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Court

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No. ICC-01/04/01/06
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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

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 Mabille
Mr Jean-Marie Biju Duval

Legal Representatives of Victims V01
Mr Franck Mulenda
Mr Luc Walleyn

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 sentence of Mr Thomas Lubanga Dyilo is not reduced pursuant to the review conducted under article 110 (3) of the Statute.
2. Mr Thomas Lubanga Dyilo's sentence shall be reviewed in two years from the issuance of this decision pursuant to article 110 (5) of the Statute and rule 224 (3) of the Rules of Procedure and Evidence.

REASONS

I. PROCEDURAL HISTORY

1. On 14 March 2012, Trial Chamber I (hereinafter: "Trial Chamber") convicted Mr Thomas Lubanga Dyilo (hereinafter: "Mr Lubanga") of having committed in Ituri, Democratic Republic of the Congo (hereinafter: "DRC") the 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]

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[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 (hereinafter: "Sentencing Decision"), para. 107.
[3] "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", ICC-01/04-01/06-3121-Red, para. 529, with "Partly dissenting opinion of Judge Sang-Hyun Song", ICC-01/04-01/06-3121-Anx1; "Dissenting Opinion of Judge Anita Ušacka", ICC-01/04-01/06-3121-Anx2; "Procedural History", ICC-01/04-01/06-3121-Anx3; "List of Authorities and Designations", ICC-01/04-01/06-3121-Anx4; "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 (hereinafter: "Sentencing Judgment"), para. 119, with "Partly Dissenting Opinion of Judge Sang-Hyun

3. On 15 June 2015, pursuant to rule 224 (1) of the Rules of Procedure and Evidence, the Appeals Chamber appointed three judges of that Chamber, Judges Silvia Fernández de Gurmendi, Howard Morrison and Piotr Hofmański (hereinafter: "Panel"), for purposes of conducting the review concerning the reduction of Mr Lubanga's sentence (hereinafter: "Sentence Review").[4]

4. On that same day, the Panel issued a scheduling order,[5] in which it, *inter alia*, scheduled the hearing with Mr Lubanga for purposes of the Sentence Review for 16 July 2015, the date at which Mr Lubanga had served two thirds of his sentence, and invited the Prosecutor, the Legal Representatives of Victims V01 (hereinafter: "Victims"), and the Legal Representatives of Victims V02 to participate in the hearing (hereinafter: "Sentence Review Hearing").[6] In order to ensure the efficient conduct of the Sentence Review Hearing, the Panel requested that the Registrar file written observations, by 3 July 2015, on the criteria set out in rule 223 (a) to (e) of the Rules of Procedure and Evidence, and that Mr Lubanga, the Prosecutor, the Legal Representatives of Victims V01 and the Legal Representatives of Victims V02 file written submissions, by 10 July 2015, on the criteria for the Sentence Review laid out in article 110 (4) of the Statute and rule 223 of the Rules of Procedure and Evidence, as well as on the written observations of the Registrar.[7]

5. On 29 June 2015, Mr Lubanga filed an application requesting the disqualification of Judge Silvia Fernández de Gurmendi from the Panel.[8] As a result of this application, the Sentence Review Hearing was rescheduled for 21 August 2015.[9]

Song", ICC-01/04-01/06-3122-Anx1; "List of Authorities and Designations", ICC-01/04-01/06-3121-Anx2.

[4] "Decision appointing three judges of the Appeals Chamber for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo", 15 June 2015, ICC-01/04-01/06-3135.

[5] "Scheduling order for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo", ICC-01/04-01/06-3137 (hereinafter: "Scheduling Order").

[6] Scheduling Order, p. 3.

[7] Scheduling Order, pp. 3-4.

[8] "Urgent Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi", registered on 3 July 2015, ICC-01/04-01/06-3139-tENG; original French version, 29 June 2015 (ICC-01/04-01/06-3139).

[9] "Order rescheduling the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo", 8 July 2015, ICC-01/04-01/06-3148.

6. On 30 June 2015, the Prosecutor filed a notice[10] regarding information "that may implicate [Mr Lubanga] in witness interference from the ICC Detention Centre"[11] in the case of *The Prosecutor v. Bosco Ntaganda* (hereinafter: "*Ntaganda* case"), which she submitted was potentially relevant to the Sentence Review.[12] She filed a second notice on 2 July 2015[13] and a third notice on 14 August 2015 on the same issue.[14]

7. On 3 July 2015, the Registrar filed his observations (hereinafter: "Registrar's Observations"),[15] to which he annexed, *inter alia*, observations from the authorities of the DRC (hereinafter: "Observations of the DRC authorities").[16]

8. On 10 July 2015, the Prosecutor filed her submissions (hereinafter: "Prosecutor's Observations").[17] On the same date, the Victims filed their

