

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Thomas Lubanga Dyilo - ICC-01/04-01/06
5 Presiding Judge Silvia Fernández de Gurmendi, Judge Howard Morrison and
6 Judge Piotr Hofmański
7 Article 110 Sentence Review
8 Friday, 21 August 2015
9 (The hearing starts in open session at 9.33 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Good morning. The hearing for the
14 review concerning the reduction of sentence of Mr Thomas Lubanga Dyilo is now in session.
15 I would ask the Court Officer to call the case, please.
16 THE COURT OFFICER: Thank you, Madam President.
17 The situation in the Democratic Republic of the Congo, in the case of the Prosecutor versus
18 Thomas Lubanga Dyilo, case reference 01/04-01/06.
19 We are in open session.
20 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.
21 I would now invite the parties and the participants at this hearing to introduce
22 themselves beginning with the Defence of Mr Lubanga.
23 Maître Mabilie, please introduce yourself and those present with you today.
24 MS MABILLE: (Interpretation) Thank you, Madam President. My team for the Defence of
25 Mr Thomas Lubanga is made up of Caroline Buteau, Jean-Marie Biju-Duval and myself,

1 Catherine Mabilie.

2 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you, madam.
3 (Speaks English) Next the office of the Prosecutor.

4 MR GUARIGLIA: Good morning, your Honours. I am Fabricio Guariglia, director of
5 Prosecutions. Appearing with me today are Ms Nicole Samson, senior trial lawyer;
6 Ms Meritxell Regué, appeals counsel; and Ms Priya Narayanan, appeals counsel.

7 PRESIDING JUDGE FERNÁNDEZ: (Microphone not activated)

8 MR WALLEYN: (Interpretation) My name is Luc Walley, Madam President. I represent
9 the V01 team of victims representatives, and my case manager is Evelyne Ombeni.
10 Today by proxy I am also representing the legal representative teams
11 V02, and the case manager is Sylviane Glodjinon. Thank you.

12 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.

13 I am myself Silvia Fernández, Presiding Judge of the Panel of the three Judges appointed by
14 the Appeals Chamber for the purpose of conducting the sentence reduction review.
15 Seated to my right is Judge Howard Morrison and to my left is Judge Piotr
16 Hofmański.

17 During today's hearing, I will refer to myself and my colleagues, Judge Morrison and
18 Judge Hofmański, as the "Panel."

19 And we are also joined today by various Registry staff members who I welcome and
20 thank for their assistance.

21 For those in the public gallery and those watching via the Internet, I will briefly explain how
22 the hearing will be conducted. Today's hearing is being held in accordance with the
23 procedures laid out in Rule 224(1) of the Rules of Procedure and Evidence.

24 In preparation for the hearing, the Panel received written submissions from the
25 parties and participants on the factors and criteria for sentence reduction laid out in

1 Article 110 of the Statute and Rule 223 of the Rules.

2 The Panel also received written observations from the Registrar on the criteria of Rule
3 223.

4 Today the Panel will hear oral submissions from the parties and participants on these
5 factors and criteria and on the various issues raised in the written submissions. As
6 indicated in the Panel's order of 7 August 2015, the Panel may, if it considers it
7 necessary, pose questions to the parties and participants. At the end of today's
8 hearing, Mr Lubanga will have the opportunity to personally address the Panel.

9 Before beginning the hearing of submissions, there are a few procedural issues that I will
10 briefly address.

11 First, the Panel notes that it has not yet issued a decision on the Prosecutor's request for
12 permission to make further submissions after this hearing. This request was most recently
13 reiterated in the Prosecutor's third notice regarding potentially relevant information to
14 Mr Lubanga's sentence review, which was filed on 14 August 2014.

15 I would like to know from Mr Guariglia, in light of the recently filed public redacted
16 version of Trial Chamber VI's decision on restrictions in relation to certain detainees,
17 does the Prosecutor still maintain this request for permission to make further
18 submissions?

19 MR GUARIGLIA: No, your Honour, not at this stage.

20 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.

21 Regarding the conduct of today's hearing, the parties and participants are reminded
22 that they are expected to complete their submissions within the time frame set by the
23 Panel in the order of 7 August 2015. I will alert you when you have two minutes
24 remaining.

25 The Panel also informs the parties and participants that any documents used or

1 referred to at this hearing will not be given an evidence number. Any such
2 documents that were not already annexed to filings made in advance of this hearing
3 should be filed as an annex before 4 o'clock on Monday, 24 August 2015.

4 Is that clear? So in other words, we will not give an EVD number, but you just file it,
5 if you have any additional documents, by Monday, 4 o'clock.

6 Regarding the scope of the oral submissions, the parties and participants are
7 reminded that pursuant to the Panel's order of 7 August 2015, they may address any
8 relevant issues pertaining to this review without exceeding the issues raised in their
9 or the other participants' written submissions.

10 In addition, pursuant to the Panel's further order of 19 August 2015 regarding issues
11 to be discussed at the hearing, the parties and participants may also address relevant
12 aspects of the public redacted version of the decision on restrictions in relation to
13 certain detainees issued by Trial Chamber VI in the case of Prosecutor versus Bosco
14 Ntaganda.

15 Finally, the parties and participants are reminded that today's hearing is being
16 conducted in open session and therefore they should be mindful not to refer to any
17 confidential information or to request, if that is necessary, that the hearing move into
18 closed session, if at all necessary.

19 Unless there are any questions with respect to what I have just said, we will now
20 proceed with the hearing of the submissions of the Defence for Mr Lubanga.

21 So there are no other questions, so Maître Mabilille, you have the floor for 20 minutes. Please
22 begin.

23 MS MABILLE: (Interpretation) Thank you, your Honours. I will now make a number of
24 observations regarding the application for a reduction in the sentence being served by Mr
25 Lubanga.

