 ("Sentencing Decision), para.91.
[5] *See* Sentencing Decision, para.91.

thirds of the sentence (or 25 years in the case of life imprisonment). Not only would such an interpretation reward a convicted person with early release for the bare minimum expected of him or her, it would also unduly limit the Panel's discretion to fully consider whether early release is even warranted.

8. Moreover, the *ad hoc* tribunals' case law supports a more expansive understanding of "co-operation" in article 110(4)(a). Indeed, at the ICTY and ICTR, a convicted person is, at a minimum, expected to provide testimony, interviews and/or a guilty plea for their cooperation to be counted towards early release.[6] Put simply, the convicted person's actions should impact "the efficient administration of justice."[7] At the same time, ICTY Chambers have expressly rejected claims of cooperation falling below actions which advance justice.[8]

9. Although the Prosecution has not approached Lubanga for co-operation, nor does it know if other Court organs have done so,[9] article 110(4)(a) is equally clear that Lubanga could have displayed his early and continuing willingness to co-operate with the Court without having been so approached. The record shows that he did not do so.

ii. Lubanga has not voluntarily assisted the enforcement of the judgements and orders of the Court in other cases

10. Article 110(4)(b) requires Lubanga to have provided assistance—of his own volition—to cases at this Court beyond his own. The record shows that Lubanga has not provided any such voluntary assistance to the Court.

[6] *See* ICTR, *Bagaragaza* Decision, paras.11-14 (guilty plea, unreserved cooperation with the Prosecution, and testimony in the *Zigiranyirazo* trial); *Rugambarara* Decision, paras.8-10 (guilty plea, expression of remorse); MICT, *Serushago* Decision, paras.23-30 (guilty plea, testimony for Prosecution twice); *Bisengimana* Decision, paras.28-31 (guilty plea); *Češić* Decision, paras.22-24 (guilty plea, commitment to testify for the Prosecution); ICTY, *Banović* Decision, paras.13-14 (guilty plea, willingness to cooperate with both the ICTY and national prosecutors); *Došen* Decision, pp.3-4 (guilty plea, expression of sincere remorse, "clear resolve to cooperate with the OTP"); *Jokić* Decision, para.15(full and honest cooperation with the Prosecution, willingness to testify against Pavle Strugar).

[7] *See e.g., Bisengimana* Decision, para.30.

[8] *See e.g.,* ICTY, *Krajišnik* Decision, paras.32-34 (Krajišnik's testimony at trial, his statement that he secured funds for the Karadžić Defence are irrelevant); *Ojdanić* Decision, paras.20-21 (decision to withdraw an appeal does not assist the Prosecution); *Šljivančanin* Decision, paras.28-30 (Šljivančanin's acquiescence to the trial continuing in his absence for four days is not cooperation with the Prosecution).

[9] Unlike the ICTR/Y, neither articles 110(4)(a) or 110(4)(b) require the Prosecution or the Court to make an offer to a convicted person to cooperate. The language is sufficiently broad and differs from that of the *ad hoc* tribunals.

iii. Lubanga's conduct while in detention is suspected to be criminal (rule 223(a))

11. Under article 110(4)(c) and rule 223(a), Lubanga must show that his conduct in detention establishes a "clear and significant change of circumstances" sufficiently justifying a reduced sentence. He has not met this burden. With the gravity of his crimes having been affirmed by the Appeals Chamber only six months ago,[10] the record does not establish that Lubanga has "genuinely dissociated from his crime". At the appeal hearing last year, Lubanga vigorously contested his role in the crimes.[11] Even considering the record following this hearing, there is simply nothing on the record to suggest that he has shown any remorse by his words or actions.[12] As the Registry suggests,[13] merely abiding by the Detention Centre House Rules and showing good behaviour *vis-à-vis* other detainees cannot qualify Lubanga for early release.

12. Furthermore, the Prosecution has grounds to believe that Lubanga has been involved in a scheme of witness interference in the *Bosco Ntaganda* case. It believes that at least two individuals who attempted to interfere with Prosecution witnesses were in contact with Lubanga at the time of the alleged interference. Based on the Prosecution's submissions, the *Ntaganda* Trial Chamber found that [REDACTED].[14] It further found, on a reasonable *prima facie* basis, that Lubanga is the person Ntaganda referred to as "Number 1" in a conversation with [REDACTED], during which Ntaganda stated that "communication should not be an issue while Number 1 is still around, [REDACTED]."[15] As a result, the *Ntaganda* Trial Chamber ordered the active monitoring of Lubanga's non-privileged telephone calls, among other measures.

