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**No. ICC-01/04/01/06
Date: 3 November 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

**Second Decision on the review concerning reduction of sentence of
Mr Thomas Lubanga Dyilo**

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

Registrar
Mr Herman von Hebel

Other
The Presidency

The three judges of the 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,

Render unanimously the following

DECISION

1. The request to postpone the review of Mr Thomas Lubanga Dyilo's sentence pursuant to rule 223 (3) of the Rules of Procedure and Evidence is rejected.
2. The sentence of Mr Thomas Lubanga Dyilo shall not be reduced pursuant to article 110 (4) and (5) of the Statute.

REASONS

I. PROCEDURAL HISTORY

1. On 14 March 2012, Trial Chamber I ("Trial Chamber") convicted Mr Thomas Lubanga Dyilo ("Mr Lubanga") of having committed in Ituri, Democratic Republic of the Congo ("DRC"), the war crimes of conscripting and enlisting children under the age of fifteen years old and using them to participate actively in hostilities.¹
2. On 10 July 2012, the Trial Chamber sentenced Mr Lubanga to 14 years imprisonment.² On 1 December 2014, the Appeals Chamber, by majority, confirmed the conviction and the sentence imposed.³

¹ "Judgment pursuant to Article 74 of the Statute", [ICC-01/04-01/06-2842](#), para. 1358.

² "Decision on Sentence pursuant to Article 76 of the Statute", [ICC-01/04-01/06-2901](#), para. 107.

³ "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", [ICC-01/04-01/06-3121-Red](#) (A 5), para. 529; "Partly dissenting opinion of Judge Sang-Hyun Song", [ICC-01/04-01/06-3121-Anx1](#) (A 5); "Dissenting Opinion of Judge Anita Ušacka", [ICC-01/04-01/06-3121-Anx2](#) (A 5). *See also* Annex 3, [ICC-01/04-01/06-3121-Anx3](#) (A 5); Annex 4, [ICC-01/04-01/06-3121-Anx4](#) (A 5); "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'", [ICC-01/04-01/06-3122](#) (A 4 A 6), para. 119; "Partly Dissenting Opinion of Judge Sang-Hyun Song", [ICC-01/04-01/06-3122-Anx1](#) (A 4 A 6). *See also* Annex 2, [ICC-01/04-01/06-3122-Anx2](#) (A 4 A 6).

3. On 15 June 2015, pursuant to rule 224 (1) of the Rules of Procedure and Evidence (“Rules”), the Appeals Chamber appointed three judges of the Appeals Chamber - Judges Silvia Fernández de Gurmendi, Howard Morrison and Piotr Hofmański (“Panel”) - for the purposes of conducting the review concerning the reduction of Mr Lubanga’s sentence.⁴

4. On 22 September 2015, having received submissions from the parties and participants⁵ as well as the Registrar⁶ and having held a hearing⁷ (“2015 Sentence Review Hearing”), the Panel determined that it was not appropriate to reduce the sentence of Mr Lubanga and decided that it would review Mr Lubanga’s sentence pursuant to article 110 (5) of the Statute two years from the issuance of that decision⁸ (“First Sentence Review Decision”).

5. On 7 August 2017, the Panel issued a scheduling order for the second review of the sentence and invited the parties and participants to submit written representations⁹ (“7 August 2017 Scheduling Order”). The DRC and the Registrar were invited to file written representations on the criteria set out in rule 223 (a) to (e) of the Rules whereas Mr Lubanga, the Prosecutor, the Legal Representatives of Victims V01, the

⁴ “Decision appointing three judges of the Appeals Chamber for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”, [ICC-01/04-01/06-3135](#).

⁵ “Prosecution’s submissions regarding Thomas Lubanga Dyilo’s sentence review”, 10 July 2015, ICC-01/04-01/06-3150-Conf-Exp; a third public redacted version was registered on 25 September 2015 ([ICC-01/04-01/06-3150-Red4](#)); “Observations of the V01 group of victims on the possible review of Mr Thomas Lubanga Dyilo’s sentence”, dated 10 July 2015 and registered on 31 July 2015, [ICC-01/04-01/06-3149-tENG](#); original French version, registered on 10 July 2015 ([ICC-01/04-01/06-3149](#)); “Observations of the Defence for Mr Lubanga on a reduction in sentence”, dated 14 July 2015 and registered on 30 July 2015, ICC-01/04-01/06-3151-Conf-Exp-tENG; original French version, registered on 14 July 2015 (ICC-01/04-01/06-3151-Conf-Exp); a public redacted version was registered on 14 July 2015 ([ICC-01/04-01/06-3151-Red](#)).

⁶ “Observations on the criteria set out in rule 223 (a) to (e) of the Rules of Procedure and Evidence”, 3 July 2015, ICC-01/04-01/06-3144-Conf-Exp; a public redacted version was registered on 7 July 2015 ([ICC-01/04-01/06-3144-Red](#)). This document was originally filed confidentially but was reclassified as public pursuant to the instruction of the three Judges of the Appeals Chamber appointed for the review concerning reduction of sentence, 17 August 2015. *See also* Annex 4, dated 6 September 2015 and registered on 7 September 2015, [ICC-01/04-01/06-3144-Anx4-tENG](#); original French version, dated 6 September 2015 and registered on 7 September 2015 ([ICC-01/04-01/06-3144-Anx4](#)). This document was originally filed confidentially but was reclassified as public pursuant to the “Registry’s transmission of the letter from the Democratic Republic of the Congo dated 24 August 2015”, dated 2 September 2015 and registered on 3 September 2015, [ICC-01/04-01/06-3170](#) and Appeals Chamber’s instruction, 6 September 2015.

⁷ Transcript of 21 August 2015, [ICC-01/04-01/06-T-366-Red-ENG](#) (WT).