1 Having served two-thirds of his sentence, Mr Lubanga is now asking to be released. He has
2 been incarcerated in The Hague since March 2006, in other words, for nine years and five
3 months. In addition he spent two years and seven months in detention and in house arrest
4 in Kinshasa.

5 Early release is not something out of the ordinary that would require exceptional
6 circumstances. Early release is an everyday practice, a commonplace practice in
7 most domestic courts. Reducing the sentence that is being served is not an exception.
8 On the contrary, not reducing the sentence, or in other words having the person serve
9 the entire sentence, that is the exception.

10 International criminal courts have drawn the appropriate conclusions. Without
11 exception, convicted persons are released after two-thirds of their sentence has been
12 served. And this is done systematically, even when no other criteria has been met.
13 To refuse early release requires demonstration that exceptional circumstances do exist.
14 We do know, thanks to a recent ruling from -- that the ICC Judges, and I make
15 reference to paragraph 37 of the decision in question, it is clear from this ruling that
16 ICC Judges attach considerable importance to the practice of the international
17 criminal courts when it comes to early release after two-thirds of the sentence. So it's
18 quite legitimate to ask for Mr Lubanga to be treated fairly and impartially and that
19 this principle be applied in a fair and equitable manner.

20 In addition to our written submissions that were filed on 14 July, I would like to make
21 a number of further submissions.

22 First of all, cooperation and the current situation in Ituri; secondly, the risk of
23 significant social instability; and finally, I will say a few words regarding the OTP's
24 allegations regarding alleged inappropriate contact by Mr Lubanga with witnesses.

25 Let me turn to my first point: Cooperation of the convicted person. I must tell the

1 Bench that the Prosecution has lost all credibility and all legitimacy as a result. It is
2 the Prosecution, not Mr Lubanga, who have deliberately blocked the proceedings and
3 their smooth operations.

4 First of all, I would remind this Bench of the Trial Chamber's decision of 13 June 2008
5 that provided for the proceedings to cease and there was -- Article 54(3)(e) was
6 incorrectly relied upon. This led to the proceedings being halted for the first time,
7 and the trial was suspended for more than five months after that by making
8 erroneous and misleading remarks that were very much prejudicial, harmful to
9 Mr Lubanga, remarks that were harshly criticised by the Trial Chamber in a ruling
10 handed down on 12 May 2010. And I make reference to the decision regarding the
11 interview given by Ms Le Fraper du Helen, member of the OTP, decision 2433. And
12 finally by refusing to comply with the orders of the Trial Chamber by repeatedly
13 refusing to disclose the name of one of their intermediaries to the Defence.

14 Because of all these actions taken by the OTP, there was another suspension of proceedings.
15 And once again, another delay, a three-month delay.

16 The OTP was not subject to any disciplinary measures despite the actions it took.

17 Mr Lubanga had to deal with the situation, and he always respected and complied
18 with all requests from the Chamber very carefully, even though some requests might
19 have been seen as difficult. He -- for example, he agreed to leave the courtroom
20 every time alleged child soldiers entered the courtroom, even though the Defence has
21 always strongly challenged the fact that these people were child soldiers. And in
22 actual fact, all the testimony of these various witnesses was dismissed by the Trial
23 Chamber.

24 I should also mention that the Chamber, the Trial Chamber, mentioned the ongoing
25 cooperation of Mr Lubanga with the Court throughout the entire proceedings,

1 whereas in contrast, the Prosecution's behaviour put him -- made him subject to
2 considerable pressure, unjustified pressure.

3 Mr Lubanga's behaviour has been exemplary throughout the entire trial. He always
4 cooperated to ensure that the proceedings would run smoothly despite the especially difficult
5 circumstances that were created because of the OTP's actions.

6 In its ruling, that Chamber also said that there were serious grounds to believe that
7 three OTP intermediaries allegedly encouraged and persuaded witnesses to make
8 false statements and to lie about being child soldiers. Once again, Mr Lubanga
9 accepted that situation. He even went beyond what one would normally expect of
10 an accused person by agreeing to make up for a number of these serious mistakes
11 made by the OTP. And I make reference to a number of ex parte submissions that I
12 have made.

13 Mr Lubanga's exemplary behaviour should be taken into account when one reassesses
14 the whole issue of his sentence.

15 Now, the Prosecution's non-compliance was never punished, whereas the proper
16 behaviour of the accused should be rewarded, is that not so, the particularly
17 cooperative behaviour from an accused person dealing with hostile and illegitimate
18 actions taken by the OTP?

19 Now let me say a few words regarding the situation in the DRC, particularly in the
20 Ituri region, and the lack of significant social instability.

21 Now, I believe the question is as follows: Would Mr Lubanga's return to the region
22 bring about significant social instability? Now, this exercise is not one of assessing
23 the entire security situation in the DRC or the Ituri situation specifically. Rather, it's
24 a matter of analysing the impact of Mr Lubanga's possible return to his country of
25 origin.

1 I think that only one serious investigation has been done, and it was the Defence who
2 did this inquiry. More than 30 different people from civil society, from various
3 ethnic groups, from different religious and community groups were met, we met with
4 them and they provided some very serious elements with serious probative value.
5 And the Defence gathered this information.

6 The Court must agree to consider these official statements made by people who are
7 familiar with the day-to-day situation in the Ituri region. On the contrary, the
8 Prosecution has only provided a number of documents without any probative value,
9 documents that really report the individual opinion of three different people, no sense
10 of reliability. And in actual fact, two of these documents are just investigation
11 reports. One is the opinion of an anonymous individual.

12 Furthermore, the Registry, the DRC and the victims representatives are assessing the
13 situation in an objective matter and provide no evidence in support of their views.

14 No one, not the Prosecutor, not the Registry, not the Legal Representatives of Victims,
15 none of them have shown that early release of Mr Lubanga could cause significant
16 social instability.

