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Pénale  
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**International  
Criminal  
Court**

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Date: **18 September 2017**

**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**

**With Confidential *Ex parte* Annexes A and B (only available to the Panel of Three Judges of the Appeals Chamber, Registry and Lubanga)**

**Public Redacted Version of "Prosecution's submissions regarding Thomas Lubanga's second sentence review", 14 September 2017, ICC-01/04-01/06-3368-Conf**

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## Introduction

1. On 22 September 2015, having found that it was not appropriate to reduce Thomas Lubanga's sentence, the Panel rejected his request for early release.<sup>1</sup> As circumstances have not changed significantly from that date, the Prosecution respectfully submits that it is likewise not appropriate to reduce his sentence in September 2017.
2. In the First Sentence Review Decision, the Panel found that only one factor, from those in article 110(4) and rule 223, was present (namely, the prospect of Lubanga's resocialisation and successful resettlement in the DRC). In the absence of any other factors in favour of reduction, the Panel found that a reduction of Lubanga's sentence could not be justified.<sup>2</sup>
3. The information currently available to the Prosecution does not show a significant change in circumstances since the First Sentence Review Decision that would justify Lubanga's early release. To the contrary, Lubanga's belated offer to meet with the victims does not show he has genuinely dissociated from his crimes nor that he has taken significant action to benefit the victims. Moreover, the effects of his interference with potential witnesses in the *Ntaganda* case have persisted after the First Sentence Review Decision.
4. Lubanga does not deserve a reduction of his sentence. The gravity of the crimes for which he was convicted—the enlistment, recruitment and use of children under the age of fifteen to participate in hostilities, which exploited the vulnerability of the victims—require that he serves the full term of his 14-year sentence. He should remain in detention.

## Level of Confidentiality

5. The Prosecution, under regulation 23*bis*(2) of the Regulations of the Court, files this request on a confidential basis because it refers to information which bears the same classification.

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<sup>1</sup> [ICC-01/04-01/06-3173](#) ("First Sentence Review Decision"), para. 77 ("The Panel therefore decides that it is not appropriate to reduce Mr Lubanga's sentence pursuant to article 110(3) of the Statute"). The Prosecution will refer to the three Judges of the Appeals Chamber appointed for the review concerning Lubanga's reduction of sentence as the "Panel".

<sup>2</sup> [First Sentence Review Decision](#), para. 77.

## Submissions

6. The Panel has stated that its review is limited to “whether there has been any significant change in circumstances since the date of the First Sentence Review Decision”.<sup>3</sup> According to the Panel which decided on Katanga’s sentence review, ‘significant’, means “large enough to be noticed or have an effect” or “of a measurable large amount”.<sup>4</sup> In the Prosecution’s view, any “significant change” must relate to circumstances or facts underpinning the Panel’s prior findings on the factors in article 110(4)(a) and (b) and rule 223, or constitute a new fact satisfying the Panel that a modification of those prior findings is necessary.<sup>5</sup> Absent such a significant change, Lubanga must remain in detention.<sup>6</sup> However, even if a significant change has been established, Lubanga’s early release is not automatic.<sup>7</sup> The Panel still has discretion to decide, in light of all the factors, whether Lubanga’s early release is appropriate.<sup>8</sup>

<sup>3</sup> [ICC-01/04-01/06-3346](#) (“Scheduling Order”), para. 2.

<sup>4</sup> [ICC-01/04-01/07-3615](#) (“Katanga Sentence Review Decision”), para. 47 referring to Oxford English Dictionary, 2015. The Panel advanced this definition with respect to article 110(4)(c). *See* article 110(4)(c): “Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence”.

<sup>5</sup> [First Sentence Review Decision](#), para. 25 (finding that “the factors that can be taken into account for purposes of considering whether to reduce a sentence are, in principle, those set out in the Court’s legal texts”). The Panel may be guided by this Court’s jurisprudence on the Chambers’ periodic review of the accused persons’ detention under article 60(3). *See* [ICC-01/05-01/08-631-Red](#) OA2, paras. 1, 60. *See also* [ICC-01/05-01/08-1019](#) OA4, para. 51 and [ICC-02/11-01/11-548-Red](#) OA 4, para. 51.

