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No: **ICC-01/04-01/06**

Date: **14 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 THE CONGO**

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

**Public Document  
With two public annexes**

**Submissions on the Second Review Concerning the Reduction of Sentence of  
Mr Thomas Lubanga Dyilo**

**Source:** Office of Public Counsel for Victims

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

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## I. INTRODUCTION

1. The Legal Representative of potential beneficiaries of reparations<sup>1</sup> submits that the factors listed under article 110(4) of the Rome Statute are not present and the criteria set out in rule 223 of the Rules of Procedure and Evidence have not been met, and that there is no “clear and significant change of circumstances sufficient to justify the reduction of sentence”.

2. In particular, the Legal Representative contends that in the past two years, there has been no significant change in the circumstances that justified the Accused's continued detention in 2015. Accordingly, Mr Lubanga's original sentence must be maintained.<sup>2</sup> The Legal Representative notes further that the only circumstances that may presently be described as different concern procedural developments in the instant case, namely the progressively tangible reparations procedures. The Legal Representative submits that such circumstances call for Mr Lubanga's continued detention.

3. Indeed, victims are concerned that Mr Lubanga's early release could affect their safety and/or well-being and thereby prevent them from accessing reparations programmes. Victims are also concerned that the possibility of Mr Lubanga's presence in Ituri might intensify animosity between communities and their stigmatization by members of communities which continue to support him.

## II. PROCEDURAL HISTORY

4. On 3 March 2015, the Appeals Chamber handed down its judgment on the appeals against the “Decision establishing the principles and procedures to be

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<sup>1</sup> “*Décision relative à la demande de réexamen du Bureau du conseil public pour les victimes de la Décision du 6 avril 2017*” (Trial Chamber II), ICC-01/04-01/06-3338, 13 July 2017, para. 10. See also “*Decision on the OPCV's request to participate in the reparations proceedings*” (Trial Chamber I), ICC-01/04-01/06-2858, 5 April 2012.

<sup>2</sup> “*Decision on Sentence pursuant to Article 76 of the Statute*” (Trial Chamber I), ICC-01/04-01/06-2901, para. 107; See also “*Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*”, (Appeals Chamber), ICC-01/04-01/06-3121-Red, para. 529.

applied to reparations” (“Judgment on appeal”) and its annex “Order for Reparations (amended)” (“Order”), directing the Trust Fund for Victims (“TFV”) to submit a draft implementation plan for reparations within six months.<sup>3</sup> The TFV submitted its draft on 3 November 2015<sup>4</sup> and added supplementary information on 7 June 2016<sup>5</sup> and 13 February 2017.<sup>6</sup> On 6 April 2017, Trial Chamber II approved the draft.<sup>7</sup>

5. On 22 September 2015, the three judges of the Appeals Chamber appointed for the review concerning reduction of sentence rendered their “Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo (“First Decision”),<sup>8</sup> in which they declined to reduce Mr Lubanga’s sentence and decided that the issue would be reviewed in two years.

6. On 13 July 2017, Trial Chamber II issued an order instructing the parties to file submissions on the monetary value of the harm suffered by the victims and on the determination of the amount for reparations payable by Mr Lubanga.<sup>9</sup>

7. On 7 August 2017, pursuant to rule 224 of the Rules of Procedure and Evidence, the three judges of the Appeals Chamber appointed for the review

<sup>3</sup> “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2” (Appeals Chamber), ICC-01/04-01/06-3129 A and ICC-01/04-01/06-3129-AnxA, A2 A3, 3 March 2015 (“Judgment on appeal” and “Order”).

<sup>4</sup> “Filing on Reparations and Draft Implementation Plan”, ICC-01/04-01/06-3177-Conf and its two Annexes, 3 November 2015.

<sup>5</sup> “Additional Programme Information Filing”, ICC-01/04-01/06-3209, 7 June 2016.

<sup>6</sup> “Information regarding Collective Reparations”, ICC-01/04-01/06-3273 and its annexes, 13 February 2017.

<sup>7</sup> “Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims” (Trial Chamber II), ICC-01/04-01/06-3289, 6 April 2017.

<sup>8</sup> “Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo” (Three judges of the Appeals Chamber appointed for the review concerning reduction of sentence), ICC-01/04-01/06-3173, 22 September 2015.