17 Mr Lubanga has decided to settle in Kisangani upon his release. This is a town some
18 800 kilometres away from Bunia, and that is in actual fact the very precaution that
19 was recommended by the handful of people who were interviewed by the OTP.

20 Furthermore, the fact that the possible release of Mr Lubanga would coincide with
21 local and provincial elections and the establishment of new provinces in Ituri is not
22 relevant in of itself.

23 Let us recall that the UPC/RP, a political/military movement created in 2002, which

24 Mr Lubanga belonged to, became a political party and was registered as such in 2004.

25 This political party has been taking part actively in the various democratic institutions

1 of the DRC and this party is currently represented by two members of parliament and
2 one member of the provincial assembly.

3 The UPC will be running approximately 30 candidates in the upcoming elections,
4 whether Mr Lubanga is released or not. These candidates have been approved by
5 the electoral commission. It clearly can be seen that from the two UN reports that
6 were disclosed by the Prosecution, that the UPC cannot be charged with any
7 particular action.

8 The only disturbances can be attributed to an R -- correction -- to an FRPI Lendu
9 militia that has no link to the UPC. The evidence shows that the people of Ituri are
10 willing to welcome both Mr Lubanga and Mr Katanga as they have already done for
11 Mr Mathieu Ngudjolo.

12 Furthermore, the witnesses state that these men must be released so the peace and
13 reconciliation process can come to a successful end. And this is the background
14 against which Mr Lubanga wishes to go home to the DRC.

15 Finally, a few words regarding the OTP's allegations regarding inappropriate contacts
16 on the part of Mr Lubanga with a number of witnesses.

17 As of this particular date, no specific allegation has been made against Mr Lubanga. No
18 specific charge has been laid.

19 On 29 June 2015, we were informed that three people on the list of non-privileged
20 telephone contacts of Mr Lubanga were to be removed from this list on an interim
21 basis. Trial Chamber VI asked us to make observations, and these observations were
22 filed on 22 July 2015. In our filings, we indicated that Mr Lubanga had no
23 inappropriate conversation with these three people, and if necessary, these
24 conversations could be listened to.

25 Mr Lubanga is not opposed to these telephone calls being subject to active

1 surveillance with the exception of his conversations with his spouse and his children,
2 which are entirely private in nature. Mr Lubanga is not opposed to these three
3 people being taken off the list of telephone contacts if the Chamber were to be of the
4 view that there were pressing security reasons that he is not aware of. So Mr
5 Lubanga was not opposed to any of these temporary measures.

6 Once again, he demonstrated his true willingness to cooperate in the search for truth.
7 In the ruling of June 30, 2015, the Chamber indicated, and I quote, that "the Chamber
8 can only draw preliminary conclusions on the basis of the information provided and
9 that the Chamber is not in a position at this juncture to specifically identify the
10 channel through which the information was sent," paragraph 8 of the June ruling.
11 Since that time, the Prosecution has not disclosed any additional information in
12 support of their allegations.

13 Trial Chamber VI in its ruling of 18 August 2015 noted on four separate occasions that
14 the Prosecution has not attempted to support its allegations any further, paragraphs
15 31, 34, 35 and 40.

16 The Prosecution has been investigating this situation ever since early 2015, it has to do
17 with three detained persons, and on 2 July, the Prosecution received all information
18 regarding Mr Lubanga's telephone contacts and the visitors that have been to see him.
19 The Prosecution did not ask the Chamber to have transcriptions prepared of the
20 telephone calls or the calls be listened to.

21 Now, in the decision of the 18th, the Chamber said that it was not necessary to order
22 monitoring of Mr Lubanga's telephone calls with the three individuals in question
23 who are described as suspect, paragraph 37, decision of 18 August.

24 The attitude of the Prosecution shows that they are not trying to determine the truth;
25 rather, they are trying to create doubt and confusion.

1 In actual fact the Prosecution is throwing up a smokescreen, smokescreen, and we can
2 only say that our client has had no inappropriate contacts with potential witnesses of
3 the OTP. The Chamber cannot take account of these groundless allegations being
4 made regarding Mr Lubanga.

5 In light of these submissions, in light of these submissions, the Defence calls upon the Bench
6 to order the release of Mr Lubanga, and I thank you very much.

7 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you, madam.
8 Thank you for respecting the time that was given to you.

9 Maintenant I give the floor to Mr Guariglia.

10 MR GUARIGLIA: Thank you, your Honour. Your Honours, the Prosecution's legal
11 arguments will be presented by my colleague, Meritxell Regué.

12 Before that I will briefly make some preliminary observations and advance the principles that,
13 in the Prosecution's view, should govern the Panel's determination, principles which when
14 applied to this case lead to a single conclusion: Thomas Lubanga's sentence should not be
15 reduced.

16 A brief point of clarification, your Honours, during our submissions we will refer to
17 "early release" and "reduction of sentence" in an interchangeable form.

18 A first and crucial point to make, your Honours, is that contrary to what has been
19 suggested by my colleague from the Defence there is no automatic release after
20 two-thirds of a sentence has been served, nor shall there be an expectation or
21 presumption of release. Rather, the principle under the Statute is a convicted person
22 shall not be released before expiry of the sentence pronounced by the Court as
23 mandated by Article 110 unless the Court is satisfied that a reduction of sentence is
24 appropriate in the circumstances of the case.

25 In this context, the Court represented by this Panel is only duty-bound to review the

1 sentence once the two-third mark is reached, but the duty finishes there with the
2 review. The Panel has discretion to decide on early release as demonstrated by the
3 clear language of Article 110(4).

4 The Panel must verify if one or more of the exhaustive factors warranting release
5 apply. If they do not, the application for release must be rejected. But even if the
6 Panel finds that one or more conditions have been met, the Panel still retains
7 discretion to deny early release if it concludes that, and I quote, "it is not appropriate
8 to reduce the sentence," as clarified by Article 110(5).