⁸ “Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”, [ICC-01/04-01/06-3173](#), p. 3.

⁹ “Scheduling Order for the second review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”, [ICC-01/04-01/06-3346](#).

Legal Representatives of Victims V02, and the Office of Public Counsel for Victims (“OPCV”) were notably invited to file submissions regarding the presence of the factors mentioned in article 110 (4) (a) of the Statute and 110 (4) (b) of the Statute, as well as other factors provided in rule 223 (a) to (e) of the Rules.¹⁰

6. By letter dated 25 August 2017, the Legal Representatives of Victims V01 and V02 as well as the OPCV informed Counsel for Mr Lubanga of their position on Mr Lubanga’s attitude towards the victims since the First Sentence Review Decision and requested that he make a public declaration on his responsibility with respect to the crimes for which he was convicted.¹¹ Mr Lubanga responded in a letter on 7 September 2017¹² (“Letter of 7 September 2017”).

7. On 4 September 2017, the Registrar filed his observations.¹³ The Registrar included an exchange of emails between the Registry and the government of the DRC indicating that the latter would only be able to file its written representations by 8 September 2017.¹⁴

8. On 5 September 2017, considering that the DRC government’s representations were of importance for deciding the matter before it, the Panel decided to modify the deadlines for the submissions of written representations.¹⁵

9. On 11 September 2017, the Registrar transmitted the observations of the authorities of the DRC¹⁶ and, on 14 September 2017, the Defence,¹⁷ the Legal

¹⁰ [7 August 2017 Scheduling Order](#), para. 3.

¹¹ Annex 1 to “Observations of the V01 Group of Victims on the Possibility of Review of Mr Thomas Lubanga Dyilo’s Sentence”, dated 25 August 2017 and registered on 27 September 2017, [ICC-01/04-01/06-3366-Anx1-tENG](#); original French version, registered on 14 September 2017 ([ICC-01/04-01/06-3366-Anx1](#)).

¹² Annex 2 to “Observations of the V01 Group of Victims on the Possibility of Review of Mr Thomas Lubanga Dyilo’s Sentence”, dated 7 September 2017 and registered on 3 October 2017, [ICC-01/04-01/06-3366-Anx2-tENG](#); original French version, dated 7 September 2017 and registered on 14 September 2017 ([ICC-01/04-01/06-3366-Anx2](#)).

¹³ “Registry’s Observations on the Criteria set out in rule 223 of the Rules of Procedure and Evidence”, [ICC-01/04-01/06-3352](#) (“Registrar’s Observations”).

¹⁴ Annex to Registrar’s Observations.

¹⁵ “Order modifying the ‘Scheduling Order for the second review concerning reduction of sentence of Mr Thomas Lubanga Dyilo’”, [ICC-01/04-01/06-3355](#).

¹⁶ “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](#).

¹⁷ “Defence Observations on the Second Review concerning Reduction of Sentence of Thomas Lubanga Dyilo”, ICC-01/04-01/06-3365-Conf-Exp-tENG (“Defence First Observations”), para. 15; a public redacted version was registered on 14 September 2017 ([ICC-01/04-01/06-3365-Red](#)).

Representatives of Victims V01,¹⁸ the OPCV,¹⁹ the Prosecutor²⁰ and the Legal Representatives of Victims V02²¹ filed their respective observations.

10. In keeping with the 7 August 2017 Scheduling Order, the OPCV,²² the Defence²³ and Prosecutor²⁴ filed their written responses to the first observations of the parties and participants on 21 September 2017.

II. PRELIMINARY ISSUE: REQUEST TO POSTPONE THE SECOND SENTENCE REVIEW

11. As a preliminary matter, the Panel shall consider the request by the Legal Representatives of Victims V01 and V02 that the review of Mr Lubanga's sentence be postponed.

¹⁸ “Observations of the V01 Group of Victims on the Possibility of Review of Mr Thomas Lubanga Dyilo’s Sentence”, registered on 5 October 2017, [ICC-01/04-01/06-3366-tENG](#) (“Observations of Legal Representatives of Victims V01”); original French version, registered on 14 September 2017 ([ICC-01/04-01/06-3366](#)). *See also* Annex 1, dated 25 August 2017 and registered on 27 September 2017, [ICC-01/04-01/06-3366-Anx1-tENG](#); original French version, registered on 14 September 2017 ([ICC-01/04-01/06-3366-Anx1](#)); [Letter of 7 September 2017](#).

¹⁹ “Submissions on the Second Review Concerning the Reduction of Sentence of Mr Thomas Lubanga Dyilo”, registered on 19 October 2017, [ICC-01/04-01/06-3367-tENG](#) (“OPCV First Observations”); original French version, registered on 14 September 2017 ([ICC-01/04-01/06-3367](#)). *See also* Annex 1, dated 25 August 2017 and registered on 27 September 2017, [ICC-01/04-01/06-3367-Anx1-tENG](#); original French version, registered on 14 September 2017 ([ICC-01/04-01/06-3367-Anx1](#)); Annex 2, dated 7 September 2017 and registered on 2 October 2017, [ICC-01/04-01/06-3367-Anx2-tENG](#); original French version, registered on 14 September 2017 ([ICC-01/04-01/06-3367-Anx2](#)).

²⁰ “Prosecution’s submissions regarding Thomas Lubanga’s second sentence review”, ICC-01/04-01/06-3368-Conf; a public redacted version was registered on 18 September 2017 ([ICC-01/04-01/06-3368-Red](#) (“Prosecutor’s First Observations”)). *See also* Annex A, ICC-01/04-01/06-3368-Conf-Exp-AnxA; Annex B, ICC-01/04-01/06-3368-Conf-Exp-AnxB.