<sup>6</sup> [ICC-01/05-01/08-2151-Red](#) OA10, paras. 1, 31 (“In reviewing a ‘ruling on release or detention’ under article 60 (3) of the Statute, the Pre-Trial or Trial Chamber needs to consider whether there are ‘changed circumstances’. [...] If, however, the Pre-Trial or Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention.”). *See also* [ICC-02/11-01/11-548-Red](#) OA4, paras. 40, 51.

<sup>7</sup> [ICC-01/05-01/08-2151-Red](#) OA10, paras. 1, 31 (“If there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention.”). *See also* [ICC-02/11-01/11-548-Red](#) OA4, para. 51.

<sup>8</sup> *See* [First Sentence Review Decision](#), paras. 21 (noting that “the Panel’s ultimate decision of whether to reduce the sentence is discretionary in nature”) and 22 (noting that “the presence of at least one factor in favour of reduction is a prerequisite to the Panel exercising its discretion to reduce a sentence. In other words, the Panel cannot proceed to reduce a sentence if no such factors are found to be present. However, given the discretionary nature of the decision, the presence of a factor in favour of reduction does not in itself mean that a sentence will be reduced. Similarly, the presence of a factor militating against a reduction of sentence does not preclude the exercise of its discretion. Such factors must be weighed against factors in favour of reduction to determine whether a reduction of sentence is appropriate.”). *See similarly* 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”). Thus, a ‘significant change in circumstances’ only permits the convicted person *to apply* for an earlier review. The Panel still retains discretion to consider the early review *and* to eventually grant it.

7. As developed below, based on the information currently available to the Prosecution, there has not been any significant change in circumstances that would justify Lubanga's early release.<sup>9</sup>

*i. Lubanga's cooperation with the Court in its investigations and prosecutions (article 110(4)(a))*

8. In the First Sentence Review Decision, the Panel found that "the article 110(4) factor of an early and continuing willingness to cooperate with the Court's investigations and prosecutions is not present for the purposes of determining whether it is appropriate to reduce Mr Lubanga's sentence".<sup>10</sup> The Prosecution has no additional relevant information regarding this factor. Thus, this factor still appears not to be present.

*ii. Lubanga's voluntary assistance to the enforcement of the judgements and orders of the Court in other cases and in locating assets which may be used for the benefit of victims (article 110(4)(b))*

9. In the First Sentence Review Decision, the Panel also found that this factor was not present.<sup>11</sup> Moreover, since there was no evidence supporting a finding of Lubanga's voluntary assistance, the Panel did not address the Prosecution's allegations of Lubanga's interference in the *Ntaganda* case.<sup>12</sup>

10. The Prosecution has no new information related to Lubanga's voluntary assistance within the terms of article 110(4)(b). Thus, this factor still appears not to be present. To the contrary, new information shows that the *effects* of Lubanga's interference in the *Ntaganda* case have continued even after the First Sentence Review Decision. In particular, [REDACTED].

11. [REDACTED].<sup>13</sup>

12. [REDACTED].<sup>14</sup> [REDACTED].<sup>15</sup> [REDACTED].<sup>16</sup>

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<sup>9</sup> Lubanga, the Legal Representatives of Victims V01 and V02 ("LRVs") and Office of Public Counsel for Victims ("OPCV") will provide their observations together with the Prosecution on 14 September 2017. In its response, the Prosecution will address those observations and adjust, if required, its observations. Moreover, in their observations, the authorities of the Democratic Republic of the Congo ("DRC") refer to an annex which has not been provided to the Registry. See [ICC-01/04-01/06-3364-Anx](#) ("DRC Observations").

<sup>10</sup> [First Sentence Review Decision](#), para. 37. See also para. 36.

<sup>11</sup> [First Sentence Review Decision](#), para. 40.

<sup>12</sup> *Ibid.*

<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED].

<sup>15</sup> [REDACTED].

<sup>16</sup> [REDACTED].

13. [REDACTED]. Moreover, the Prosecution has not been granted access to the Registry's reports on Lubanga's authorised calls, visits and correspondence in the location where he currently serves his sentence.<sup>17</sup> [REDACTED]. Mindful of the Panel's instructions on the relevant time frame of the Parties' and participants' submissions,<sup>18</sup> the Prosecution does not elaborate on the results of its review. However it is ready to provide additional information if the Panel so requires.