9 So the mandatory review provided for in the Statute does not in any way guarantee
10 early release, nor does it imply that such release is a foregone conclusion.

11 Nor is a reduction of sentence an entitlement of convicted persons, your Honours. It
12 is a reward that must be earned by meeting certain expressed conditions that satisfy
13 the Court that a person is eligible for release. In this sense, your Honours, a person
14 that makes no effort while in custody to meet any of the conditions for release cannot
15 have a reasonable expectation of release just before he has served two-thirds of his
16 sentence.

17 Moreover, your Honours, the burden to demonstrate that early release is warranted
18 rests squarely on the person seeking release. In this sense it should be stressed that
19 Mr Thomas Lubanga is not at this stage a person sheltered by the presumption of
20 insurance, the in dubio pro reo principle or any other favourable evidentiary
21 presumption. He is a convicted person who was found guilty of committing very
22 serious crimes under the Statute in a judgment confirmed by the Appeals Chamber of
23 this Court.

24 This is the point of departure of any discussion on early release in this case. If a
25 convicted person cannot demonstrate in clear and conclusive terms that any of the

1 statutory conditions warranting a reduction of sentence are met, then no such
2 reduction can be ordered.

3 If there is any uncertainty on whether the criteria are met, the convicted person, in
4 this case Mr Thomas Lubanga, must continue to serve his sentence.

5 Any other interpretation would allow him to obtain the benefit of release without
6 discharging his statutory burden. As my colleague Ms Regué will demonstrate,
7 Thomas Lubanga has failed to make such a showing. On the contrary and as it will
8 be explained in detail, there are reasons to believe that he himself has recently
9 engaged in unlawful conduct from the detention centre.

10 Finally, your Honours, when making this determination this Panel should also
11 consider that once a sentence is reduced and released ordered, the Court effectively
12 loses control over the person. On their face the relevant provisions of the Statute and
13 the Rules do not contain any mechanism enabling the Court to establish conditions
14 during release, to monitor the behaviour of a released person or to reverse a release
15 order if required, as many domestic jurisdictions do.

16 Indeed we're not here today to discuss a change in conditions of imprisonment, but the
17 possibility of early release, which means an end to all conditions of imprisonment. Simply
18 put, if this Panel were to order that Thomas Lubanga's sentence be reduced, whatever he does
19 or says once released is outside of this Court's jurisdiction. The Panel should bear this in
20 mind as it should bear in mind the fact that, as the experience of the ad hoc tribunals shows,
21 once release is granted and the doors are opened, promises of good behaviour can be quickly
22 forgotten and words of remorse withdrawn or repudiated.

23 This strongly militates in favour of a cautious approach to release that is based on
24 facts, not empty assurances, as well as a strict construction of the conditions
25 enshrined in Article 110 and Rule 223.

1 And this we respectfully submit is the manner in which this Panel should exercise its
2 functions under the Statute and the Rules and accordingly reject Thomas Lubanga's request
3 for early release.

4 I will now give the floor to my colleague, Ms Regué.

5 MS REGUÉ: Good afternoon, your Honours. The question that your Honours must answer
6 is whether Mr Lubanga has met any of the criteria warranting reduction of sentence, and even
7 if he has, whether he deserves early release. As I will demonstrate, the answer is no.

8 The available information shows that no criteria are met. Quite the contrary.

9 Your Honours, Mr Lubanga has not cooperated with the Court, nor has he
10 approached the Court to do so. He has showed a complete indifference towards
11 victims throughout the proceedings and afterwards. And notably he's facing serious
12 allegations of witness interference in the Ntaganda case.

13 These factors, together with others that I will further elaborate, show that Mr Lubanga has not
14 earned reduction of sentence.

15 I will now address the relevant conditions in turn.

16 Starting with Article 110(4)(a) on cooperation, Mr Lubanga has not cooperated, nor has he
17 shown early and continuing willingness to do so with the Court.

18 The case law of the ad hoc tribunals is instructive on what constitutes cooperation
19 given that the rules on early release require substantial cooperation with the
20 Prosecutor.

21 Cooperation refers to actions having an impact on official administration of justice,
22 such as guilty pleas or providing testimonies in other cases. I refer to paragraph 8
23 and footnote -- and the authorities cited in footnote 6 of the Prosecution's
24 observations.

25 The extent of cooperation must be substantial. The types of cooperation

1 foreshadowed in Article 110(4)(a) and (b) and the chapeau of Article 110(4),
2 permitting the Panel to reduce the sentence only if one factor is met, suggests that the
3 threshold is high.

4 With respect to timing, the person's cooperation or willingness to do so must be
5 displayed early in the proceedings and must be continuous. Ordinarily any
6 cooperation that took place before conviction and was already considered at
7 sentencing and does not continue post-conviction should not be considered again to
8 reduce the sentence.

9 Your Honours, Mr Lubanga's examples of cooperation, alleged cooperation, do not
10 meet these requirements. For example, suspending his release pending the
11 resolution of appeals or leaving the courtroom upon an instruction of the Chamber to
12 permit a vulnerable witness to enter or returning confidential material erroneously
13 disclosed are not examples of cooperation. These are examples of mere compliance
14 with the statutory framework and the Chamber's orders, which is mandatory and
15 expected.

16 Similarly, Mr Lubanga's good behaviour at trial is not cooperation, much less early
17 and continuous cooperation. This type of behaviour is expected of every accused
18 person sitting in a courtroom.

19 Mr Lubanga not only has not cooperated with the Court, he has failed to show any
20 willingness to do so. He has not presented any evidence to show that he has. In
21 addition and as a clarification, Mr Lubanga's allegations with respect to abuse of
22 process and its impact on sentencing were rejected by the Trial Chamber and by the
23 Appeals Chamber in the Lubanga judgments. I will refer to paragraphs 30 and 91 of
24 the trial judgment and paragraphs 108 to 112 of the appeals judgment.