²¹ “Representations of the V02 Team of Legal Representatives of Victims pursuant to Appeals Chamber Order ICC-01/04-01/06-3346 regarding the Review of Mr Thomas Lubanga’s Sentence”, registered on 5 October 2017, [ICC-01/04-01/06-3369-tENG](#) (“Observations of Legal Representatives of Victims V02”); original French version, registered on 14 September 2017 ([ICC-01/04-01/06-3369](#)). *See also* Annex 1, dated 25 August 2017 and registered on 27 September 2017, [ICC-01/04-01/06-3369-Anx1-tENG](#); original French version, dated 25 August 2017 and registered on 14 September 2017 ([ICC-01/04-01/06-3369-Anx1](#)); Annex 2, dated 7 September 2017 and registered on 2 October 2017, [ICC-01/04-01/06-3369-Anx2-tENG](#); original French version, dated 7 September 2017 and registered on 14 September 2017 ([ICC-01/04-01/06-3369-Anx2](#)).

²² “Réponse aux observations sur le deuxième examen de la question de la réduction de la peine de M. Thomas Lubanga Dyilo”, ICC-01/04-01/06-3371-Conf (“OPCV Second Observations”); a public redacted version was registered on 21 September 2017 ([ICC-01/04-01/06-3371-Red](#)).

²³ “Réponse de la Défense concernant le deuxième examen de la question de la réduction de la peine de M. Thomas Lubanga Dyilo”, ICC-01/04-01/06-3372-Conf (“Defence Second Observations”); a public redacted version was registered on 21 September 2017 ([ICC-01/04-01/06-3372-Red](#)).

²⁴ “Prosecution’s Consolidated Response to Lubanga’s, OPCV’s and Legal Representatives of Victims V01’s and V02’s observations regarding Thomas Lubanga’s second sentence review”, [ICC-01/04-01/06-3373](#) (“Prosecutor’s Second Observations”).

A. Submissions by the parties and participants

12. The Legal Representatives of Victims V01 and V02 suggest that the Panel's second review decision be postponed for six months.²⁵

13. According to the Legal Representatives of Victims V01, whilst the conditions for Mr Lubanga's early release are still not met,²⁶ the Letter of 7 September 2017 "merits consideration"²⁷ as it contains "new information"²⁸ on the intentions of Mr Lubanga. They recall that, in this letter, Mr Lubanga expresses his desire to participate in the reparation process and even become its "committed partner".²⁹ They note that he also reiterates his proposal to organise public apologies which could be, according to the Legal Representatives, held whilst he is still in detention and that he clearly affirms that he will not seek any reduction of sentence if his continued detention would in any way serve social harmony and the well-being of the communities who suffered from his crimes.³⁰

14. The Legal Representatives of Victims V01 argue that they do not wish to rule out that these 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.³¹ According to them, the proposed six month postponement would allow for a meeting to be held between Mr Lubanga and a delegation of victims authorised to participate in the proceedings, in order to achieve consensus on the possible forms of public apologies, and to implement them, should agreement be reached.³²

15. In the view of the Legal Representatives of Victims V01, 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 his release to be effected in favourable

²⁵ [Observations of Legal Representatives of Victims V01](#), para. 19; [Observations of Legal Representatives of Victims V02](#), paras 18, 25.

²⁶ [Observations of Legal Representatives of Victims V01](#), para. 13

²⁷ [Observations of Legal Representatives of Victims V01](#), para. 14.

²⁸ [Observations of Legal Representatives of Victims V01](#), para. 16.

²⁹ [Observations of Legal Representatives of Victims V01](#), para. 16.

³⁰ [Observations of Legal Representatives of Victims V01](#), para. 16.

³¹ [Observations of Legal Representatives of Victims V01](#), para. 17.

³² [Observations of Legal Representatives of Victims V01](#), para. 19.

conditions.³³ The Legal Representatives of Victims V02 submit that if the Panel agrees to postpone its decision, the reparation process may be implemented effectively and with the involvement of all parties and the Trust Fund.³⁴

16. The Prosecutor submits that the Panel should decide on the basis of the information currently available and should not postpone its decision.³⁵ She submits that the Letter of 7 September 2017 merely repeats Mr Lubanga's earlier statements which the Panel already considered in its First Sentence Review Decision.³⁶

17. The OPCV states that it is opposed to Mr Lubanga's early release as well as to the postponement of the decision of the Panel.³⁷ The OPCV also argues that the decision of the Panel on the second review is urgent in order to reassure the victims who will potentially have access to the reparation programme.³⁸

18. Mr Lubanga notes the request for the postponement of the decision on the review of his sentence and underlines his wish to participate in a ceremony where he could meet the victims of the crimes for which he was convicted and declares his readiness to express himself in favour of reconciliation.³⁹

B. Determination by the Panel

19. Rule 224 (3) of the Rules provides that the panel of three judges of the Appeals Chamber "shall review the question of reduction of sentence every three years, unless it establishes a shorter interval in its decision taken pursuant to article 110, paragraph 3 of the Statute". In the First Sentence Review Decision, the Panel did not consider that a three year interval until the next review of sentence was appropriate and decided, pursuant to article 110 (5) of the Statute, that it would review Mr Lubanga's sentence two years from the issuance of its First Sentence Review Decision.⁴⁰

³³ [Observations of Legal Representatives of Victims V01](#), para. 19.

³⁴ [Observations of Legal Representatives of Victims V02](#), para. 18.

³⁵ [Prosecutor's Second Observations](#), para. 8.

³⁶ [Prosecutor's Second Observations](#), para. 8.

³⁷ [OPCV Second Observations](#), para. 9.

³⁸ [OPCV Second Observations](#), para. 9.

³⁹ [Defence Second Observations](#), para. 22.

⁴⁰ [First Sentence Review Decision](#), para. 79.

20. Although the Panel considers that it would have the power to further modify the timing of the issuance of its review decision, it finds, in the present case, that the arguments put forward by the parties and participants do not warrant the postponement of its decision.