13. Given the preliminary indications that Lubanga may be involved in witness interference, his early release may jeopardise the security of witnesses in the *Ntaganda* proceedings and may undermine the integrity of proceedings before this Court. Even if the

[10] *See* ICC-01/04-01/06-3122 A4 A6, paras.61-73.
[11] ICC-01/04-01/06-T-363-Red-ENG ("20 May 2014 Appeal Hearing Transcript"), p.65 ln.15-p.72 ln.8. *See* p.66 ln.7-p.67 ln.9 (where Lubanga contested that the young FPLC soldiers were under the age of 15); p.69 ln.11-p.72 ln.8 (where Lubanga claimed that he formally prohibited the enlisting of minors in the FPLC, and contested the Trial Chamber findings that he "abducted, enlisted and sent children into combat". He claimed that "misleading images" and "implausible testimony" were held against him. Further, he stated "[…]to convict me it has been necessary to close one's eyes to a whole portion of the reality of facts."). The Prosecution acknowledges that Lubanga may make a statement at the hearing.
[12] ICC-01/04-01/06-3144-Conf-Red ("Registry's Observations"), para.4. [REDACTED]
[13] Registry's Observations, para.4.
[14] ICC-01/04-02/06-683-Conf-Exp ("*Ntaganda* Order of 29 June 2015"), para.6; ICC-01/04-02/06-683-Conf-Exp-Red2, para.6.
[15] *Ntaganda* Order of 29 June 2015, paras.6-7.

Prosecution's investigations into these allegations are ongoing, the issue should be critical to the Panel's review of his sentence at this stage.

14. Two examples support the Prosecution's submissions on this point. [REDACTED].[16] [REDACTED].[17] [REDACTED].[18]

15. [REDACTED],[19] [REDACTED].[20] [REDACTED][21] [REDACTED].[22] [REDACTED].[23] [REDACTED].

16. If the Panel were minded to grant early release, it should, at the least, defer its decision until further information on the suspected witness interference is collected and analysed.

17. Given both Lubanga's apparent reluctance to genuinely dissociate from his crimes, and his continued suspected criminal activity from the Detention Centre, his conduct cannot be considered to warrant any early release.

iv. Lubanga cannot show that he can be resocialised and successfully resettled at this stage (rule 223(b))

18. The Prosecution has no information that Lubanga has demonstrated "a clear and significant change in circumstances" such that following early release, he could be resocialised and successfully resettled. The Prosecution notes that the Registry's Observations on this criterion[24] are equivocal at best. Therefore, in the absence of more specific information, this factor should be considered to be neutral. It cannot assist Lubanga in seeking early release.

[16] [REDACTED].
[17] [REDACTED].
[18] [REDACTED].
[19] [REDACTED].
[20] [REDACTED].
[21] [REDACTED].
[22] [REDACTED].
[23] [REDACTED].
[24] Registry's Observations, para.5 ("[…]Lubanga's involvement in group activities with other detainees" could hardly indicate a prospect of resocialisation and successful resettlement "considering that the ICC Detention Centre does not possess the necessary expertise for assessing that criterion.").

v. Lubanga's early release would give rise to significant social instability (rule 223(c))

19. [REDACTED].[25] [REDACTED].[26] Moreover, although the Registry is unable to conclude definitively, it raises some key issues that may threaten the region's social stability, including that early release may be problematic if it coincided with local and provincial elections, and that Lubanga remained "a powerful figurehead for the UPC" and is viewed as a "hero/martyr." According to the Registry, "disturbances are possible if large crowds gather."[27] Further, [REDACTED] has confirmed that should Lubanga return, agitations are likely in Bunia town and its suburbs. According to him, although Lubanga's supporters would welcome him, other ethnic communities are likely to be uneasy with his return, which could result in insecurity and displacement of non-Hema populations in Hema villages. Equally, [REDACTED] of Bunia and an individual emphasised that Lubanga's return could spark renewed tension among the local Bunia population.[28]

20. [REDACTED], it is unlikely that he meets the criteria in rule 223(c).

vi. Lubanga has not taken any significant action for the benefit of the victims (rule 223(d))

21. The record does not demonstrate that Lubanga has taken any "significant action" to benefit the victims.[29] [REDACTED].[30] So too do [REDACTED] of Bunia and another individual.[31]

vii. No individual circumstances warranting consideration of early release (rule 223(e))

22. The Prosecution is not aware of any individual circumstances that may warrant Lubanga's early release.[32]

[25] [REDACTED].
[26] [REDACTED].
[27] Registry's Observations, p.5.
[28] Annexes 2-4.
[29] The Prosecution cannot access the Registry's Observations on this criterion, as they are redacted.
[30] [REDACTED].
[31] Annexes 2-4.
[32] *See* Registry's Observations, para.10. The Registry states that Lubanga is not an elderly man. His medical reports are unavailable to the Prosecution.

Conclusion

23. The Prosecution opposes Lubanga's early release. As the record demonstrates, Lubanga does not meet the criteria in article 110 and rule 223. Equally, the Panel should consider the gravity of his crimes. At this stage, Lubanga is simply not a candidate for early release. Moreover, if the Panel were minded to grant early release, it should, at the least, defer its decision pending the receipt of additional information on Lubanga's suspected involvement in witness interference. It would be paradoxical to reward Lubanga with early release at this stage, despite his suspected involvement in witness interference undermining the integrity of this Court's proceedings.

Fatou Bensouda, Prosecutor

Dated this 20th day of August 2015

At The Hague, The Netherlands

Word Count:2988[33]

[33] The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para.32.