25 Now moving to Article 110(4)(b) also in cooperation but this time in relation to other

1 cases, the information available about Mr Lubanga's involvement in a scheme of
2 witness interference in the Ntaganda case clearly shows that this condition is not met.
3 Instead, it shows that Mr Lubanga's suspected actions potentially subverted the
4 efficient administration of justice in another case.

5 Mr Lubanga has allegedly disseminated confidential information and interfered with
6 witnesses in the Ntaganda case. I refer to paragraph 13 of the decision
7 01/04-02/06-786. The seriousness of these allegations led Trial Chamber VI just two
8 days ago to affirm most of the restrictions imposed on Mr Lubanga under Regulation
9 101.

10 The Chamber held, and I quote, "There is a risk that integrity of the proceedings in the
11 Ntaganda case may be damaged should the Chamber reinstate two individuals to Mr
12 Lubanga's contact list," end of quote, paragraph 34.

13 The Chamber further held that it continues to be lawful, necessary and proportionate
14 to actively monitor Mr Lubanga's conversations with limited exceptions given the
15 seriousness of the allegations before it. That's in paragraph 40.

16 These are important findings to your Honours' decision. Your Honours do not need
17 to find that Mr Lubanga has committed a crime beyond reasonable doubt. Your
18 Honours will assess the information before it to decide whether the risk that Mr
19 Lubanga is or has been involved in such a conduct is a fact that militates against his
20 reduction of sentence. We submit that it is.

21 Turning to Rule 223(a), Mr Lubanga has failed to show by his conduct in detention
22 that he has genuinely dissociated from his crime. Quite the contrary. The available
23 information on witness interference in the Ntaganda case suggests precisely the
24 opposite. Early release cannot be earned in these circumstances.

25 In addition, the Prosecution is not aware that Mr Lubanga has expressed any remorse.

1 Certainly he uttered no such thing in the sentencing hearing and in the appeals
2 hearing.

3 Also, merely complying with the detention centre rules is not guarantee of rehabilitation.

4 The Registry in paragraph 4 of its submissions has acknowledged this fact.

5 Turning now to Rule 223(b) on resocialisation and resettlement. Mr Lubanga has not
6 shown a prospect that he will resocialise. Again his alleged unlawful conduct in the
7 Ntaganda case renders any prospect of resocialisation dim.

8 The statements of the Kisangani University staff that Mr Lubanga provides do not
9 show the contrary. If anything, they make us wonder if Mr Lubanga truly intends to
10 study psychology in Kisangani. Annex 1, the statement of the vice-chancellor of
11 Kisangani University, confirms that Mr Lubanga has not yet applied to the university.

12 And even if he does, there is no guarantee that he will be accepted. The DRC
13 authorities need to approve his admission given his special and extremely sensitive
14 case.

15 In sum, this condition is plainly not met.

16 Moving to Rule 223(c), Mr Lubanga has not shown that his return to DRC would not
17 give rise to significant social instability in Ituri. At the outset we note that there is
18 simply no guarantee that Mr Lubanga will not return to Ituri. There is a plausible
19 doubt as to Mr Lubanga's true intention to study psychology in Kisangani: The
20 passionate defence of his political role in the sentencing and in the recent appeals
21 hearing. I refer to transcript 360, page 68 and transcript 363, page 66.

22 Also his current ties with the UPC and his own submissions and annexes which
23 mostly relate to Ituri all suggest that returning to Ituri may indeed be his true
24 intention.

25 If this happens, and particularly at this stage, there is a risk of significant social

1 instability in the region. The risk is confirmed by the Registry, the victims, the
2 authorities consulted in annex 4 to the Registry's observations and the three political
3 and judicial authorities interviewed by the Prosecution.

4 The risk is particularly high at this time considering: First, the number of demobilised
5 militiamen from his group in Bunia and the weapons still available in the region; second, the
6 upcoming local and provincial elections; and third, that Mr Lubanga is still a powerful figure
7 for the UPC with political influence among the Hema community in Ituri.

8 I refer to annexes 2 and 4 of the Prosecution's observations, paragraph 6 of the
9 Registry's observations and paragraph 13 of the victims' observations respectively.

10 In addition, the current situation in Ituri is not, as Mr Lubanga says, stable. The
11 MONUSCO report of 26 June 2015 and the 8 July 2015 MONUSCO press briefing
12 show the opposite. These documents describe the precarious situation, security
13 situation in Ituri, the ongoing military actions, the human rights abuses committed
14 and the existence of tensions between the Hema and the Lendu communities. I refer
15 to paragraph 17 and 18 of the MONUSCO report and pages 8 to 10 of the MONUSCO
16 press briefing.

17 And, your Honours, it's our submission that the drafters had in its mind permit the
18 Panel to consider factors on the ground in order to make its assessment contrary to
19 what Mr Lubanga now contends.

20 In any event, your Honours, and regardless of where Mr Lubanga relocates in DRC, be it Ituri,
21 be it Kisangani, there is still a risk that his return to the country will cause significant social
22 instability in Ituri, in particular, if we consider the Panel -- the factors that I just mentioned
23 and the lack of guarantees attached to Mr Lubanga's release. Once released Mr Lubanga will
24 be free to travel and communicate.

25 As to Rule 223 on victims, the Prosecution is not aware of any significant action taken

1 by Mr Lubanga for the benefit of the victims in the reparation process or elsewhere.

2 Quite the contrary. In his statements before this Court, he has persistently ignored

3 the existence and suffering of the victims and has shown no compassion towards

4 them. In addition, his early release may have a negative impact on the victims.