21. It must be noted that, in his Letter of 7 September 2017 and in the Defence Second Observations,⁴¹ Mr Lubanga mainly refers to intentions and actions to be taken in the future. The Legal Representatives of Victims V01 refer to the “desire” of Mr Lubanga to participate in the reparations process and to “become” its “committed partner”.⁴² In the view of the Panel, there is too much uncertainty as to whether the proposals or changes will transpire and be implemented and how much time this would entail.

22. The Panel recalls, finally, that rule 224 (3) of the Rules permits the sentenced person to request a new review at any time on the basis of a significant change in circumstances justifying reduction.

23. For all the above mentioned reasons, the Panel will not postpone its review of Mr Lubanga’s sentence.

III. MERITS

A. Applicable law

24. Article 110 (3) of the Statute provides in relevant part that “[w]hen the person has served two thirds of the sentence, [...] the Court shall review the sentence to determine whether it should be reduced”.

25. Article 110 (4) of the Statute provides:

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 continuous willingness of the person to cooperate with the Court in its investigations and prosecutions;

⁴¹ [Defence Second Observations](#), paras 24-27.

⁴² [Observations of Legal Representatives of Victims V01](#), para. 16.

(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 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 [...].

26. Article 110 (5) of the Statute provides in relevant part that, “[i]f the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence”, the Court shall conduct another review at a later time.

27. Rule 223 of the Rules provides:

In reviewing the question of reduction of sentence pursuant to article 110, paragraphs 3 and 5, the [Panel] shall take into account the criteria listed in article 110, paragraph 4 (a) and (b), and the following criteria:

(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.

28. In its First Sentence Review Decision, the Panel considered that, read together, these provisions provide a comprehensive framework for the purposes of sentence review.⁴³ The Panel also underlined that, while conducting a review is mandatory, article 110 (4) of the Statute makes clear that the Panel’s ultimate decision of whether to reduce the sentence is discretionary in nature.⁴⁴

⁴³ [First Sentence Review Decision](#), para. 19.

⁴⁴ [First Sentence Review Decision](#), para. 21.

29. In addition, and importantly, the Panel found that the plain reading of article 110 (4) of the Statute and rule 223 of the Rules does not support the “presumption of early release” based on the fact that two thirds of a sentence have been served.⁴⁵ The Panel noted that, in carrying out its review, it would assess the information and evidence brought before it by the parties and participants.⁴⁶

30. The Panel finally notes that this is the second review of Mr Lubanga’s sentence. In the 7 August 2017 Scheduling Order, the Panel made it clear that the second review would be 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. Therefore, the Panel’s analysis pursuant to article 110 (5) of the Statute is focussed on whether there is any information available that shows any developments since the First Sentence Review Decision was issued.

B. Review of Mr Lubanga’s sentence

31. Below, the Panel will assess each of the factors under article 110 (4) of the Statute and rule 223 of the Rules to determine whether there has been a change in circumstances since the First Sentence Review Decision and, if so, whether the change was significant. In making this determination, the Panel has carefully considered all of the submissions of the parties and participants, even if they are not reproduced or referred to in the sections below.

32. The Panel notes that some of the parties and participants have reiterated arguments that were already submitted to and, therefore, considered by the Panel in the context of the first review of Mr Lubanga’s sentence. Given that the present review is focussed on whether there has been any change in circumstances since the First Sentence Review Decision, the Panel has not considered these arguments.

⁴⁵ [First Sentence Review Decision](#), para. 27.

⁴⁶ [First Sentence Review Decision](#), para. 33.

1. *Article 110 (4) (a): The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions*

(a) First Sentence Review Decision

33. In the First Sentence Review Decision, the Panel considered that neither Mr Lubanga nor the Prosecutor had identified any cooperation or willingness to cooperate on the part of Mr Lubanga that continued beyond the conviction and imposition of sentence. The Panel had not been presented with any information that the cooperation taken into account in the Sentencing Decision had any additional post-sentence impact on the Court's investigations or prosecutions. It concluded that, as such, in light of the relevant information, the acts of cooperation pointed to by Mr Lubanga did not qualify as "an early and continuing willingness to cooperate" within the meaning of article 110 (4) (a) of the Statute.⁴⁷

(b) Submissions of the parties and participants

34. Mr Lubanga submits that he has reiterated his willingness to participate in the reparations phase.⁴⁸ He recalls that he made a legitimate request for a video link to take part in the initial reparations hearings held on 11 and 13 October 2016 and that he is willing to cooperate and personally be involved in reparations when they are put in place.⁴⁹

35. Mr Lubanga also underlines that he has participated in all the submissions made for the determination of reparations and of his financial liability. He explains that the individual observations that he made regarding the 474 applications for reparations seek to shed light on the relevance and reliability of the information contained in the applications,⁵⁰ to enable the Trial Chamber to rule on the collective reparations for victims of the crimes for which he was convicted, as well as on his financial liability.⁵¹ According to Mr Lubanga, his participation at the reparations phase thus contributes to the efficient administration of justice.⁵²

⁴⁷ [First Sentence Review Decision](#), para. 36-37.

⁴⁸ [Defence First Observations](#), para. 15.

⁴⁹ [Defence First Observations](#), para. 17.

⁵⁰ [Defence First Observations](#), para. 24; [Defence Second Observations](#), para. 18.

⁵¹ [Defence First Observations](#), para. 24; [Defence Second Observations](#), para. 18.

⁵² [Defence First Observations](#), para. 19.

36. Finally, Mr Lubanga submits that his firm intention to cooperate with the Court is clearly expressed through the proposal that he made in February and October 2016,⁵³ in the context of the reparation proceedings, to organise a public and traditional ceremony at which he would meet the victims, listen to them and offer his apologies (“Ceremony Proposal”).