<sup>9</sup> “Order Instructing the Parties to File Submissions on the Evidence Admitted for the Determination of Thomas Lubanga Dyilo’s Liability for Reparations” (Trial Chamber II), ICC-01/04-01/06-3339-tENG, 13 July 2017. See also “Decision on the Application of the Office of Public Counsel for Victims for an extension of the time limit set by the Order of 13 July 2017”, (Trial Chamber II), ICC-01/04-01/06-3345-tENG, 21 July 2017.

concerning reduction of sentence issued the “Scheduling Order for the second review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”.<sup>10</sup> The Scheduling Order was amended on 5 September 2017.<sup>11</sup>

8. On 4 September 2017, the Registry filed its observations on the criteria set out in rule 223 of the Rules of Procedure and Evidence and noted that there had been no significant change in the circumstances that in 2015 had justified Mr Lubanga’s continued detention.<sup>12</sup> The Registry also forwarded to the Chamber the request of the authorities of the Democratic Republic of the Congo (DRC) for an extension of the time limit to file submissions on the matter. The following day, the Chamber extended the time limit for the DRC authorities to 8 September 2017.<sup>13</sup>

9. On 11 September 2017, the Registry forwarded the submissions of the DRC authorities expressing their objection to a reduction of Mr Lubanga’s sentence.<sup>14</sup>

### III. SUBMISSIONS

10. The Legal Representative submits that (A) the factors listed under article 110(4) of the Rome Statute are not present and the criteria set out in rule 223 of the Rules of Procedure and Evidence have not been met. Hence, there has been no “clear and significant change of circumstances sufficient to justify the reduction of

<sup>10</sup> “Scheduling Order for the second review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”(Three judges of the Appeals Chamber appointed for the review concerning reduction of sentence), ICC-01/04-01/06-3346, 7 August 2017. See also “Order modifying the ‘Scheduling Order for the second review concerning reduction of sentence of Mr Thomas Lubanga Dyilo’” (Three judges of the Appeals Chamber appointed for the review concerning reduction of sentence), ICC-01/04-01/06-3355, 5 September 2017.

<sup>11</sup> “Order modifying the ‘Scheduling Order for the second review concerning reduction of sentence of Mr Thomas Lubanga Dyilo’”, ICC-01/04-01/06-3355, 5 September 2017, *idem* footnote 10.

<sup>12</sup> “Registry’s Observations on the Criteria set out in rule 223 of the Rules of Procedure and Evidence”, ICC-01/04-01/06-3352 with Confidential Annex, 4 September 2017.

<sup>13</sup> “Order modifying the ‘Scheduling Order for the second review concerning reduction of sentence of Mr Thomas Lubanga Dyilo’”, ICC-01/04-01/06-3355, 5 September 2017, footnote 10 above.

<sup>14</sup> “Transmission of the Observations of the authorities of the Democratic Republic of Congo on the Criteria set out in rule 223 of the Rules of Procedure and Evidence”, ICC-01/04-01/06-3364 with confidential Annex, 11 September 2017.

sentence”. The Legal Representative argues *a contrario* that (B) the only change since the 2015 review, namely the progress made in the implementation of reparations, militates in favour of Mr Lubanga’s continued detention.

**A. The factors listed under article 110(4) of the Rome Statute are not present and the criteria set out in rule 224 of the Rules of Procedure and Evidence have not been met: there has been no significant change of prevailing circumstances since 2015**

11. The Legal Representative takes note of the Registry’s observations on this matter and, in particular, the points below on the criteria set out in rule 223(b), (c) and (d) of the Rules of Procedure and Evidence. Since the last review, there has been no significant change in the overall political context in Ituri; there is no confirmation of Mr Lubanga’s political interests or ambitions;<sup>15</sup> the Registry is not aware of any significant action taken by the sentenced person for the benefit of the victims;<sup>16</sup> and the Registry notes that from a psychological standpoint, Mr Lubanga’s early release is likely to increase the stress levels of some victims and affect their perception of justice.<sup>17</sup>

12. Moreover, the DRC Government issued a negative opinion on the reduction of Mr Lubanga’s sentence because of the impact of the case in the DRC in the recent past.<sup>18</sup> The Legal Representative notes that that opinion was issued in the light of the criteria set out in rule 223 of the Rules of Procedure and Evidence, which were communicated to the DRC Government.<sup>19</sup> The following criteria, in particular, were accordingly taken into account: Mr Lubanga’s conduct while in detention with

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<sup>15</sup> “Registry’s Observations on the Criteria set out in rule 223 of the Rules of Procedure and Evidence”, ICC-01/04-01/06-3352, 4 September 2017, para. 10, footnote 12 above. The Legal Representative notes further that elections have still not been held, contrary to the original schedule, paras. 6 and 7.