14. The Prosecution further notes that, since the First Sentence Review Decision, on 17 December 2015 Trial Chamber VI (seised with the *Ntaganda* case) confirmed Lubanga's restrictions on telephone calls,<sup>19</sup> and then on 21 July 2017 lifted such restrictions due to, among other reasons, "the absence of information before the Chamber to indicate that Mr Lubanga has engaged in any attempt at witness interference since the date of the First [Restrictions] Review Decision" on 17 December 2015.<sup>20</sup>

<sup>17</sup> [ICC-01/04-02/06-1939-Red](#) ("Access Reports Decision"), para. 11 ("At this stage, in light of the above, and based on the information before it, the Chamber has not found it appropriate or necessary to grant the Prosecution access to the Registry Transmission Reports. In this regard, the Chamber however clarifies that the information transmitted to it by the Registry does not contain any report of interruption of calls or visits"). Lubanga was granted access to these reports: see [Access Reports Decision](#), para. 9 ("The Chamber notes that the information they contain does not appear to be *prima facie* relevant to the ongoing review of the restrictions, but nonetheless considers it appropriate, in the circumstances, for Mr Lubanga to also have access to these documents.")

<sup>18</sup> [Scheduling Order](#), para. 2 ("The Present review is limited to the Panel's consideration of whether there has been any significant change in circumstances since the date of the First Sentence Review Decision and, as such, *any written representations and responses thereto, as provided for below, shall only address the period since the First Sentence Review Decision*"). Emphasis added.

<sup>19</sup> [ICC-01/04-02/06-1061-Corr-Red2](#) ("First Restrictions Review Decision"). A corrigendum was issued on 21 January 2016. On 29 June 2015, Trial Chamber VI imposed certain interim restrictions on Lubanga's contacts ([ICC-01/04-02/06-683-Conf-Exp-Red2](#)). On 18 August 2015, the Chamber lifted some of the aforementioned restrictions and decided to continue others. In particular, it directed: (i) that three named individuals be or remain suspended from Lubanga's list of contacts; and (ii) active monitoring of Lubanga's non-privileged phone calls be conducted by the Registry, with the exception of phone calls made with his wife and children ([ICC-01/04-02/06-786-Red4](#)). On 22 September 2015, the Registrar ordered the active monitoring of Lubanga's non-privileged visits, noting that on the basis of the restrictions imposed by the Chamber on Lubanga's phone calls, the criteria of regulation 184(1) of the Regulations of the Registry were met ([ICC-01/04-02/06-852-Conf-Exp](#)).

<sup>20</sup> [ICC-01/04-02/06-2000-Red2](#) ("Lifting Restrictions Decision"), para. 27 (noting that since the [First Restrictions Review Decision](#), the situation has significantly changed because the Prosecution's case-in-chief closed on 29 March 2017 and the Legal representative for victims of the attacks concluded his presentation of evidence), para. 28 (noting that the Prosecution's submissions on witness interference date back primarily to 2013 and that there is no information before the Chamber to suggest that, since the date of the Restrictions First Review Decision, Lubanga has directly or indirectly attempted to interfere with witnesses or pervert the course of justice or that there is any specific motivation to do so) and para. 29 (again noting that the situation has significantly changed since the First Restrictions Review Decision in light of: "(i) the current stage of the proceedings; (ii) in particular, the Chamber's previous finding that the restrictions placed on Mr Lubanga 'should only remain in place until the [REDACTED]'; (iii) [REDACTED]; and (iv) the absence of information before the Chamber to indicate that Mr Lubanga has engaged in any attempt at witness interference since the date of the First [Restrictions] Review Decision. The Chamber finds that the justification for maintaining the current restrictions is no longer apparent.")

iii. *Whether Lubanga's conduct while in detention shows a genuine dissociation from his crimes (rule 223(a))*

15. In the First Sentence Review Decision, the Panel found that “there is no indication that Mr Lubanga’s conduct while in detention shows a genuine dissociation from his crimes within the meaning of rule 223(a)”.<sup>21</sup>

16. The Prosecution has no information demonstrating a “clear and significant change of circumstances” since that decision.<sup>22</sup> Although the Prosecution has no information about Lubanga’s conduct while in detention since being transferred from the ICC Detention Centre on 19 December 2015, any such potential good conduct generally or *vis-à-vis* other detainees in the detention facility and its staff is not sufficient on its own to meet this factor.<sup>23</sup>

17. Further, Lubanga’s offer in February 2016, in the context of the reparations proceedings, to meet with “*les victimes des crimes pour lesquels il a été condamné afin d'exprimer, de manière personnelle et sincère, ses sentiments et excuses à leur égard*” is also insufficient to establish Lubanga’s genuine dissociation from his crimes.<sup>24</sup> This belated and ambiguously crafted offer<sup>25</sup> is not a clear and sincere statement of remorse.<sup>26</sup> Indeed, although Lubanga wishes to express “his feelings and apologies” to the victims of the crimes for which he was convicted, he still does not acknowledge *his own culpability* for conscripting and enlisting children under the age of 15 years old and using them to participate actively in

<sup>21</sup> [First Sentence Review Decision](#), para. 47.

