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No.: ICC-01/04-01/06
Date: **14 September 2017**

**THE APPEALS CHAMBER
JUDGES APPOINTED FOR THE SENTENCE REVIEW**

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

**Observations of the V01 Group of Victims on the Possibility of Review of
Mr Thomas Lubanga Dyilo's Sentence
With Two Annexes**

Source: Legal Representatives of the V01 group of victims

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

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**Victims Participation and Reparations
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Other

I. PROCEDURAL HISTORY

1. By decision of 22 September 2015, the judges of the Appeals Chamber appointed for the review concerning the possibility of a reduction of Mr Thomas Lubanga Dyilo's sentence determined that the factors for reduction were not present, and decided to review the matter in two years' time.¹
2. The Order of 7 August 2017² invited written representations from the participating victims on their views and concerns concerning a possible reduction of sentence, with due consideration for the criteria stated in article 110(4) of the Statute and rule 223 of the Rules of Procedure and Evidence.
3. The Registrar filed observations on 4 September 2017,³ as did the Democratic Republic of the Congo on 11 September 2017.⁴

II. LEGAL FRAMEWORK

a. Article 110 of the Statute

4. Article 110 of the Statute provides:
 3. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
 - (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
 - (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation

¹ ICC-01/04-01/06-3173 22-09-3 /32 EO RO.

² ICC-01/04-01/06-3346 07-08-2017 1/5 NM RW.

³ ICC-01/04-01/06-3352 04-09-2017.

⁴ ICC-01/04-01/06-3364 + Anx.

- which may be used for the benefit of victims; or
- (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.

b. Rule 223

5. Rule 223 fleshes out a number of the criteria laid down by article 110(4)(c):
- (a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime;
 - (b) The prospect of the resocialization and successful resettlement of the sentenced person;
 - (c) Whether the early release of the sentenced person would give rise to significant social instability;
 - (d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release;
 - (e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.

III. OBSERVATIONS

6. The victims are of the view that the legal criteria for reduction of sentence are not, at this point, present.

Criterion (a): attitude towards the crimes committed

7. In the two years since the decision of 11 September 2015, Mr Lubanga's conduct has not shown his dissociation from the crimes for which he was sentenced.

Criterion (c): risk of social instability

8. The Registry's observations advance the opinion that early release of the

sentenced person should not give rise to social instability or to security issues for the victims who gave evidence or appeared in Court. That view is at variance with that of the DRC government, which fears that the case may have national repercussions. In any case, that consideration was already taken into account in the 2015 decision and so does not constitute new information.

9. The victims participating in the proceedings fear that Mr Lubanga's release and return to the region might hamper implementation of the Trust Fund for Victims' reparations programme, as he holds sway over public opinion in some quarters in Ituri. The collective reparations process, with the symbolic reparations component chosen by the Court, does require a degree of cooperation from local communities and, hence, from their leadership. Yet some of the leaders continue to keep strong ties to the political group headed by the sentenced person, and opposition on their part to the reparations programmes may deter any participation in them.

Criterion (d): significant action for the benefit of the victims

10. As the Registry's observations confirm, no significant action for the benefit of the victims has been taken in the last two years. While the Defence did announce at the hearing on 13 October 2016 before Trial Chamber II that Mr Lubanga was considering extending his apologies to the victims, he would only do so once he had been released and at a traditional ceremony also to be attended by the victims, which could be problematic for those who fear retaliation, were they to make their participation in the proceedings known.

11. Whereas public apologies on the part of the sentenced person could have formed part of the reparations, there was nothing to prevent him from taking other significant action, such as disclosing lists of former child soldiers to assist the Trust Fund for Victims in identifying the potential victims; issuing a public appeal in support of the victims and their right to reparations; galvanizing the party, of which he is still President, for the benefit of the victims; and making a reasonable proposal for his financial involvement in the reparations, while engaging in dialogue with the victims and their representatives.
12. Throughout the reparations proceedings, the sentenced person has instead declined all cooperation in the process, deigning only to dispute the standing of all potential victims identified to date. He does not accept the fact of the former child soldiers' recruitment and so continues to object to their inclusion in reparations programmes.
13. This lack of any change in conduct compels the Legal Representatives to conclude that the legal criteria for sentence reduction are not, at this point, met.

IV. REQUEST FOR DEFERRAL OF THE DECISION

14. In spite of Mr Lubanga's persistent attitude, all of the Legal Representatives resumed contact with the Defence in the hope of securing tangible and realistic arrangements for the apologies, drawing on the initiatives taken by

other persons convicted by the Court. They did so by e-mail dated 26 August 2017.⁵ Lead Counsel for Mr Lubanga replied on 7 September 2017 by an official letter, which merits consideration.⁶

15. In the letter, the Defence claims that, in his statement at the hearing before your Chamber on 21 August 2015, he offered “[TRANSLATION] apologies” and “[TRANSLATION] understanding” to the victims; the claim runs counter to your Panel’s analysis in the decision of 21 September 2015⁷ and gives the impression that the letter does not reflect a genuine change in attitude.

16. That notwithstanding, the aforementioned e-mail also contains new information:

- Mr Lubanga expressed his desire to participate in the reparations process and even to become its “[TRANSLATION] committed partner”.
- His proposed public apologies could be held during his detention, and the victims’ perception – that the practical arrangements announced (namely, a meeting to be held at a public, traditional ceremony) would entail his prior release – was the result of a misunderstanding.
- He has no intention whatsoever of making his contribution to reparations contingent on prior release and will not seek any reduction of sentence if his continued detention can in any way serve social harmony and the well-being of the communities

⁵ Annex 1.

⁶ Annex 2.

⁷ Decision of 22 September 2015, 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.”

who suffered from his crimes.

17. The Legal Representatives do not wish to rule out that the new proposals, **should they prove to be sincere**, may make way for public apologies that provide some measure of satisfaction to victims and may pave the way for successful reparations. Their clients, however, have yet to be convinced of Mr Lubanga's sincerity and consider that a reduction of sentence cannot be founded on "significant action" which has reached only the stage of a promise, and has not begun to materialize in any way.
18. The instruments of the Court do not provide for conditions to be attached to sentence reduction, unlike the "conditional release" regimes which exist in many national jurisdictions: here, sentence reduction is subject to conduct antecedent to the decision to be taken.
19. To resolve this conundrum and to afford Mr Lubanga the opportunity to prove his sincerity by honouring his promises, the Legal Representatives suggest postponing the decision for six months. That time frame should allow for a meeting to be held between Mr Lubanga and a delegation of victims authorized to participate in the proceedings, with their respective counsel, in order to achieve consensus on the possible forms of public apologies for the crimes which attracted a penalty, and to implement the proposed apologies, should agreement be reached. Then, the Trust Fund for Victims could be involved in the activity, in order to look at Mr Lubanga's possible role in symbolic reparations, in the involvement of certain local communities in the Trust Fund's programme of services, and in the mobilization of potential beneficiaries. To foster that process, the parties could, if they regard it necessary, avail themselves of a mediator.
20. The initiation of such a process could, if successful, assuage the victims' fears,

promote reconciliation between communities and within Mr Lubanga's community, remove obstacles to the implementation of reparations, and enable release to be effected in favourable conditions.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER TO:

Take note of the Legal Representatives' observations.

Determine that the legal criteria for sentence reduction are not, at this juncture, present.

Defer for six months the review concerning a possible sentence reduction.

For the V01 group of victims

[signed] [signed]

Luc Walley and Franck Mulenda, Legal Representatives.

Dated this 14 September 2017,

At Brussels, Belgium and Kinshasa, DRC