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[10] "Prosecution's notice regarding potentially relevant information to Thomas Lubanga Dyilo's sentence review", dated 29 June 2015 and registered on 30 June 2015, ICC-01/04-01/06-3140-Conf-Exp (hereinafter: "Prosecutor's First Notice regarding *Ntaganda* case"); a confidential redacted version was registered on 8 July 2015 (ICC-01/04-01/06-3140-Conf-Exp-Red); a public redacted version was registered on 20 August 2015 (ICC-01/04-01/06-3140-Red2).
[11] Prosecutor's First Notice regarding *Ntaganda* case, para. 1.
[12] Prosecutor's First Notice regarding *Ntaganda* case, para. 7.
[13] "Prosecution's further notice regarding potentially relevant information to Thomas Lubanga Dyilo's sentence review", dated 30 June 2015, ICC-01/04-01/06-3141-Conf-Exp. Pursuant to the instruction of the Panel, this document was reclassified as public on 20 August 2015 (ICC-01/04-01/06-3141).
[14] "Prosecutor's third notice regarding potentially relevant information to Thomas Lubanga Dyilo's sentence review", ICC-01/04-01/06-3160-Conf-Exp (hereinafter: "Prosecutor's Third Notice regarding *Ntaganda* case"); a confidential *ex parte* redacted version was registered on 14 August 2015 (ICC-01/04-01/06-3160-Conf-Exp-Red); a public redacted version was registered on 20 August 2015 (ICC-01/04-01/06-3160-Red2).
[15] "Observations on the criteria set out in rule 223 (a) to (e) of the Rules of Procedure and Evidence", ICC-01/04-01/06-3144-Conf-Exp, with four annexes: Annex 1, ICC-01/04-01/06-3144-Conf-Exp-Anx1; Annex 2, ICC-01/04-01/06-3144-Conf-Anx2; Annex 3, ICC-01/04-01/06-3144-Conf-Anx3; and Annex 4, ICC-01/04-01/06-3144-Anx4. Pursuant to the instruction of the Panel, this document was reclassified as public on 17 August 2015 (ICC-01/04-01/06-3144-Red).
[16] Annex 4 to the Registrar's Observations, registered on 7 September 2015, ICC-01/04-01/06-3144-Anx4-tENG; original French version, 3 July 2015 (ICC-01/04-01/06-3144-Conf-Exp-Anx4); a public redacted version was registered on 7 September 2015, ICC-01/04-01/06-3144-Anx4. Pursuant to the instruction of the Panel, this document was reclassified as confidential on 7 July 2015. Following receipt of the DRC authorities' permission to make the observations public and pursuant to the Panel's further instruction of 6 September 2015, this document was reclassified as public. *See* "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.
[17] "Prosecution's submissions regarding Thomas Lubanga Dyilo's sentence review", ICC-01/04-01/06-3150-Conf-Exp; with four annexes: Annex 1, ICC-01/04-01/06-3150-Anx1; Annex 2, ICC-01/04-01/06-3150-Conf-Exp-Anx2; Annex 3, ICC-01/04-01/06-3150-Conf-Exp-Anx3; Annex 4, ICC-01/04-01/06-3150-Conf-Exp-Anx4; a confidential *ex parte* redacted version was registered on 10 July 2015 (ICC-01/04-01/06-3150-Conf-Exp-Red); a public redacted version was registered on 18 August 2015 (ICC-01/04-01/06-3150-Red2); a second public redacted version was registered on 20 August 2015 (ICC-01/04-01/06-3150-Red3).

submissions (hereinafter: "Victims' Observations").[18] The Legal Representatives of Victims V02 did not file written submissions.

9. On 14 July 2015, after being granted a time extension,[19] Mr Lubanga filed his submissions (hereinafter: "Mr Lubanga's Observations").[20]

10. On 3 August 2015, Mr Lubanga's request for the disqualification of Judge Silvia Fernández de Gurmendi from the Panel was dismissed.[21]

11. On 7 August 2015, the Panel issued a further order setting the timetable for the Sentence Review Hearing.[22]

12. On 18 August 2015, in the *Ntaganda* case, Trial Chamber VI issued the "Decision on restrictions in relation to certain detainees" (hereinafter: "*Ntaganda* Decision"),[23] in which it imposed the continuation of certain measures due to, *inter alia*, "allegations before it implicating Mr Lubanga in the dissemination of confidential information and/or witness interference in the *Ntaganda* case".[24]

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[18] "Observations of the V01 group of victims on the possible review of Mr Thomas Lubanga Dyilo's sentence", registered on 31 July 2015, ICC-01/04-01/06-3149-tENG; with annex 1, ICC-01/04-01/06-3149-Conf-Anx1; original French version, 10 July 2015 (ICC-01/04-01/06-3149).
[19] "Order for the reclassification of documents and extension of the time limit for the filing of submissions", 6 July 2015, ICC-01/04-01/06-3145-Conf-Exp; a public redacted version was registered on the same date, (ICC-01/04-01/06-3145-Red).
[20] "Observations of the Defence for Mr Lubanga on a reduction in sentence", registered on 30 July 2015, ICC-01/04-01/06-3151-Conf-Exp-tENG; with seven annexes: Annex A, ICC-01/04-01/06-3151-AnxA; Annex 1, ICC-01/04-01/06-3151-Anx1; Annex 2, ICC-01/04-01/06-3151-Anx2; Annex 3, ICC-01/04-01/06-3151-Conf-Anx3; Annex 4, ICC-01/04-01/06-3151-Conf-Anx4; Annex 5, ICC-01/04-01/06-3151-Conf-Anx5; Annex 6, ICC-01/04-01/06-3151-Conf-Anx6. A public redacted English translation was registered on 4 September 2015 (ICC-01/04-01/06-3151-Red-tENG); a second public redacted version was registered on 16 September 2015 (ICC-01/04-01/06-3151-Red2-tENG); original French version, 14 July 2014 (ICC-01/04-01/06-3151-Conf-Exp)**;** a public redacted version was registered on the same date (ICC-01/04-01/06-3151-Red); a second public redacted version was registered 8 September 2015 (ICC-01/04-01/06-3151-Red2).
[21] Plenary, "Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*", dated 3 August 2015 and registered on 4 August 2015, ICC-01/04-01/06-3154-AnxI. *See also* "Notification of the Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*", dated 3 August 2015 and registered 4 August 2015, ICC-01/04-01/06-3154.
[22] "Further order setting the timetable regarding the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo", ICC-01/04-01/06-3155.
[23] Registered on 19 August 2015, ICC-01/04-02/06-786-Red4.
[24] *Ntaganda* Decision, para. 39.