<sup>22</sup> See article 110(4)(c) referring to rule 223. See also [Katanga Sentence Review Decision](#), para. 47 defining “clear” as “free from doubt”, “unambiguous”, and “very obvious”, while “significant” is defined as “large enough to be noticed or have an effect” or “of a measurable large amount”.

<sup>23</sup> See [First Sentence Review Decision](#), para. 45 (“The Panel does not consider that good conduct while in detention generally or *vis-à-vis* other detainees and the Detention Centre staff is sufficient on its own to establish the necessary connection between this conduct a dissociation from the crimes for which Mr Lubanga was convicted”).

<sup>24</sup> [ICC-01/04-01/06-3196-Red2](#) (“Lubanga Observations Draft Implementation Plan”), para. 97. Counsel for Lubanga reiterated this offer on 11 October 2016 in the reparations hearing: [T-367](#), p. 84, ln. 7 to p. 85, ln. 5. In particular, see p. 84, lns. 15-21 (“Mr Lubanga proposes that there should be a ceremony, and he himself says that such ceremonies are organised regularly, maybe not in the entire country of Congo, but in Ituri, when serious crimes are committed, the people concerned meet together and carry out a sort of ritual or ceremony during which the perpetrator sincerely apologises to the family that suffered from the crime, and there is a general rule, maybe there is a cow or a sheep or a goat that is brought, and sometimes there are little, a few drops of blood that are drunk that seals the reconciliation”).

<sup>25</sup> The Prosecution is not aware of any other action taken by Lubanga. See [ICC-01/04-01/06-3360](#) (“OPCV Evidence Observations”), para. 56 (“*Le Représentant légal note qu'à ce jour cette initiative de la part de M. Lubanga est la seule mise en avant par la Défense [...]*”). See also [ICC-01/04-01/06-3352](#) (“Registry Observations”), para. 12 (“The Registry is not aware of any significant action taken by the sentenced person for the benefit of the victims”).

<sup>26</sup> [Katanga Sentence Review Decision](#), paras. 47 (on what “clear” means, *ie.* “free from doubt”, “unambiguous” and “very obvious”) and 48 (noting that Trial Chamber II, in the Sentencing Decision, “considered that ‘a statement of remorse may be taken into account as a mitigating circumstance [pursuant to rule 145(2)(a)[...]]’ but only if such a statement is ‘sincere’”).

hostilities.<sup>27</sup> Conversely, Katanga—in addition to withdrawing his appeal and filming an apology which was made available to various communities in the DRC—accepted Trial Chamber II’s findings on his role and conduct in the Bogoro crimes. The Panel noted that “Mr Katanga has repeatedly and publically taken responsibility for the crimes for which he was convicted, as well as expressed regret for the harm caused to the victims by his actions”.<sup>28</sup>

18. In sum, Lubanga’s offer to express “his feelings and apologies” to the victims in a traditional ceremony is not, on its own, a significant change in the circumstances underlying the factor in rule 223(a). On the information currently available, Lubanga has not genuinely dissociated from his crimes.

*iv. The prospect of Lubanga’s resocialisation and successful resettlement (rule 223(b))*

19. In the First Sentence Review Decision, the Panel found that this factor was met, since “Mr Lubanga has a family in the DRC with whom he currently maintains regular contact” and “has taken steps to arrange to be a post-graduate student following his incarceration”.<sup>29</sup> The Prosecution has no further information relating to this factor. Thus, the factor still appears to be met. However, before taking a definite position, the Prosecution awaits Lubanga’s forthcoming observations and supporting evidence.