37. The Prosecutor considers that the factor mentioned in article 110 (4) of the Statute is still not present.⁵⁴ In particular, she argues that Mr Lubanga’s continuing opposition to the 474 applicants for reparation does not constitute cooperation in terms of article 110 (4) (a) of the Statute. In her view, his “blanket opposition”⁵⁵ to all applications does not assist the efficient administration of justice. According to the Prosecutor, Mr Lubanga has, to the contrary, prolonged the reparations proceedings by effectively requiring the Legal Representatives and OPCV to reply to his observations.⁵⁶

38. The OPCV also submits that this factor is not present.⁵⁷

39. The Legal Representatives of Victims V01 argue that Mr Lubanga has not cooperated in the reparation proceedings. They aver that Mr Lubanga does not accept the fact of the former child soldiers’ recruitment and so continues to object to their inclusion in reparation programmes.⁵⁸

40. The Legal Representatives of Victims V02 submit that Mr Lubanga’s good faith and his wish to cooperate with the reconciliation process in Ituri, although apparent, still need to be proven in this case.⁵⁹

⁵³ “Observations de la Défense de M. Thomas Lubanga relatives au « filing on reparations and Draft Implementation Plan », date du 3 novembre 2015”, 1 February 2016, ICC-01/04-01/06-3196-Conf; a public redacted version was registered on 2 February 2016, [ICC-01/04-01/06-3196-Red2](#); Transcript of 11 October 2016, [ICC-01/04-01/06-T-367-ENG](#) (ET WT), p. 84.

⁵⁴ [Prosecutor’s First Observations](#), para. 8.

⁵⁵ [Prosecutor’s Second Observations](#), para. 6; [Prosecutor’s First Observations](#), para. 22,

⁵⁶ [Prosecutor’s Second Observations](#), para. 6.

⁵⁷ [OPCV First Observations](#), para. 15.

⁵⁸ [Observations of Legal Representatives of Victims V01](#), para. 12.

⁵⁹ [Observations of Legal Representatives of Victims V02](#), paras 11-12.

(c) Determination by the Panel

41. As the Panel indicated in its First Sentence Review Decision, article 110 (4) (a) of the Statute refers to the “early and continuous willingness of the person to cooperate” with the Court’s investigation and prosecutions.⁶⁰ In the context of the present review, this concerns in particular Mr Lubanga’s participation in the reparation proceedings.

42. Given the scope of the present decision, which focusses on the actual changed circumstances since the date of the First Sentence Review Decision, the Panel shall not take into account any actions that Mr Lubanga may take in the future in order to show his determination to cooperate with the Court.

43. The information presented to the Panel shows that Mr Lubanga has indeed, during the period of time subject to examination, actively participated in the reparation proceedings. The Panel notes, however, that Mr Lubanga did so essentially by exercising his rights to defend his interests in the context of the reparation process. Active participation in proceedings, albeit welcome, cannot constitute an indication of cooperation on the part of Mr Lubanga in the meaning of article 110 (4) (a) of the Statute. Therefore the exercise of Mr Lubanga’s procedural rights does not demonstrate *per se* a change of circumstance since the date of the First Sentence Review Decision.

44. Accordingly, the Panel considers that, on the basis of the information received, there has been no change in circumstances regarding the factor set out in article 110 (4) (a) of the Statute regarding an early and continuing willingness to cooperate with the Court’s investigations and prosecutions. As a consequence, this factor is still not present for the purposes of determining whether it is appropriate to reduce Mr Lubanga’s sentence.

⁶⁰ [First Sentence Review Decision](#), para. 36.

2. *Article 110 (4) (b): The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases*

(a) First Sentence Review Decision

45. In the First Sentence Review Decision, the Panel found that none of the participants had presented any information that could potentially establish the presence of voluntary assistance to the Court by Mr Lubanga. Accordingly, on the basis of the information received, the Panel indicated that the factor set out in article 110 (4) (b) of the Statute was not present for purposes of determining whether it was appropriate to reduce Mr Lubanga's sentence. Having found that this factor was in any case not present, the Panel found that there was no need for it to address the allegations presented by the Prosecutor that Mr Lubanga had interfered in the *Ntaganda* case.⁶¹

(b) Submissions of the parties and participants

46. The Prosecutor submits that she has no new information relating to Mr Lubanga's voluntary assistance to the Court within the meaning of article 110 (4) (b) of the Statute.⁶² The Prosecutor again raises the issue of Mr Lubanga's interference in the *Ntaganda* case, which, according to her, continued after the First Sentence Review Decision.⁶³

47. Mr Lubanga replies to these allegations by arguing that none of the elements provided by the Prosecutor demonstrate any interference in the *Ntaganda* case.⁶⁴

(c) Determination of the Panel

48. As indicated by the Panel in its First Sentence Review Decision, before addressing the Prosecutor's allegations that Mr Lubanga interfered in the *Ntaganda* case, it must establish that there is evidence to support a finding that Mr Lubanga provided voluntary assistance. The Panel notes that none of the participants have presented any new information in that regard. Therefore, the Panel does not identify any change in circumstances since the date of the First Sentence Review Decision.

⁶¹ [First Sentence Review Decision](#), para. 40.

⁶² [Prosecutor's First Observations](#), para. 10.

⁶³ Confidential version of Prosecutor's First Observations, paras 10-14.

⁶⁴ [Defence Second Observations](#), para. 4-14.

49. Accordingly, on the basis of the information received, the Panel finds that the factor set out in article 110 (4) (b) of the Statute relating to the voluntary assistance of Mr Lubanga in enabling the enforcement of the Court's judgments and orders in other cases is still not present for purposes of determining whether it is appropriate to reduce Mr Lubanga's sentence.