<sup>16</sup> *Ibid.*, para. 12.

<sup>17</sup> *Ibid.*, paras. 13, 15 and 16.

<sup>18</sup> “Transmission of the Observations of the authorities of the Democratic Republic of Congo on the Criteria set out in rule 223 of the Rules of Procedure and Evidence”, footnote 14 above.

<sup>19</sup> “Registry’s Observations on the Criteria set out in rule 223 of the Rules of Procedure and Evidence”, footnote 12 above, Confidential Annex, p. 2.

respect to the crimes of which he was convicted; the prospect of his resocialization and resettlement; and whether his early release would give rise to significant social instability.<sup>20</sup> Absent any detailed evaluation, the Legal Representative merely notes the unfavourable opinion in this case. The Legal Representative nevertheless points out that, since Mr Lubanga is currently in detention in the DRC, the DRC authorities are best placed to determine whether the above criteria have been met.

13. In addition, the Legal Representative wishes to notify the three judges of the Appeals Chamber of the contact initiated with the Defence by all Legal Representatives of Victims during the drafting of these submissions.<sup>21</sup> The Legal Representative wishes to emphasize that, whereas the assertions contained in the Defence's response are a true reflection of what Mr Lubanga said at the hearing of 21 August 2015,<sup>22</sup> which took place before the decision to confirm his continued detention, they appear to patently contradict the stances hitherto adopted by the Defence during the proceedings. In fact, although Mr Lubanga claims that he is willing to devote his life to the people of Ituri, such statements, which were made in parallel with his contradictory conduct during the proceedings, are clearly not sufficient to convince or reassure potential victim beneficiaries. In fact, the Legal Representative has observed throughout the proceedings that Mr Lubanga has systematically refused to acknowledge the harm suffered by victims of the crimes of which he was convicted. The Legal Representative nevertheless points out that she welcomes the recent letter from the Defence confirming Mr Lubanga's intentions, and once again endorses the position that the pending proceedings, in particular reparations proceedings, should essentially seek to reconcile communities. The Legal Representative, like Mr Lubanga, also highlights the fact that "the wounds run deep

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<sup>20</sup> "Registry's Observations on the Criteria set out in rule 223 of the Rules of Procedure and Evidence", *Supra*, footnote 12, Confidential Annex, p. 2.

<sup>21</sup> Letter sent by the Legal Representatives of Victims to the Defence at 17.07 on 26 August 2017 (Annex 1) and the response sent by the Defence to the Legal Representatives of victims at 18.51 on 7 September 2017 (Annex 2).

<sup>22</sup> Transcript of the hearing of 20 August 2015, ICC-01/04-01/06-T-366-Red-FRA WT, pp. 29 and 30.

and will require long and sustained care to heal.”<sup>23</sup> Admittedly, Mr Lubanga's attitude is indeed a step in the right direction, but it cannot be afforded significant weight since his actions belie his words.

14. The Legal Representative recalls that the three judges of the Appeals Chamber appointed for the review concerning reduction of sentence have emphasized that this evaluation must be restricted to establishing whether there has been any significant change of circumstances since the First Decision<sup>24</sup> rather than being used, as suggested by the Defence during the first review in 2015, to establish the existence of exceptional circumstances which would militate against Mr Lubanga's release.<sup>25</sup>

15. The Legal Representative submits that it is clear from the evidence presented above that, in the past two years, there has been no significant change in any of the circumstances examined. Indeed, apart from the information already mentioned above, the Legal Representative is not aware of any information which would suggest that the cooperation that was taken into account in the Sentencing Decision has had any additional post-sentence impact on any of the Court's investigations and prosecutions;<sup>26</sup> any information which would establish Mr Lubanga's voluntary assistance in enabling the enforcement of the Court's judgments and orders in other pending cases;<sup>27</sup> any additional information showing Mr Lubanga's dissociation from his crimes through his conduct while in detention;<sup>28</sup> and lastly, any information concerning Mr Lubanga's individual circumstances and which should be taken into consideration in determining whether to reduce his sentence.<sup>29</sup>

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<sup>23</sup> Transcript of the hearing of 20 August 2015, ICC-01/04-01/06-T-366-Red-FRA WT, p. 2, lines 20-21.