*v. Significant social instability resulting from Lubanga’s early release (rule 223(c))*

20. In the First Sentence Review Decision, the Panel found that “there is no indication that the early release of Mr Lubanga would give rise to significant social instability within the meaning of rule 223(c)”.<sup>30</sup> Based on the Registry’s observations (noting that “there is an insufficient basis to conclude that Mr Lubanga’s early release would give rise to significant social instability”)<sup>31</sup> and notwithstanding DRC’s stated opposition to Lubanga’s early

<sup>27</sup> [First Sentence Review Decision](#), para. 46 (where the Panel declined to consider Lubanga’s expression of “remorse [at the First Sentence Review Hearing] for being unable to ‘convince the judges that [his] actions were effective when it came to demobilisation [of child soldiers]’, but did not acknowledge his own culpability for conscripting and enlisting children under the age of fifteen years old and using them to participate actively in hostilities or express remorse or regret to the victims of the crimes *for which he was convicted*. The Panel considers that this indicates that Mr Lubanga has not, as submitted by the Prosecutor and the Victims, genuinely dissociated from his crimes”). Emphasis in the original. See also [Katanga Sentence Review Decision](#), para. 47 (“there is a difference between a person expressing opposition to a particular criminal act in the abstract and that person accepting responsibility and expressing remorse for having committed those criminal acts”). See also [Strugar AJ](#), para. 365, where the Appeals Chamber stated that an expression of remorse requires more than expressing “sincere regrets”; it still “requires acceptance of some measure of moral blameworthiness for personal wrongdoing, falling short of the admission of criminal responsibility of guilt”.

<sup>28</sup> [Katanga Sentence Review Decision](#), para. 50. See [ICC-01/04-01/07-3606-Anx2](#) (“Katanga Filmed Apology”).

<sup>29</sup> [First Sentence Review Decision](#), paras. 52-53.

<sup>30</sup> [First Sentence Review Decision](#), paras. 63-64.

<sup>31</sup> [Registry Observations](#), paras. 5-11.

release,<sup>32</sup> no evidence has been obtained suggesting that there has been a significant change in the circumstances underlying this factor from the First Sentence Review Decision.

- vi. *Any significant action taken for the benefit of the victims and any impact on the victims and their families resulting from Lubanga's early release (rule 223(d))*

21. In the First Sentence Review Decision, the Panel found that “there is no indication of any significant action taken by Mr Lubanga for the benefit of the victims within the meaning of rule 223(d)” and noted “the potential detrimental effect that Mr Lubanga’s early release could have on the victims and on their families”.<sup>33</sup> The information available to the Prosecution does not show any significant change in the circumstances underpinning the Panel’s previous finding.

22. Lubanga’s *offer* to meet with the victims to express his feelings and apologies is not, on its own, “a significant action” within the terms of rule 223(d),<sup>34</sup> in particular, since the information available shows that Lubanga’s offer would likely not be well-received by the victims.<sup>35</sup> The victims’ position appears reasonable given Lubanga’s stance in the reparation proceedings wherein he requested Trial Chamber I to reject *all* victims’ applications. It is

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<sup>32</sup> [DRC Observations](#).

<sup>33</sup> [First Sentence Review Decision](#), paras. 69-70.

<sup>34</sup> [Katanga Sentence Review Decision](#), para. 103 (where Trial Chamber II noted “while Mr Katanga’s offer to meet with Victims in order to apologise to them is an action that potentially benefits the Victims, it is not on its own a significant action, given the uncertainty as to whether such action would be considered desirable and of benefit to the Victims”). *See also* paras. 90 (“Rule 223(d) [...] requires the Panel to consider actions taken by the sentenced person, as well as the perspective of the victims regarding those actions, i.e. whether the victims consider that the actions taken by the sentenced person have benefited them and whether they consider those actions to have been significant”), 91 (“while the perspective of victims should be considered under this factor, an assessment can only be done on a case by case basis, taking into account an objective evaluation of the actions taken by the sentenced person balanced against the reasonableness of the victims’ objections that they have not benefited from those actions”) and 100 (“The Panel considers that any steps taken by a sentenced person to attempt to ensure the broadest degree of acceptance and positive impact of that apology coupled with the reaction of the victims to such steps may be relevant to determining whether such an apology or offer to apologise is a ‘significant action’ that benefits victims”).