13. On 19 August 2015, the Panel, noting that the *Ntaganda* Decision contains information potentially relevant to the Sentence Review, issued an order permitting the participants to address that decision at the Sentence Review Hearing.[25]

14. On 21 August 2015, the Sentence Review Hearing was held.[26]

II. MERITS

A. Applicable law

15. 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".

16. 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;
>
> (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

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[25] "Order regarding the issues to be discussed at the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo", ICC-01/04-01/06-3164.

[26] Transcript of Sentence Review Hearing, registered on 16 September 2015, ICC-01/04-01/06-T-366-Red-ENG (WT). On 14 August 2015, the Prosecutor filed a notice regarding material she intended to use at the Sentence Review Hearing. *See* "Prosecution's notice regarding material to be used at the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo", ICC-01/04-01/06-3159 (hereinafter: "Prosecutor's Notice of materials"); with two annexes: Annex A, ICC-01/04-01/06-3159-Anx; Annex B, ICC-01/04-01/06-3159-AnxB. On 17 August 2015, Mr Lubanga requested that the Prosecutor's Notice of materials and the Prosecutor's Third Notice regarding *Ntaganda* case be declared inadmissible and that the Prosecutor not be allowed to use the documents referred to in these notices at the Sentence Review Hearing. *See* "Requête de la Défense de M. Lubanga pour faire déclarer irrecevable la « *Confidential redacted version of Prosecution's third notice regarding potentially relevant information to Thomas Lubanga Dyilo's sentence review, 14 August 2015* » et la « *Prosecution's notice regarding material to be used at the hearing for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo* »", ICC-01/04-01/06-3162**.** Pursuant to the instruction of the Panel, this document was reclassified as public on 8 September 2015. On 19 August 2015, the Panel rejected Mr Lubanga's request. *See* "Decision on Mr Lubanga's request to have two filings from the Prosecutor declared inadmissible", ICC-01/04-01/06-3165. On 20 August 2015, the Legal Representatives of Victims V02 filed a notice that the Legal Representatives of Victims V01 would represent them at the Review Hearing. "Procuration aux fins de la représentation de l'équipe V02 à l'audience du 21 août 2015", registered on 21 August 2015, ICC-01/04-01/06-3166 with public annex, ICC-01/04-01/06-3166-Anx.

> (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 […].

17. 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.

18. Rule 223 of the Rules of Procedure and Evidence 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.

19. Read together, these provisions provide a comprehensive framework for the purposes of sentence review. In this section, the Panel will set out in more detail various aspects of the Court's sentence review framework. In addition, certain arguments of the participants will be addressed to the extent that they relate to the overall framework for sentence review.

1. The triggering of the Sentence Review

20. When a sentenced person has served two thirds of his or her sentence or 25 years if sentenced to life imprisonment, article 110 (3) of the Statute provides that the Court "*shall* review the sentence to determine whether it should be reduced" (emphasis added). Thus, the initial review of sentence at the Court under this legal provision is not triggered by an application of a sentenced person, but rather is an

automatic and mandatory review once the threshold of having served two thirds of a sentence has been met.

2. The nature and scope of the Sentence Review decision

21. 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 ("the Court may reduce").

22. The Panel notes that, in order to determine whether it is appropriate to reduce a sentence, it must first determine whether any of the factors under article 110 (4) and rule 223 of the Rules of Procedure and Evidence are present. The Panel notes that not all factors listed in rule 223 of the Rules of Procedure and Evidence weigh in favour of reduction of sentence. For instance, the risk of significant social instability referred to in rule 223 (c) of the Rules of Procedure and Evidence is a negative factor, weighing against reduction. Thus, the presence of at least one factor in favour of reduction is a prerequisite to the Panel exercising its discretion to reduce a sentence. In other words, the Panel cannot proceed to reduce a sentence if no such factors are found to be present. However, given the discretionary nature of the decision, the presence of a factor in favour of reduction does not in itself mean that a sentence will be reduced. Similarly, the presence of a factor militating against a reduction of sentence does not preclude the exercise of its discretion. Such factors must be weighed against factors in favour of reduction to determine whether a reduction of sentence is appropriate.

23. With respect to Mr Lubanga's argument that "[t]o refuse early release requires demonstration that exceptional circumstances do exist",[27] the Panel notes that Mr Lubanga refers to the practice of domestic and other international criminal courts in support of this contention.[28] The Panel recalls that article 21 (1) (a) of the Statute provides that the Court shall apply "[i]n the first place, [the] Statute [...] and its Rules".[29] In this regard, the Panel does not find, nor does Mr Lubanga identify, any

[27] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 5, line 13.
[28] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 5, lines 5-10.
[29] *See*, in this regard, "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 23.

requirement in the Court's legal texts that there must be a demonstration of the presence of exceptional circumstances to justify not reducing a sentence. Accordingly, Mr Lubanga's argument in this regard is rejected.