5 Annex 4 to the Registry observations and the political and judicial personalities

6 interviewed by the Prosecution suggest that victims may be re-traumatised with his

7 return to Ituri.

8 Mr Lubanga has therefore failed to meet this requirement.

9 Finally and now moving to the last condition on individual circumstances of the

10 convicted person, Rule 223(e), the Panel should simply ignore Mr Lubanga's

11 submissions on this condition. They simply do not fall within this provision which

12 refers to circumstances such as age or infirmity, none of which have been alleged by

13 Mr Lubanga. His one-year detention in the DRC and the delays caused by the two

14 stays of proceedings are not individual circumstances.

15 They are also factors that Mr Lubanga has already alleged in his sentencing and appeal

16 proceedings. Obviously, they are not clear, they don't constitute a clear change of

17 circumstances meriting reduction of sentence.

18 To conclude, the Panel should deny Mr Lubanga's reduction of sentence. Mr

19 Lubanga has not shown that any of the criteria is met. Instead, by his actions and

20 omissions he has shown the opposite. He warrants imprisonment. His lack of

21 cooperation with the Court and notably his suspected unlawful actions in the

22 Ntaganda case confirm this.

23 And even if the Panel concludes that certain criteria are met, his release, his early

24 release, should still be denied. The serious allegations of witness interference, his

25 complete indifference towards victims and the gravity of the crimes for which he has

1 been convicted strongly militate against his release.

2 We ask your Honours that Mr Lubanga remains in detention. Thanks.

3 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Thank you.

4 (Interpretation) Maître Walley, you have 10 minutes to make submissions on behalf of team

5 V01, but I now see that you represent the two teams. Do you need additional time?

6 MR WALLEYN: (Interpretation) Madam President, I think that I should be able to submit

7 within 10 minutes and maybe with a slight overlap. Thank you very much.

8 PRESIDING JUDGE FERNÁNDEZ: (Interpretation) Thank you.

9 MR WALLEYN: (Interpretation) Madam President, your Honours, today I represent all the
10 victims participating in these proceedings given the unavoidable absence of the other
11 counsels of team V02.

12 With Maître Mulenda I was able to meet nearly all our clients and to collect their
13 views and concerns regarding the early release of the convicted person and his
14 possible return to the DRC.

15 The general position of our clients is not for Mr Lubanga to be maintained in detention to the
16 end of his sentence. However, they all believe that his liberation should be predicated by a
17 change in attitude regarding the crimes committed and regarding his duties to the victims.

18 These victims expect a lot from the implementation of the programme by the Trust
19 Fund for Victims. According to the Court, this programme should have a collective
20 nature and involve local communities as well.

21 The consequence, therefore, is that success of the efforts of the fund will depend not
22 only on the collaboration of local authorities, but also on the conduct of local leaders
23 and other persons of influence within the community.

24 Our clients express the hope that now that conviction has been upheld, conviction has
25 been upheld by the Appeals Chamber, at this juncture Mr Lubanga should finally

1 admit the reality of child enlistment and express remorse.

2 With regard to this phenomenon, I'm sure some respect for the young people who

3 had the courage to participate in these proceedings rather than refer to them as liars

4 and crooks.

5 They wonder whether he will not use his authority to sabotage the reparations

6 programme and maybe on the contrary also call on his former collaborators to

7 support the work of the fund.

8 We have made requests to the clients of Mr Lubanga through his counsel, but have

9 been disappointed by his reaction. Instead of reaching out to the olive branch, he

10 has continued to call on leaders of Ituri to sign the statements on his favour -- in his

11 favour rather than engage in dialogue with victims and maintain that attitude.

12 These statements, if need be any further, do prove indeed that Mr Lubanga has

13 continued to maintain some influence in Ituri. The conduct of Mr Lubanga, who still

14 feels that he's a victim of false accusations and of a violation of his rights to a fair trial,

15 are indeed of great concern to the victims. They fear that his returning to Ituri may

16 provoke negative reactions for some members of the community, that is of

17 Mr Lubanga's community as well as their communities, and this is also true regarding

18 the participation of some beneficiaries in the programme, the reparations programme.

19 Many of them therefore may hesitate to join the funds programmes if there is

20 opposition within the community.

21 Contrary to the arguments of the Defence, the victims do indeed fear that the return

22 to the Ituri of the historic leader of the UPC may lead to heightened insecurity and

23 tensions and could ultimately lead to new or renewed armed conflict in the area.

24 Mr Lubanga's plan to pursue academic research in Kisangani is not convincing to the

25 extent that no one could stop him from returning to Bunia. And this intention is

1 more of a provocation than anything else.

2 Schooling for our clients was abruptly interrupted because of the crimes for which

3 Mr Lubanga was convicted. Some of them today barely make it in life as taxi drivers,

4 but they continue to hope that one day they may return to school thanks to the

5 reparations programme.

6 The dean of the Kisangani University has shown enthusiasm in announcing that

7 Mr Lubanga, his brother, would return to school, but this is a bitter pill to swallow for

8 the victims.

9 Madam President, your Honours, the Rome Statute does not offer interim release or release

10 on parole as provided for in local or national jurisdictions. Early release here simply

11 amounts to an unconditional final and irrevocable release comparable to some form of

12 pardon.

13 This Statute provides the criteria, particularly -- or, rather, and this is clearer in Rule

14 223, which states as follows: Any significant action taken by the sentenced person

15 for the benefit of the victims as well as any impact on the victims and their families as

16 a result of the early release should be taken into consideration.

17 You see that Maître Mabilille and other arguments have not taken this into concern.

18 Your Honours, I therefore urge you to take these concerns into consideration when

19 you deal with the situation of the victims. Thank you.

20 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you very much.

21 Maître Mabilille, you have 10 minutes, if you wish, to make a response to the submissions of

22 the Prosecutor and the Legal Representatives of Victims.