<sup>35</sup> *See e.g.* [OPCV Evidence Observations](#), paras. 56 (“*ce type d’initiative ne semble pas répondre aux souhaits des victimes et reste irréaliste dans le contexte actuel. En effet, M. Lubanga est toujours en détention en RDC, ce qui par ailleurs correspond aux souhaits des victimes, qui craignent que sa possible sortie de prison pendant la période de mise en œuvre des réparations ne les empêche de pouvoir participer aux programmes proposés*”) and 57 (“*depuis le début des procédures, M. Lubanga n’a montré aucune intention de reconnaître les souffrances causées aux victimes. De plus, tout au long du processus en réparation, il a contesté le statut des potentiels bénéficiaires.*”); [ICC-01/04-01/06-3333](#) (“OPCV Reply to Lubanga Response 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Transmission”), paras. 8, 12, 24 (“*Le Représentant légal note également que la Défense fait clairement montre de mauvaise foi à la lecture des dossiers soumis par les potentiels bénéficiaires. Il apparaît en effet évident que certains ont retenu une orthographe ou une prononciation de noms de commandants différente mais qui clairement correspond aux noms de commandants connus de et retenus par la Chambre*”); [ICC-01/04-01/06-3316](#) (“OPCV Request Reply to Lubanga Response 4<sup>th</sup> Transmission”), para. 7 (“*le Représentant légal note l’opposition constante et dénuée de nuance de la Défense à l’ensemble des dossiers qui lui sont présentés dans le cadre de cette procédure. En d’autres termes, il semble que la Défense envisage à ce jour une procédure en réparation au bénéfice des victimes, sans toutefois qu’aucune d’entre elles ne puisse ultimement en être bénéficiaire.*”). *See also* [ICC-01/04-01/06-3349](#) (“OPCV Reply to Lubanga Response 8<sup>th</sup> Transmission”), paras. 6, 11.

striking that, according to Lubanga, *none* of the 474 applicants for reparations meet the requirements set out in the *Lubanga* Reparations Appeals Judgment.<sup>36</sup> Lubanga has taken this position regardless of the complex situation in the field—of which Lubanga is well aware<sup>37</sup>—and despite the involvement of the Registry, the Trust Fund for Victims, OPCV and LRVs in the process to ensure the completeness of the applications.<sup>38</sup> Notably, according to OPCV, Lubanga even challenges Trial Chamber I’s findings in the *Lubanga* Trial Judgment.<sup>39</sup> Lubanga’s current attitude is, regrettably, consistent with his position in the First Sentence Review Hearing, in which Lubanga’s Counsel continued to challenge the Victims’ status.<sup>40</sup>

<sup>36</sup> [ICC-01/04-01/06-3291](#) (on the first transmission of victims’ applications: “*CONSTATER qu’en l’état aucune des 31 demandes de réparations visées aux présentes ne remplit les conditions requises par la Chambre d’appel*” [et] “*En conséquence, REJETER les 31 demandes de réparation transmises à la Défense*”); [ICC-01/04-01/06-3299](#) (requesting the same relief with respect to the second transmission of 23 victims’ applications); [ICC-01/04-01/06-3311](#) (requesting the same relief with respect to the third transmission of 95 victims’ applications); [ICC-01/04-01/06-3315](#) (requesting the same relief with respect to the fourth transmission of 92 victims’ applications); [ICC-01/04-01/06-3320](#) (requesting the same relief with respect to the fifth transmission of 61 victims’ applications); [ICC-01/04-01/06-3322](#) (requesting the same relief with respect to the sixth transmission of 60 victims’ applications); [ICC-01/04-01/06-3335](#) (requesting the same relief with respect to the seventh transmission of 60 victims’ applications); [ICC-01/04-01/06-3336](#) (requesting the same relief with respect to the eighth transmission of 53 victims’ applications).