24. The Panel notes the Prosecutor's argument that the gravity of the crimes for which Mr Lubanga was convicted "strongly militate against" his sentence being reduced and that this should be taken into account for the purposes of the review.[30] The Panel notes further that, unlike at other international criminal tribunals, the gravity of the crime is not a factor that in itself weighs for or against reduction of sentence.[31] Rather, the gravity of the crime for which the person was convicted is an integral and mandatory part of the original sentence imposed.[32] Put differently, the sentence imposed reflects the Trial Chamber's determination of a punishment proportionate to *inter alia*, the gravity of the crimes committed.[33] Thus, the Panel considers that generally this factor should not be considered again when determining whether it is appropriate to reduce a sentence.

3. The factors relevant to the Sentence Review

(a) The "other factors" of article 110 (4) (c) of the Statute

25. The Panel notes that article 110 (4) (c) of the Statute refers to "other factors", thus raising the initial question of whether factors outside of those enumerated in the Court's legal texts may also be taken into account. In this regard, the Panel observes that the "other factors" of article 110 (4) (c) are qualified by the words "as provided in the Rules of Procedure and Evidence". Furthermore, rule 223 of the Rules of Procedure and Evidence provides that, in addition to the factors[34] listed in sub-

[30] Prosecutor's Observations, para. 3; Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 19, line 23 to p. 20, line 1.
[31] *See* in this respect, Rule 125 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, which provides that, in determining whether pardon or commutation of a sentence is appropriate, the President shall take into account, *inter alia*, "the gravity of the crimes for which the person was convicted".
[32] *See* article 78 (1) of the Statute; rule 145 (1) (c) of the Rules of Procedure and Evidence.
[33] *See* Sentencing Judgment, paras 32-34.
[34] The Panel notes that article 110 (4) of the Statute refers to "factors" and also refers, in article 110 (4) (c) of the Statute, to "factors" provided in the Rules. Rule 223 of the Rules of Procedure and Evidence, however, refers to "criteria" and also makes reference to the "criteria" listed in article 110 (4) of the Statute. The Panel considers that the cross-referencing to the Statute and Rules of Procedure and Evidence in these respective provisions indicates that these two terms are not meant to have distinct meanings and accordingly decides, for reasons of clarity, to use the term "factors" throughout this decision. *See*, for a similar analysis, Sentencing Judgment, footnotes 66-67, wherein the Appeals

paragraphs (a) – (e), the Panel "shall take into account the criteria listed in article 110, paragraph 4 *(a) and (b)*" (emphasis added). Of note, is that this rule does not provide that the factors in article 110 (4) (c) also be taken into account. Accordingly, the Panel considers that the "other factors" of article 110 (4) (c) of the Statute refers to those factors listed in rule 223 (a) – (e) of the Rules of Procedure and Evidence.[35] Therefore, the factors that can be taken into account for purposes of considering whether to reduce a sentence are, in principle, those set out in the Court's legal texts.

26. In this regard, the Panel notes Mr Lubanga's argument that the fact that he has served two thirds of his sentence is a relevant factor.[36] Mr Lubanga asserts that, at other international criminal tribunals, "the majority of people convicted have been released after serving two thirds of their sentence" and that some have been released on the basis of that factor alone, even where none of the other conditions for early release were met.[37] According to Mr Lubanga, "this factor is considered preponderant when examining an application for early release".[38]

27. As to Mr Lubanga's argument that there is a presumption of release once two thirds of a sentence has been served or that this is a relevant factor for the purpose of a review of sentence, the Panel recalls that the applicable law at the Court is, in the first

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Chamber determined that, despite the use of differing terminology, the "considerations" laid out in rule 145 (1) (c) of the Rules of Procedure and Evidence are in fact "factors" in the same sense as the factors of article 78 (1) of the Statute.

[35] The Panel notes that this interpretation is shared by commentators on the Court's legal texts. *See* A. Oehmichen, "Commentary Rome Statute: Part 10", *in Commentary on the Law of the International Criminal Court*, Case Matrix Network, at p. 817 ("As sub-paragraph c) makes reference to the Rules of Procedure and Evidence, the "other factors" referred to here are those listed under Rule 223 RPE. The wording "other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence" is formulated in such an open manner that it could also comprise additional factors not mentioned in Rule 223. However, the explicit reference to the RPE as well as the clear guidance of Rule 223 RPE that "one or more of the following factors must be present" clarifies that the list of Art. 110(4), read in conjunction with Rule 223, is – unlike Rule 125 ICTY Statute/Rule 126 ICTR statute – exhaustive." [Footnotes omitted.]); E. Gumboh, "The Penalty of Life Imprisonment under International Criminal Law", *11 African Human Rights Law Journal* (2011), at p. 88.

[36] Mr Lubanga's Observations, para. 10.

[37] Mr Lubanga's Observations, para. 10, referring to *Prosecutor v. Mlađo Radić*, "Public redacted version of 13 February 2012 Decision of the President on early release of Mlađo Radić", 9 January 2013, IT-98-30/1-ES, para. 30; Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 5, lines 10-12.

[38] Mr Lubanga's Observations, para. 10, referring to *Prosecutor v. Miodrag Jokić*, "Decision of the President on request for early release", 1 September 2008, IT-01-42/1-ES (hereinafter: "*Jokić* Decision"), para. 16.

place, the Statute.[39] Furthermore, while the case-law of other international tribunals may be of interest, the Panel notes that legal regimes for early release at the tribunals referred to by Mr Lubanga differ from the Court's legal regime. Under the Court's legal framework, the two-third threshold serves as a trigger mechanism for the commencement of the sentence review under article 110 (3) of the Statute.[40] Additionally, article 110 (4) of the Statute and rule 223 of the Rules of Procedure and Evidence, do not include this factor, nor does a plain reading of these provisions support the notion of a "presumption of early release" based on the fact that two thirds of a sentence have been served. Accordingly, Mr Lubanga's arguments in this regard are rejected.