3. *Rule 223 (a): The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime*

(a) First Sentence Review Decision

50. The Panel previously considered that Mr Lubanga had not genuinely dissociated from his crimes. On the basis of the information received, the Panel found that the factor mentioned in rule 223 (a) of the Rules was not present.

(b) Submissions of the parties and participants

51. Mr Lubanga does not make specific submissions with regard to this factor. However, in the Letter of 7 September 2017, Counsel for Mr Lubanga recalls the content of the declaration of his client made during the 2015 Sentence Review Hearing. Reference is also made to the Ceremony Proposal, made in 2016, to organize a reconciliation meeting with the victims of the crimes where Mr Lubanga would notably "express his feelings and apologies to them".⁶⁵ According to the Letter of 7 September 2017, Mr Lubanga is ready to reiterate his wish to engage in such a ceremony during a new hearing before the Panel.

52. The Prosecutor submits that she has no information demonstrating a clear and significant change of circumstance since the First Sentence Review Decision.⁶⁶ She submits that, although Mr 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 and using them to participate actively in hostilities".⁶⁷

⁶⁵ [Letter of 7 September 2017](#), p. 2.

⁶⁶ [Prosecutor's First Observations](#), para. 16.

⁶⁷ [Prosecutor's First Observations](#), para. 17.

53. The Legal Representatives of Victims V01 submit that, in the two years since the First Sentence Review Decision, Mr Lubanga's conduct has not shown his dissociation from the crimes for which he was sentenced.⁶⁸

(c) Determination of the Panel

54. As the Panel indicated in its First Sentence Review Decision, 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. The Panel considered that rule 223 (a) of the Rules is primarily concerned with the latter, and not the former.

55. In its First Sentence Review Decision, the Panel carefully assessed the content of the declaration Mr Lubanga made during the 2015 Sentence Review Hearing. This declaration will therefore not be considered as a new circumstance for the purpose of the present decision.

56. The Panel also takes note of the Letter of 7 September 2017 and of Mr Lubanga's wish to express his apologies to the victims of the crimes for which he was convicted. However, on the basis of the information received, which is mainly referring to *future* actions that have not yet been taken, the Panel finds that, at present, there has been no change in circumstances since the First Sentence Review Decision.

57. Therefore, there is still no indication, at this stage, that Mr Lubanga's conduct while in detention shows a genuine dissociation from his crimes within the meaning of rule 223 (a) of the Rules for the purpose of determining whether it is appropriate to reduce his sentence.

4. *Rule 223 (b): The prospect of the resocialization and successful resettlement of the sentenced person*

(a) First Sentence Review Decision

58. In the First Sentence Review Decision, the Panel found that, on the basis of the information received, there was prospect for the resocialisation and successful

⁶⁸ [Observations of Legal Representatives of Victims V01](#), para. 7.

resettlement of Mr Lubanga in the DRC. It therefore considered that the factor laid out in rule 223 (b) of the Rules was present.⁶⁹

(b) Submissions of the parties and participants

59. Mr Lubanga argues that he has maintained contact with his wife and children almost on a daily basis, despite his many years of detention. Mr Lubanga also submits that he remained steadfast in his plan to resume post-graduate studies in psychology at the University of Kisangani.⁷⁰ According to him, “in addition to being a proof of resettlement, [this plan] could also become a crucial factor in the reconciliation process by encouraging dialogue between the Hema and Lendu communities, and thus constitute ‘personal support’ taken into account in the review of the reduction of the sentence”.⁷¹

60. The Prosecutor states that she has no further information relating to this factor and concedes that it still appears to be met,⁷² although, according to her, Mr Lubanga has not yet contributed in any manner to the reconciliation process.⁷³

(c) Determination of the Panel

61. On the basis of the information received, the Panel finds that there has not been a significant change in circumstances and that the prospect for the resocialisation and successful resettlement that was recognized in the First Sentence Review Decision still exists.

5. *Rule 223 (c): Whether the early release of the sentenced person would give rise to significant social instability*

(a) First Sentence Review Decision

62. The Panel previously considered that, on balance, the information presented suggested that Mr Lubanga’s release would give rise to some level of social instability, but that this instability was not demonstrated to be “significant” within the meaning of rule 223 (c) of the Rules.

⁶⁹ The Panel notes that paras 53 and 77 of the First Sentence Review Decision contain an error. In these paragraphs, “rule 223 (c)” should indeed read “rule 223 (b)”.

⁷⁰ [Defence First Observations](#), para. 33.

⁷¹ [Defence First Observations](#), para. 34.

⁷² [Prosecutor’s First Observations](#), para. 19.

⁷³ [Prosecutor’s Second Observations](#), para. 5.

(b) Submissions of the parties and participants

63. The Registrar submits there is an insufficient basis to conclude that Mr Lubanga's early release would give rise to significant social instability.⁷⁴ The Registrar indicates that, although political tensions and related violence have significantly increased in the country due, in part, to delays of the presidential election initially scheduled for November 2016, tensions are less pronounced in Ituri.⁷⁵ While tensions between communities do rise and fall depending on localised events and developments at any given time, the overall context of continued tensions between Hema and Lendu communities has not altered significantly.⁷⁶

64. Regarding the current state of the *Union des Patriotes Congolais* founded by Mr Lubanga, the Registrar notes that it was recognised as a formal political party in recent years with candidates running in the 2011 legislative elections securing two seats out of the 500 seats of the National Assembly. The Registrar notes that, unlike what he reported in his previous observations with regard to the election calendar, there is currently no clear timeline for the next legislative elections.⁷⁷

65. Additionally, the Registrar submits that there is no confirmation of Mr Lubanga's political interests or ambitions. Furthermore, the Registrar maintains that regardless of his intentions, set against the backdrop of the general context in the DRC, specific dynamics in Ituri, and the current state of the UPC, the overall political context in Ituri has not altered significantly since the First Sentence Review Decision.⁷⁸

66. Mr Lubanga takes note of the Registrar's observations and recalls that in his Letter of 7 September 2017, his Counsel informed the Legal Representatives and the OPCV that he would not ask for a reduced sentence if his serving his full sentence could in any way be of use to social peace and the well-being of the people affected by the crimes tried.⁷⁹

⁷⁴ [Registrar's Observations](#), para. 11.