<sup>37</sup> See e.g. [ICC-01/04-01/06-3359](#) (“V01 LRV Evidence Observations”), paras. 16-17 (where V01 LRV explained “*Dans le cas d’espèce, la détermination de ces éléments est rendue encore plus difficile à cause de l’ancienneté relative des faits [...], la situation de vulnérabilité dans laquelle se trouvent les victimes, l’attitude de la personne condamnée et de ses sympathisants vis-à-vis des victimes et de la procédure en réparations, l’environnement social et politique non stabilisé dans lequel la procédure se déroule[...].*”) and 28-31; [ICC-01/04-01/06-3325](#) (“OPCV Reply Request to Lubanga Response 5<sup>th</sup> and 6<sup>th</sup> Transmissions”), para. 10 (noting “*les réalités contextuelles de cette affaire, pourtant connues de tous y compris de la Défense – en particulier le temps écoulé depuis les crimes à l’origine de la victimisation et la situation prévalant sur le terrain aujourd’hui (13 années, comme le rappelle également la Défense), ne permettaient d’anticiper que la Défense estimerait néanmoins insuffisant et insatisfaisant tout élément d’information et tout document produit par les victimes, et ce de manière systématique [...]*”); [ICC-01/04-01/06-3317](#) (“V01 LRV Response OPCV Observations”), paras. 24-28. See also [OPCV Reply to Lubanga Response 8<sup>th</sup> Transmission](#), paras. 8-10; [OPCV Reply to Lubanga Response 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Transmissions](#), paras. 27, 32; [ICC-01/04-01/06-3296](#) (“V01 V02 LRVs Reply Lubanga Response 1<sup>st</sup> Transmission”), paras. 32-34; [ICC-01/04-01/06-3293-Red](#) (“OPCV Potential Beneficiaries Information”), paras. 13-27. See in this respect [ICC-01/04-01/06-3129-AnxA](#) (“*Lubanga* Amended Reparations Order”), para. 22 (“In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, *based on the specific circumstances of the case*. Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of ‘beyond reasonable doubt’, should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including *the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence*”). Emphasis added.

<sup>38</sup> See e.g. [ICC-01/04-01/06-3269](#) (“Registry Applications Report”), paras. 11-16; [V01 LRV Evidence Observations](#), paras. 20-23, 35, 38; [ICC-01/04-01/06-3317](#) (“V01 LRV Response OPCV Observations”), para. 29; [V01 V02 LRV Reply Lubanga Response 1<sup>st</sup> Transmission](#), paras. 30, 35; [ICC-01/04-01/06-3276](#) (“First Transmission”), para. 9.

<sup>39</sup> [OPCV Reply to Lubanga Response 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Transmissions](#), paras. 14-15 (on when the UPC existed); para. 21 (on Mandro camp); and paras. 22-23 (on the list of UPC commanders not being exhaustive). The Prosecution does not have access to the Defence annexes referred to by OPCV.

<sup>40</sup> [First Sentence Review Decision](#), para. 69 (“the Panel observes that Mr Lubanga has not responded to the Victims’ suggestion regarding his involvement in, inter alia, the reparation process or a demonstration of regret, which could be acts considered to be of relevance to this factor. On the contrary, the Panel observes that during the Sentence Review Hearing Mr Lubanga’s counsel continued to challenge the Victims’ status”). See [ICC-](#)

23. The Prosecution also notes that some of the reparation applicants have refused to disclose their identities to Lubanga.<sup>41</sup> However, according to the Victims and Witness Unit, although Lubanga's release could increase the stress levels of the 14 victims who participated in the trial proceedings, and raise concerns about the physical security of their relatives living in Ituri, it would not affect their security situation.<sup>42</sup>

24. Based on the above, there has not been a significant change in the circumstances underlying this factor. Accordingly, this factor still does not appear to be met.

*vii. Lubanga's individual circumstances warranting consideration of early release (rule 223(e))*

25. In the First Sentence Review Decision, the Panel found that "there are no individual circumstances which should be taken into consideration within the meaning of rule 223(c)".<sup>43</sup> The Prosecution is not aware of a significant change in Lubanga's individual circumstances which could be considered under this factor. Based on the available information, rule 223(c) still does not appear to be met.

### Conclusion and Relief Sought

26. Based on the information available, the Prosecution requests the Panel not to reduce Lubanga's sentence.



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Fatou Bensouda, Prosecutor

Dated this 18<sup>th</sup> day of September 2017

At The Hague, The Netherlands

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[01/04-01/06-3213-tENG](#), para. 9 (where V01 LRV noted "[t]he convict's consistently negative and, in fact, aggressive stance towards victims (e.g. during the reduction of sentence hearing)").

<sup>41</sup> See e.g. [First Transmission](#), para. 9; [Registry Applications Report](#), para. 18; [ICC-01/04-01/06-3287](#) ("Third Transmission"), para. 12; [ICC-01/04-01/06-3213-tENG](#), para. 11.

<sup>42</sup> [Registry Observations](#), paras. 13-16.

<sup>43</sup> [First Sentence Review Decision](#), paras. 74-76.