23 MS MABILLE: (Interpretation) My colleague, Jean-Marie Biju-Duval, will respond, Madam

24 President.

25 MR BIJU-DUVAL: (Interpretation) Thank you, Madam President, your Honours. Just a

1 few words by way of response.

2 My learned friend opposite from the Prosecution, Mr Guariglia, said that an early
3 release was not a right but, rather, some form of reward, and Ms Regué in turn spoke
4 about the criteria of Rule 112, and I just -- correction, Rule 223.

5 I just would like to set the record straight. We find ourselves dealing with a rather
6 special situation, an unusual one, because Thomas Lubanga was detained in 2006, in
7 March of that year. In other words, he found himself in a position where he had to
8 wait six years before a trial decision was handed down. He had to wait eight years
9 and nine months before the conviction at the trial level was confirmed and upheld.

10 In other words, he served his sentence in advance, so to speak, six years before he was
11 found guilty by the Trial Chamber and eight years before the appellate Chamber
12 actually upheld the conviction.

13 So I think we must realise that national courts and in particular I think of the
14 jurisprudence of the European Court of Human Rights that one must attach
15 considerable importance to time spent in detention awaiting trial or before a
16 conviction during this time. Well, Mr Lubanga did not enjoy any reduction in his
17 sentence.

18 The sentence that he already served was aggravated because of the situation, the
19 conditions under which he had to serve this sentence. So, you see, the sentence was
20 particularly harsh, and those circumstances lead us to examination of the criteria that
21 are set out in Rule 223, particularly the provision having to do with change in
22 circumstances.

23 Now, two-thirds of the sentence or almost was spent in initial detention. So I think
24 that the Court has a duty to do something to undo this harm, this prejudice suffered
25 by my client. Six years of pre-trial detention, nine years in detention before the final

1 decision from the appellate Court. That is not justified. I believe the Court must
2 take that into account.

3 My second observation is this: The current situation in the Ituri region, Ms Regué
4 said something that was quite correct, when Mr Thomas Lubanga is released, he will
5 be entirely free. Indeed, that is so. Indeed. And I don't see why that would be a
6 hindrance to reducing the sentence.

7 Just one word, if you don't mind. The Court must uphold its image of impartiality.

8 That is an essential consideration. Yet, we see that in terms of the actual information
9 provided to the Court regarding reduction of the sentence that those who are

10 opposed to early release are the government of Kinshasa, (Redacted)

11 (Redacted). Your court must be extremely

12 careful, because one certainly cannot conceive of those political authorities thinking
13 that the Court should just pass on their opposition to Mr Lubanga's returning to the
14 country, a man who was arrested by the government in Kinshasa all those years ago
15 in 2004.

16 Allow me to turn to my third observation, the whole issue of suspicions. And I
17 believe Ms Mabilie has said it all. This is very unusual situation and this is indeed
18 quite scandalous. Trial Chamber VI which is dealing with the Ntaganda case that is
19 hearing the matter, yes, of course Trial Chamber VI can see the seriousness of the
20 allegations made by the OTP, these allegations are indeed seriously -- naturally, they
21 are serious, but they are only allegations.

22 And what does Trial Chamber VI have to say? Ms Mabilie reminded you of their
23 points. On 30 June they said they had nothing to allow for a charge against

24 Mr Lubanga. And on 18 August, just a few days ago, the Chamber said, as

25 Ms Mabilie pointed out, the Prosecution has done nothing to substantiate, to support

1 these allegations. In other words, this case is really quite empty, and the Prosecution
2 is not making any attempt to truly determine what has happened.

3 So perhaps there is another explanation, quite a likely one, as Ms Mabilie said, the Prosecution
4 has only one objective, which is to spread rumours, to sow doubt in the minds of certain
5 people as if this idea that if there is smoke there must be fire would be agreed to by this
6 Honourable Bench.

7 Now, finally, a few words about Mr Lubanga's attitude to the clients of Mr Walley, n,
8 in other words, the people who came together and formed a group, group of victims
9 in the Lubanga case. We are told that a dialogue is necessary. One must begin a
10 dialogue. And I am very sorry, this dialogue is not a forum, but if we are to speak to
11 the victims, the question is this: Who are we speaking to?

12 Ever since the very beginning of this case, the victims, this group of people who have
13 come together and are represented by my colleague, have disappeared into
14 anonymity. Those who actually appeared before the Trial Chamber all were
15 disqualified. Their false testimony was revealed for what it is -- was. The judges
16 dismissed their testimony. They withdrew their status as victims.

17 Mr Walley, n is saying that they have gone to the field, recently I suppose, to seek out
18 the opinion of these people to consult his clients. And so we have waited, we have
19 waited for statements or information, for documents, and we have had nothing, no
20 annexes to the various observations made by the Legal Representatives of Victims.

21 But this is very disturbing, a lawyer's remarks cannot truly replace the actual words
22 of the victims. We were the ones who consulted the communities, and we have
23 come back with what they told us. We came back with what they had to tell you, the
24 Hema, Bira, Ngiti communities, all these communities, all of these communities made
25 official statements, legal statements saying that the time has come for Mr Thomas

1 Lubanga to be released.

2 I have concluded, your Honour. And as I conclude, I wish to say that by ending the
3 sentence that Mr Lubanga has served since 2006, if you choose to do so, you will be
4 rendering justice and you will be making up for this tremendous gulf of
5 incomprehension between the people of Ituri and the International Criminal Court. I
6 conclude.

7 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.
8 (Speaks English) The Panel now retires for ten minutes in order to deliberate on the
9 basis of what we have heard, decide whether we have any additional questions at this
10 stage, but also to give the opportunity to Mr Lubanga to address the Panel. So we
11 will now adjourn for 10 minutes.