⁷⁵ [Registrar's Observations](#), para. 6.

⁷⁶ [Registrar's Observations](#), para. 8.

⁷⁷ [Registrar's Observations](#), para. 9.

⁷⁸ [Registrar's Observations](#), para. 10.

⁷⁹ [Defence First Observations](#), para. 41.

67. According to the Prosecutor, no evidence has been obtained that there is a significant change in the circumstances underlying this factor from the First Sentence Review Decision.⁸⁰

68. The DRC authorities submit that it is important to consider “the national impact of the case in the relatively recent past”, without providing further detail in this regard, and generally object to the reduction of Mr Lubanga’s sentence.⁸¹

69. The Legal Representatives of Victims V01 refer to the fear expressed by the victims that Mr Lubanga’s release and return to the region might hamper implementation of the Trust Fund for Victims’ reparation programme. They recall that the collective reparation process does require a degree of cooperation from local communities and hence from their leadership and that some of the leaders continue to keep strong ties with the political group headed by Mr Lubanga and that opposition on their part to the reparation programme may deter any participation in them.⁸²

70. The Legal Representatives of Victims V02 submit that any risk of social instability is more related to the potential for stigmatisation between victims during the reparations implementation process than to the possibility of an adverse reaction to Mr Lubanga’s early release.⁸³

71. The OPCV argues that the potential presence of Mr Lubanga in Ituri might reinforce the animosity between communities and stigmatise them even more in the eyes of members of Mr Lubanga’s supporting community.⁸⁴

(c) Determination of the Panel

72. In the view of the Panel, and in light, in particular, of the Registrar’s observations, circumstances have slightly changed in the DRC since the date of the First Sentence Review Decision.

⁸⁰ [Prosecutor’s First Observations](#), para. 20.

⁸¹ Annex to “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”, dated 8 September 2017 and registered on 2 October 2017, [ICC-01/04-01/06-3364-Anx-tENG](#); original French version, dated 8 September 2017 and registered on 11 September 2017 ([ICC-01/04-01/06-3364-Anx](#)).

⁸² [Observations of Legal Representatives of Victims V01](#), para. 9.

⁸³ [Observations of Legal Representatives of Victims V02](#), para. 19.

⁸⁴ [OPCV First Observations](#), para. 17.

73. However, according to the Panel, these changes are not significant. As in the First Sentence Review Decision, there remains conflicting information about the potential effects of Mr Lubanga's release and, as in the First Sentence Review Decision, the information presented suggests that Mr Lubanga's release would give rise to some level of social instability, but this instability has not been demonstrated to be "significant", contrary to the requirement of rule 223 (c) of the Rules.

74. Accordingly, on the basis of the information received, the Panel still finds 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) of the Rules for the purpose of determining whether it is appropriate to reduce his sentence.

6. *Rule 223 (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*

(a) First Sentence Review Decision

75. The Panel had previously noted that none of the participants presented any information that could potentially establish the presence of an action taken by Mr Lubanga for the benefit of the victims of the crimes for which he was convicted. It also noted the relevance of the information brought by the participants in relation to the potential detrimental effect that Mr Lubanga's early release could have on the victims and on their families. The Panel concluded that the factor mentioned in rule 223 (d) of the Rules was not present.

(b) Submissions of the parties and participants

76. Mr Lubanga recalls the declaration he made during the 2015 Sentence Review Hearing, and reiterated in the Letter of 7 September 2017. He reaffirms his sincere wish to be of service to all those who have suffered during the conflict. He also acknowledges that he has a duty in the reconciliation process and that it is his duty to take a public position against the use of children in armed conflicts.⁸⁵

⁸⁵ [Defence First Observations](#), paras 44-46.

77. Mr Lubanga also argues that the Ceremony Proposal, which would be organised at his initiative, will allow former child soldiers who are stigmatised within their community to be recognised as victims and thus facilitate their reintegration.⁸⁶

78. For the Prosecutor, Mr 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) of the Rules, in particular, since the available information shows that Mr Lubanga's offer would be unlikely to be well received by the victims. In the Prosecutor's view, the victims' position appears reasonable given Mr Lubanga's stance in the reparation proceedings and his systematic opposition to the applications.⁸⁷

79. The Registrar submits that he is not aware of any significant action taken by Mr Lubanga for the benefit of the victims.⁸⁸ In addition, focusing on the victims who have testified before the Court and on victims who have expressed their views and concerns, the Registrar indicates that the early release of Mr Lubanga is likely to increase stress levels and to raise concerns about the physical security of relatives living in the area of Ituri.⁸⁹ Nevertheless, the Registrar concludes that the early release of Mr Lubanga would not affect the security situation of these victims.⁹⁰

80. The Legal Representatives of Victims V02 submits that Mr Lubanga should adopt a more cooperative approach towards the victims.⁹¹

81. In the view of the Legal Representatives of Victims V01, a traditional ceremony to be attended by the victims could be problematic for those who fear retaliation, and would have to make known their participation in the proceedings.⁹² In their submission, the Letter of 7 September 2017, which refers extensively to the 2015

⁸⁶ [Defence First Observations](#), para. 48.

⁸⁷ [Prosecutor's First Observations](#), para. 22.

⁸⁸ [Registrar's Observations](#), para. 12.

⁸⁹ [Registrar's Observations](#), para. 15.

⁹⁰ [Registrar's Observations](#), para. 16.