(b) The time frame during which the presence of a factor may be taken into account by the Panel

28. Article 110 (4) (c) of the Statute provides in relevant part that the Panel may reduce the sentence if it finds "other factors establishing a clear and significant *change of circumstances* sufficient to justify the reduction of sentence" (emphasis added). As set out above,[41] the Panel has determined that these "other factors" are, in principle, those listed in rule 223 of the Rules of Procedure and Evidence. The Panel also notes that each factor in rule 223 of the Rules of Procedure and Evidence contains the phrase "the sentenced person". Two of those factors will be considered for the first time for the purpose of the review of sentence: the prospect of resocialization and successful resettlement of the sentenced person under rule 223 (b) of the Rules of Procedure and Evidence, and whether the early release of the sentenced person would give rise to significant social instability under rule 223 (c) of the Rules of Procedure and Evidence. Accordingly, the Panel considers that it is necessary to find that there are changed circumstances in relation to the factors listed in rule 223 (a) (d) and (e) of the Rules of Procedure and Evidence from the time that the sentence was imposed.

[39] *Supra* para. 23.
[40] *Supra* para. 20.
[41] *Supra* para. 25.

(c) Information concerning factors under article 110 (4) (a) – (b) already taken into account in the sentencing decision

29. The Panel notes that the requirement of "clear and significant change of circumstances" is not replicated in the factors under article 110 (4) (a) and (b) of the Statute. This raises the question of whether information relevant to these factors already taken into account in sentencing can be taken into account again for purposes of reduction of sentence. In this regard, the Prosecutor submits that "[o]rdinarily any cooperation that took place before conviction and was already considered at sentencing and does not continue post-conviction should not be considered again to reduce the sentence".[42]

30. The Panel concurs with the Prosecutor's submission and notes in this regard that cooperation with the Court is a potential mitigating circumstance pursuant to rule 145 (2) (a) (ii) of the Rules of Procedure and Evidence. Thus, cooperation or assistance, which does not continue post-conviction and which was taken into account in imposing the original sentence, will not generally be taken into account for purposes of reducing that same sentence. However, in so holding, the Panel emphasises that the fact that a person's cooperation or assistance has not continued post-conviction and was taken into account in the original sentence may not always result in the automatic non-consideration of these acts. This is because the full impact of a person's cooperation or assistance, even where it does not continue post-conviction, may only become apparent post-sentence. The ability to accurately assess the impact of a person's cooperation with the Court or his or her assistance in other cases is mainly dependent upon the timing of the Court's investigations and prosecutions, as opposed to the date when the sentence is imposed. Thus, the original sentence imposed may not fully capture the extent of the assistance provided, the benefit it provides to victims, nor the degree to which it furthered the Court's investigations and prosecutions. Accordingly, whether information taken into account at sentencing, regarding a person's cooperation with the Court or assistance in enabling the enforcement of judgments and orders in other cases, is relevant to a review of sentence under article 110 of the Statute, should be assessed on a case by case basis.

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[42] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 15, lines 4-8.

(d) The burden to establish the presence of a relevant factor

31. The Prosecutor argues that the burden to demonstrate that reduction of sentence is warranted rests "squarely on the person seeking release"[43] and, "if a convicted person cannot demonstrate in clear and conclusive terms that any of the statutory conditions warranting a reduction of sentence are met, then no such reduction can be ordered".[44]

32. The Panel considers that the Prosecutor's submissions in this regard slightly misconceive the nature of the Sentence Review proceedings. The Panel recalls that, unlike at the *ad hoc* tribunals and many domestic jurisdictions, the review of sentence at the Court is not triggered by a request from the sentenced person, but rather is a mandatory *proprio motu* review undertaken by the panel of judges appointed by the Appeals Chamber for that purpose.[45] While a sentenced person clearly has a strong interest in presenting information sufficient to establish the presence of factors justifying a reduction of his or her sentence, this does not equate to a burden of proof as such.[46] In this regard, the Panel notes that a sentenced person may not have access to or be able to provide all of the necessary information relevant to the factors laid out in article 110 (4) of the Statute and rule 223 of the Rules of Procedure and Evidence. Indeed, it is for this reason that the Panel decided to seek observations on the relevant factors from not only the Prosecutor and the Victims, but also from the Registrar, who in turn sought the views of the DRC authorities. The Panel considers that all participants in the Sentence Review, not only the sentenced person, are required to

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[43] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 12, lines 17-18.
[44] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p.12, line 24 to p. 13, line 2.
[45] *Supra* para. 20.
[46] While not binding authority, the Panel notes that some national jurisdictions similarly do not place a burden of proof upon sentenced persons in their respective early release proceedings. *See* United Kingdom, High Court of Justice, *R. (on the application of Sturnham) v Parole Board for England and Wales*, 14 March 2011, [2011] EWHC 938 (Admin), para. 27, where it was determined that no burden of proof existed in the parole review of an individual serving a life sentence as it was for the parole board to inquire into matters submitted before it in order to satisfy itself whether the confinement of the sentenced person was no longer necessary; United Kingdom, House of Lords, *Regina v Lichniak*, 25 November 2002, [2002] UKHL 47, paras 8, 16, explaining that the parole board is an independent body conducting an administrative proceeding, therefore casting doubt upon whether a burden of proof lies upon the sentenced person; United Kingdom, Court of Session, *Alexander Birrell v Parole Board of Scotland*, 30 November 2006, [2007] S.L.T. 440, para. 44, indicating that there is no adversarial element to the parole proceeding. *See also* A. Gualazzi, et. al., "'Back door sentencing' in Italy: common reasons and main consequences for the recall of prisoners", 4.1 European Journal of Probation (2012), p.73, at p.82, detailing the Italian early release procedure involving an administrative determination of a Surveillance Judge without hearing any participants or defence lawyers.