12 THE COURT USHER: All rise.

13 (Recess taken at 10.40 a.m.)

14 (Upon resuming in open session at 10.55 a.m.)

15 THE COURT USHER: All rise.

16 Please be seated.

17 PRESIDING JUDGE FERNÁNDEZ: We are now back in session. The Panel thanks all of
18 you for the clarity of your submissions and for respecting the time allocated to you. Actually,
19 we only have one question, clarification to Maître Walley.

20 Could you please (Interpretation) Could you please tell us the date of your field
21 mission? We noted that it is not included in your written submissions.

22 MR WALLEYN: (Interpretation) Thank you, Madam President. End of June, early July.
23 Thank you.

24 PRESIDING JUDGE FERNÁNDEZ: (Microphone not activated)

25 MR LUBANGA: (Interpretation) Madam President, your Honours, before beginning my

1 remarks, I would like to express my concern about the allegations that have been made by the
2 Prosecution regarding interference in the Ntaganda case. I reiterate at no point in time did I
3 have inappropriate contacts with anyone whatsoever. And I wish to reassure the
4 Prosecution that I am willing to cooperate with them so that light can be shed on the contacts
5 that I had with the three people in question. I remain willing to cooperate with them in this
6 regard, and I thank you.

7 Madam President, your Honours, I have spent 12 years in prison, first in Kinshasa in
8 the Makala Prison and then here in The Hague. During all those years and in
9 particular today, my thoughts have always been with the people of the Ituri region
10 and my emotions.

11 These people who have spoken through a number of community associations and
12 groups, these people have clearly expressed their willingness to see me return to
13 society if I were to be granted a reduced sentence today, and I thank the people of the
14 Ituri region for the support, because, you see, in the past we travelled down the same
15 path with them during the most painful period of time in our history, an ordeal that
16 began with the first massacres in 1999.

17 In 2002 and 2003, I attempted to intervene, hoping to lessen the suffering of the
18 community. I still regret that the actions I took were not sufficient to end this
19 terrible conflict. Thus, I believe I am accountable to the community at two levels.

20 First of all, speaking on my own behalf and speaking on behalf of the organisation
21 that I led at that time, I offer my sincere apologies to all the victims for the suffering
22 that they endured. I share their pain, and I assure them that I hold them in deep
23 respect. I sincerely hope that I can be of service to all of those who have suffered,
24 and at the appropriate time I am ready and willing to devote my efforts to them once
25 I am released.

1 As I look to our common future, I realise that I have a duty as part of the
2 reconciliation process. The various communities within Ituri have made a number
3 of statements regarding my return to society, and they have touched upon this duty I
4 have. And I take what they have said as a call, a call to take action, and this is a duty
5 that I hope to take up seriously showing great responsibility. Tremendous efforts
6 have already been made to work on these issues and already we have seen significant
7 results.

8 However, I must say the scars are deep, and the journey to health will be long indeed.

9 I wish to reassure all those involved in this noble endeavour that I will be a
10 committed partner, and I hope to help build a strong foundation for a new society
11 where a tragedy such as the one we experienced will never occur again.

12 Moreover, because of this commitment, I've decided to begin doctoral studies at the
13 University of Kisangani. And unlike what has been said earlier in this courtroom, I
14 wish to explain a few things, this research will look into the contribution of
15 psychosociological determinants to inter-ethnic conflicts by identifying and isolating
16 the stereotypes, the prejudices. I hope to help identify a new form of sociology that
17 will help the tribal groups to live together in harmony. And I think that this
18 endeavour will be useful not only for the Ituri region, but also for other parts of my
19 country also dealing with these problems.

20 But academic research and study does not mean that one can disconnect from the
21 reality of what is really happening or turn an indifferent eye to the suffering endured.

22 Madam President, I was convicted of the enrolment of children under the age of 15
23 and convicted of using them within armed forces. Even though we were not able to
24 convince the judges that my actions were effective when it came to demobilisation,
25 my convictions have not changed, to my mind, there is no place in an army for

1 children. Unfortunately, this practice of enrolling children in armies is still a
2 widespread one, particularly in my country, the Democratic Republic of the Congo.
3 Thus, I stand alongside all those who have taken a public position against this
4 practice using all conduits possible to get this message across to raise the awareness
5 of people to help political and military leaders understand.

6 At this particular juncture, I feel great emotion as I think of my family and my
7 children, which I hope I could rejoin after 12 years of separation, because, you see, it
8 was back in 2003 that I began a series of incarcerations and house arrest in Kinshasa
9 before I was transferred to The Hague. The fate of my family was shattered because
10 of my long absence, and I hope to devote the necessary time to my family to support
11 them, to help them.

12 Finally, I believe that everyone who knows me realises that I have no bank account,
13 no wealth, no ability to help my family, but people who know me do realise that I am
14 ready to give my family everything else, everything that remains, myself, my time,
15 and my endeavours.

16 I am in the hands of the Court, and I thank you.

17 PRESIDING JUDGE FERNÁNDEZ: (Interpretation) Thank you, Mr Lubanga, for your
18 remarks.

19 (Speaks English) I would like to thank the parties and participants for their
20 submissions in respect to this hearing. Rule 224(2) provides that following the
21 review hearing, the Panel's decision and the reasons for it should be communicated to
22 the review participants as soon as possible. The Panel wishes to inform today all of
23 you and Mr Lubanga that it's working diligently to ensure that the issuance of its
24 decision occurs in as timely a manner as possible.

25 This concludes today's hearing. My last task is to thank you myself, on behalf of my

- 1 colleagues, Judge Morrison and Judge Hofmański, all the interpreters and all the
- 2 Registry staff members both inside and outside the courtroom who has assisted us
- 3 today.
- 4 The hearing is adjourned.
- 5 THE COURT USHER: All rise.
- 6 (The hearing ends in open session at 11.08 a.m.)