⁹¹ [Observations of Legal Representatives of Victims V02](#), para. 23.

⁹² [Observations of Legal Representatives of Victims V01](#), para. 10.

Sentence Review Hearing which was already considered by the Panel in its First Sentence Review Decision, does not reflect a genuine change of attitude.⁹³

82. The OPCV underlines the fears expressed by the victims if Mr Lubanga were to know their identity when accessing the reparation programme and insists on the need to take into account their feelings, which it argues will be crucial for the success of the reparation programme.⁹⁴

83. In reply, Mr Lubanga suggests that some of the fears expressed by the victims may be irrational, and although understandable, do not amount to a reasonable assessment of the risks.⁹⁵

(c) Determination of the Panel

84. The Panel recalls that it must first evaluate the question of the significance of any actions taken by Mr Lubanga for the benefit of the victims, which is the first aspect of rule 223 (d) of the Rules. The Panel notes that, on this issue, many arguments raised by the parties and participants were already considered in the First Sentence Review Decision. Therefore, these arguments will not be reexamined in the present decision.

85. Turning to the proposal to organise a public ceremony at which Mr Lubanga could meet the victims of the crimes of which he was convicted and during which he would offer his apologies, although constituting a change of circumstance, it is not sufficiently significant for the Panel to consider modifying Mr Lubanga's sentence on this basis. This is because, as mentioned above, there is currently no indication as to if and when the proposal is to be put into practice. In other words, while there is a proposal, no action has yet been taken.

86. As to Mr Lubanga's statement, in his Letter of 7 September 2017, that "he would not ask for a reduced sentence if his serving his full sentence could in any way be of use to [...] the well-being of the people affected by the crimes tried", the Panel takes note of his intentions, which essentially aim at taking into account the views of

⁹³ [Observations of Legal Representatives of Victims V01](#), para. 15.

⁹⁴ [OPCV First Observations](#), para. 19.

⁹⁵ [Defence Second Observations](#), para. 16.

the victims. However, in light of the information at hand, this does not constitute a significant change of circumstance showing *acts* of meaningful involvement in the reparation process or a demonstration of sincere apologies or regret.

87. Therefore, the Panel does not identify any significant change in circumstances since the date of the First Sentence Review Decision. Accordingly, on the basis of all the information received, the Panel finds that there is still no indication of any significant action taken by Mr Lubanga for the benefit of the victims within the meaning of rule 223 (d) of the Rules for the purpose of determining whether it is appropriate to reduce Mr Lubanga's sentence.

7. *Rule 223 (e): Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age*

(a) First Sentence Review Decision

88. The Panel determined, in the First Sentence Review Decision, that there were no individual circumstances with respect to Mr Lubanga which should be taken into consideration within the meaning of rule 223 (e) of the Rules in determining whether it was appropriate to reduce his sentence.

(b) Submissions of the parties and participants

89. Mr Lubanga recalls that detained persons are entitled to serve their sentence under conditions which protect them from any risk of ill-treatment.⁹⁶ He mentions that the Makala prison in the DRC, to which he was transferred, was the target of an armed attack during the night between 16 and 17 May 2017, which resulted in the escape of 5,000 prisoners.⁹⁷ Mr Lubanga argues that the security measures in force in the Makala prison are a serious cause of concern, and that his right to serve his sentence without risk of physical harm has been breached. He submits that this situation must therefore be taken into account when reviewing his sentence.⁹⁸

⁹⁶ [Defence First Observations](#), para. 51.

⁹⁷ [Defence First Observations](#), para. 53.

⁹⁸ [Defence First Observations](#), para. 58.

90. The Prosecutor submits that the attack against the Makala prison in the DRC does not, in itself and in light of all relevant known factors, justify Mr Lubanga's early release.⁹⁹

91. The OPCV agrees with the Defence that Mr Lubanga should benefit from conditions of detention that respect fundamental rights. The OPCV argues, however, that this is not the only situation that should be taken into account in the decision on the reduction of sentence; stating that based on open-source information, the level of security at the Malaka prison seems to have been recently reinforced.¹⁰⁰

(c) Determination of the Panel

92. The Panel understands Mr Lubanga to argue that a reduction of sentence should serve as a remedy for alleged violations of his human right to serve his sentence without risk of physical harm. The Panel already stated in its First Sentence Review Decision that the reduction of sentence as a remedy for a human rights violation finds no basis in either article 110 (4) of the Statute or rule 223 of the Rules. Therefore, and without considering the veracity of the allegations put forward by Mr Lubanga regarding his detention conditions, the Panel will not consider this matter further. The Panel notes in this regard that, in accordance with article 106 of the Statute, and following rule 211 of the Rules, the Presidency is the appropriate forum to deal with any issue regarding the enforcement of sentences and conditions of imprisonment, in consultation with the State of enforcement.

93. In light of the information before it, the Panel concludes that there is no significant change in circumstances. Therefore the Panel still determines that there are no individual circumstances which should be taken into consideration within the meaning of rule 223 (e) of the Rules in determining whether it is appropriate to reduce Mr Lubanga's sentence.

⁹⁹ [Prosecutor's Second Observations](#), para. 5.

¹⁰⁰ [OPCV Second Observations](#), paras 6-7.

C. Conclusion

94. For the reasons set out above, the Panel determines that there has been no significant change in circumstances since the date of the First Sentence Review Decision that would merit a reduction of Mr Lubanga's sentence.

95. Given that Mr Lubanga's sentence expires on 15 March 2020, the Panel sees no reason to schedule a further review of his sentence. This is without prejudice to Mr Lubanga's right under rule 224 (3) of the Rules to apply for a new review of his sentence in case of a significant change in circumstances.

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



Judge Silvia Fernández de Gurmendi
Presiding Judge

Dated this 3rd day of November 2017

At The Hague, The Netherlands