provide any information in their possession, whether weighing for or against release, relevant to the factors of article 110 (4) and rule 223 of the Rules of Procedure and Evidence. On the basis of all of the relevant information provided, the Panel will determine if any of the factors set out in the Court's legal framework are present and, if so, whether they justify a reduction of sentence.

B. Review of Mr Lubanga's sentence

33. Below, the Panel will assess each of the factors under article 110 (4) of the Statute and rule 223 of the Rules of Procedure and Evidence to determine whether any of these factors are present. In making this determination, the Panel has taken into account all of the information submitted in writing and orally from the Sentence Review participants, as well as from the Registrar and the DRC authorities, that is of relevance to each factor. In this regard, the Panel has carefully considered all of the submissions, even if they are not exhaustively summarised in the sections below.[47]

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

(a) Submissions of the participants

34. Mr Lubanga submits that this factor is satisfied.[48] He argues that, while he has not acknowledged guilt, he nonetheless has "always shown a firm desire to cooperate with the Court".[49] In this respect, he points out that, in the Sentencing Decision, the Trial Chamber noted his constant cooperation with the Court during the proceedings, even when the Prosecutor's conduct had put unjustified and considerable pressure on him.[50] Mr Lubanga argues that his conduct was "exemplary" throughout the trial proceedings and that he always cooperated despite "the difficult circumstances" in which his trial took place, referring in particular to the delay in the trial and the two stays of proceedings.[51] Mr Lubanga argues that, even if some examples of his

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[47] For example, where a participant has stated that they have no information in relation to a particular factor or that another participant is better suited to provide information in relation to a particular factor, these submissions are not reproduced below.
[48] Mr Lubanga's Observations, para. 19.
[49] Mr Lubanga's Observations, para. 14.
[50] Mr Lubanga's Observations, para. 15, referring to Sentencing Decision, para. 97.
[51] Mr Lubanga's Observations, paras 14-15; Transcript of Sentence Review Hearing ICC-01/04-01/06-T-366-Red-ENG (WT), p. 6, line 1 to p. 7, line 18.

cooperation during trial were taken into account in the Sentencing Decision, they can also be considered in the Sentence Review.[52]

35. The Prosecutor submits that Mr Lubanga has not demonstrated an 'early and continuing willingness' to cooperate with the Court.[53] She argues that the Trial Chamber's finding regarding Mr Lubanga's respectful and cooperative conduct throughout the proceedings does not amount to the cooperation envisaged under article 110 (4) (a) of the Statute.[54] She adds that a plain reading of this provision indicates that this factor is framed broadly to include proceedings that were not against the convicted person.[55] She argues that any other interpretation "would lead to absurd consequences", such as that every convicted person at this Court exhibiting good behavior during the court proceedings would be eligible for a reduction in sentence at the two thirds mark.[56] The Prosecutor argues that the case-law of other international criminal tribunals supports a "more expansive understanding" of the notion of cooperation in article 110 (4) (a) of the Statute.[57] She submits that, according to this case law, a convicted person is "at a minimum, expected to provide testimony, interviews and/or a guilty plea for their cooperation to be counted towards early release".[58] In other words, the actions of the convicted person "should impact 'the efficient administration of justice'".[59]

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[52] Mr Lubanga's Observations, para. 18.
[53] Prosecutor's Observations, para. 7; Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 14, lines 16-17.
[54] Prosecutor's Observations, para. 7, referring to Sentencing Decision, para. 91; Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 14, line 25 to p. 15, line 3; p. 15, lines 9-20.
[55] Prosecutor's Observations, para. 7.
[56] Prosecutor's Observations, para. 7.
[57] Prosecutor's Observations, para. 8.
[58] Prosecutor's Observations, para. 8, referring to ICTR, *The Prosecutor v. Michel Bagaragaza*, "Decision on the early release of Michel Bagaragaza", ICTR-05-86-S, 24 October 2011 (hereinafter: "*Bagaragaza* Decision"), paras 11-14; ICTR, *The Prosecutor v. Juvénal Rugambarara*, "Decision on the Early Release Request of Juvénal Rugambarara", 8 February 2012, ICTR-00-59 (hereinafter: "*Rugambarara* Decision"), paras 8-10; MICT, *Prosecutor v. Omar Serushago*, "Public Redacted Version of Decision of the President on the Early Release of Omar Serushago", 13 December 2012, MICT-12-28-ES, paras 23-30; MICT, *Prosecutor v. Paul Bisengimana*, "Decision of the President on early release of Paul Bisengimana and on motion to file a public redacted application", (public redacted version), 11 December 2012, MICT-12-07 (hereinafter: "*Bisengimana* Decision"), paras 28-31; MICT, *Prosecutor v. Ranko Češić*, "Public redacted version of the 30 April 2014 Decision of the President on the Early Release of Ranko Češić", 28 May 2014, MICT-14-66-ES, paras 22-24; ICTY, *Prosecutor v. Predrag Banović*, "Decision of the President on commutation of Sentence", 3 September 2008, IT-02-65/1-ES, paras 13-14; ICTY, *Prosecutor v. Dusko Sikirica, Damir Dosen and Dragan Kolundzija*, "Order of the President on the early release of Damir Došen", dated 28 February