<sup>24</sup> “Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”, footnote 8 above, para. 22.

<sup>25</sup> Transcript of the hearing of 20 August 2015, footnote 22 above, p. 5, lines 26-27.

<sup>26</sup> “Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”, footnote 8 above, para. 36.

<sup>27</sup> *Ibid*, para. 40: “However, the Panel observes that 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”.

<sup>28</sup> *Ibid*. paras. 46-47.

<sup>29</sup> *Ibid*. para. 76.

**B. Developments in the reparations procedure call for Mr Lubanga's continued detention**

16. The Legal Representative submits that the only events that have taken place since the 2015 review concerning the reduction of Mr Lubanga's sentence are the developments in the reparations procedures that have now moved into a more tangible phase. Indeed, following Trial Chamber II's approval of its draft reparations implementation plan, the TFV should now be evaluating the programmes proposed by prospective partners who have come forward. The programmes should soon be submitted for the Chamber's approval. The actual implementation of reparations, i.e. when victims come forward to benefit from the programmes that are rolled out, is imminent.

17. However, as pointed out by the Legal Representative in her previous submissions,<sup>30</sup> the prospect of being involved in these programmes if Mr Lubanga is back in Ituri, or at least free to come and go, is a source of concern to potential beneficiary victims. Indeed, many have expressed fears for their personal safety and that of their families and for their general welfare, were Mr Lubanga to learn of their identity when they access reparations programmes. The victims are also concerned that if Mr Lubanga is present in Ituri, it could intensify animosity between communities and their stigmatization by members of the communities which continue to support him.

18. The Legal Representative, therefore, also wishes to direct the Chamber's attention to the fact that some victims, who have waited for the past 14 years to receive support and assistance for the harm they have suffered, could forego the benefits of these programmes as a means of protecting themselves and their families.

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<sup>30</sup> "Observations sur les éléments admis dans la procédure en vue de fixer le montant des réparations auquel est tenu M. Thomas Lubanga Dyilo", ICC-01/04-01/06-3360, 8 September 2017, para. 56.

19. Indeed, the Legal Representative notes that although it is hard to grasp the dynamics in the villages where the victims live, it should be recalled that even the Registry encountered difficulties during its awareness-raising sessions in Hema villages that are close to Mr Lubanga. These difficulties, moreover, had made it impossible for the Legal Representative to visit those villages to meet with potential beneficiaries of reparations.<sup>31</sup> The Legal Representative stresses the need to take into account the victims' frame of mind, and submits that this will be key to their involvement in the reparations programmes, and hence, to the success of the programmes. As long as the victims continue to feel that Mr Lubanga's early release will compromise their safety and/or well-being, to the extent that it hinders their access to reparations programmes, then clearly, Mr Lubanga must continue to be detained until he has served the entire sentence imposed on him.

20. Lastly, the Legal Representative highlights the conclusion that the Defence has generously arrived at:

[TRANSLATION] If, as you seem to believe, Mr Lubanga's continued detention until the expiry of his sentence can in any way promote social peace and the well-being of the people affected by the crimes prosecuted, then, Mr Lubanga has informed me, he will not seek any reduction in sentence.<sup>32</sup>

21. The Legal Representative states that in the light of the views and concerns expressed by her clients, the confirmation of Mr Lubanga's continued detention will reassure them and foster the consolidation of efforts to restore social cohesion and reconciliation.

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<sup>31</sup> "Deuxième demande de prorogation du délai aux fins de dépôt des demandes en réparation supplémentaires de bénéficiaires potentiels", ICC-01/04-01/06-3279-Conf, 20 March 2017, paras. 14-16.

<sup>32</sup> See Annex 2, footnote 21 above.

#### IV. CONCLUSION

22. Accordingly, the Legal Representative respectfully requests the three judges of the Appeals Chamber appointed for the review concerning reduction of sentence to confirm the original sentence imposed on Mr Lubanga and order his continued detention.

[signed]

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**Paolina Massidda**  
**Principal Counsel**

Dated this 14 September 2017

At The Hague, Netherlands