(b) Determination of the Panel

36. The Panel recalls that article 110 (4) (a) of the Statute refers to the "early and *continuing* willingness of the person to cooperate" (emphasis added) with the Court's investigations and prosecutions. In this respect, the Panel notes that Mr Lubanga's cooperation during trial was taken into account in the Sentencing Decision as a mitigating factor, including during "particularly onerous circumstances" due to certain actions of the Prosecutor.[60] As set out above, this does not mean that this cooperation *per se* cannot be taken into account in the Sentence Review.[61] However, in their respective observations, neither Mr Lubanga nor the Prosecutor identifies any cooperation or willingness to cooperate from Mr Lubanga that continued beyond the conviction and imposition of sentence. In this same respect, the Panel has not been presented with any information that the cooperation taken into account in the Sentencing Decision has had any additional post-sentence impact on the Court's investigations or prosecutions. As such, in light of the relevant information, the acts of cooperation pointed to by Mr Lubanga do not qualify as "an early and continuing willingness to cooperate" within the meaning of article 110 (4) (a) of the Statute.

37. Accordingly, on the basis of all of the information received, the Panel finds that the article 110 (4) (a) factor of an early and continuing willingness to cooperate with the Court's investigations and prosecutions is not present for purposes of determining whether it is appropriate to reduce Mr Lubanga's sentence.

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, 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

(a) Submissions of the participants

38. The Prosecutor submits that Mr Lubanga has not provided any voluntary assistance to the Court within the meaning of article 110 (4) (b) of the Statute.[62] Furthermore, the Prosecutor argues that the currently available information relevant to

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2003 and registered on 7 March 2003, IT-95-8-ES, pp. 3-4; *Jokić* Decision, para. 15; Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 14, lines 21-24.
[59] Prosecutor's Observations, para. 8, referring to *Bisengimana* Decision, para. 30.
[60] Sentencing Decision, para. 91.
[61] *Supra* para. 30.
[62] Prosecutor's Observations, para. 10.

Mr Lubanga's alleged involvement in witness interference in the *Ntaganda* case "shows that Mr Lubanga's suspected actions potentially subverted the efficient administration of justice in another case".[63]

39. Mr Lubanga does not make any submissions relevant to voluntary assistance that he has given in relation to enforcing the judgments and orders of the Court in another case. However, in relation to the allegations against him in the *Ntaganda* case, Mr Lubanga asserts that he has had "no inappropriate contacts with potential [Prosecutor's] witnesses" and that the Panel cannot take these "groundless allegations" into account.[64] In this regard, Mr Lubanga points out the preliminary nature of the allegations and Trial Chamber VI's determinations thereon, as well noting that he has not been charged on the basis of these allegations.[65]

(b) Determination of the Panel

40. The Panel is mindful of the preliminary nature of the allegations against Mr Lubanga with respect to his actions in relation to the *Ntaganda* case. However, the Panel notes that the chapeau of article 110 (4) of the Statute requires it to first inquire into the presence of the factors listed therein. In this sense, the Panel considers that, before further addressing these allegations and whether they demonstrate *interference* in another case, it must first establish whether there is any evidence supporting a finding of the presence of *voluntary assistance* on the part of Mr Lubanga. The Panel notes that none of the participants have 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 finds that the article 110 (4) (b) factor of the voluntary assistance of Mr Lubanga in enabling the enforcement of the Court's judgments and orders in other cases is not present for purposes of determining whether it is appropriate to reduce Mr Lubanga's sentence. Having found that this factor is in any case not present, the Panel finds that there is no need for it to address the allegations of interference in the *Ntaganda* case.

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[63] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 15, line 25 to p. 16, line 4.
[64] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 11, lines 1-4.
[65] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 9, lines 17-18; p. 10, lines 7-10.

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

(a) Submissions of the participants

41. The Registrar submits that Mr Lubanga follows the Detention Centre House rules and that his overall behavior is good vis-à-vis the other detainees and the custodian and administrative staff of the Court.[66] However, the Registrar indicates that he has not been informed of "any speech or any conduct [of Mr Lubanga] which has showed regrets or other form of dissociation from his crime".[67]

42. Mr Lubanga submits that the Registrar's Observations show that he is respectful of the Detention Centre's rules and conforms to given instructions, as well as that he has conducted himself well in detention, in particular towards other detainees, the staff and administration of the Detention Centre.[68] According to Mr Lubanga, this demonstrates signs of rehabilitation.[69] At the Sentence Review Hearing, Mr Lubanga expressed remorse that "the actions [he] took [in 2002 and 2003] were not sufficient to end [the] conflict" and offered his "sincere apologies to all the victims for the suffering that they endured".[70] With respect to the crimes of conscripting and enlisting children under the age of fifteen years old and using them to participate actively in hostilities, Mr Lubanga stated:

> I was convicted of the enrolment of children under the age of 15 and convicted of using them within armed forces. Even though we were not able to convince the judges that my actions were effective when it came to demobilisation, my convictions have not changed, to my mind, there is no place in an army for children. Unfortunately, this practice of enrolling children in armies is still a widespread one, particularly in my country, the Democratic Republic of the Congo. Thus, I stand alongside all those who have taken a public position against this practice using all conduits possible to get this message across to raise the awareness of people to help political and military leaders understand.[71]

43. The Prosecutor submits that in light of Mr Lubanga's "apparent reluctance to genuinely dissociate from his crimes" and his alleged criminal activity in the

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[66] Registrar's Observations, para. 4.
[67] Registrar's Observations, para. 4.
[68] Mr Lubanga's Observations, para. 35.
[69] Mr Lubanga's Observations, para. 35.
[70] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 27, lines 17-25.
[71] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 28, lines 22 to p. 29, line 5.

Ntaganda case from the Detention Centre, "his conduct cannot be considered to warrant any early release".[72] The Prosecutor argues that the record does not demonstrate that Mr Lubanga has "genuinely dissociated from his crime" or that he has expressed remorse.[73] Referring to the Registrar's Observations, the Prosecutor argues that "merely abiding by the Detention Centre House Rules and showing good behavior *vis-à-vis* other detainees cannot qualify [Mr] Lubanga for early release".[74]

44. The Victims submit that Mr Lubanga's conduct does not demonstrate a genuine dissociation from his crimes.[75] They emphasize that during the proceedings Mr Lubanga always denied responsibility for the crimes for which he was convicted and further denied the fact that crimes had been committed.[76]

(b) Determination of the Panel

45. At the outset, the Panel notes that the plain meaning of this factor requires that the conduct of the sentenced person while in detention demonstrates a genuine dissociation from his or her crime. The Panel does not consider that good conduct while in detention generally or vis-à-vis other detainees and the Detention Centre staff is sufficient on its own to establish the necessary connection between this conduct and a dissociation from the crimes for which Mr Lubanga was convicted. The Panel notes that Mr Lubanga has expressed remorse for the general situation of unrest that exists in his community and that he has clearly expressed his opposition to conscripting and enlisting children under the age of fifteen years old and using them to participate actively in hostilities.

46. However, the Panel observes that there is a difference between a person expressing opposition to a particular criminal act in the abstract and that person accepting responsibility and expressing remorse for having committed those criminal acts. The Panel considers that this factor is primarily concerned with the latter, and not the former. In this regard, the Panel notes that, in his personal address, Mr Lubanga expressed remorse for being unable to "convince the judges that [his] actions

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[72] Prosecutor's Observations, para. 17.
[73] Prosecutor's Observations, para. 11, referring to Sentencing Judgment, paras 61-73; Registrar's Observations, para. 4.
[74] Prosecutor's Observations, para. 11, referring to Registrar's Observations, para. 4.
[75] Victims' Observations, para. 9.
[76] Victims' Observations, para. 9.

were effective when it came to demobilisation [of child soldiers]", but did not acknowledge his own culpability for conscripting and enlisting children under the age of fifteen years old and using them to participate actively in hostilities or express remorse or regret to the victims of the crimes *for which he was convicted*. The Panel considers that this indicates that Mr Lubanga has not, as submitted by the Prosecutor and the Victims, genuinely dissociated from his crimes.

47. Accordingly, on the basis of the information received, the Panel finds that there is no indication that Mr Lubanga's conduct while in detention shows a genuine dissociation from his crimes within the meaning of rule 223 (a) of the Rules of Procedure and Evidence 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) Submissions of the participants

48. Mr Lubanga submits that factors in favour of the release of a convicted person are whether the person is married, has children and has maintained contact with his or her family.[77] In this regard, he submits that he is married, has eight children and is the guardian of another child.[78] He argues that he has maintained contact with his wife and children almost on a daily basis since his detention at the Court, and that they visit him regularly.[79] Mr Lubanga submits that, if his sentence is reduced, he plans to resume post-graduate studies in psychology at the University of Kisangani,[80] where he intends to study inter-ethnic conflicts with a goal to identifying "stereotypes [and] prejudices" in order for the various "tribal groups to live together in harmony".[81] He avers that the vice-chancellor of the University of Kisangani does not oppose his

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[77] Mr Lubanga's Observations, para. 20, referring to ICTY, "Decision on President on early release of Veselin Sljivancanin", 5 July 2011, para. 25; *Bagaragaza* Decision, para. 12; ICTY, *Šljivančanin* Decision , para. 25; ICTY, *Prosecutor v. Dusko Sikirica, Damir Dosen and Dragan Kolundzija*, "Order of the President on the early release of Dragan Kolundžija", dated 5 December 2001 and registered on 13 December 2001, IT-95-8-S; MICT, *Prosecutor v. Dario Kordić*, "Public redacted version of the 21 May 2014 Decision of the President on the early release of Dario Kordić", 6 June 2014, MICT-14-68-ES, paras 22-23; *Bisengimana* Decision, para. 25.
[78] Mr Lubanga's Observations, para. 21.
[79] Mr Lubanga's Observations, para. 21.
[80] Mr Lubanga's Observations, para. 22.
[81] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 28, lines 13-19.

registration, subject to him fulfilling the conditions for admission.[82] In this regard, a university professor confirms that there are no obstacles to Mr Lubanga's registration and that he will personally monitor Mr Lubanga's post-graduate studies as well as supervise his dissertation.[83] Mr Lubanga adds that he has no previous convictions.[84]

49. The Registrar submits that because the Detention Centre of the Court is specifically mandated for the detention of suspects and accused persons only, it does not provide for a rehabilitation programme.[85] Thus, while Mr Lubanga is involved in group activities with other detainees, this cannot be considered as "indicative of a prospect of resocialization and successful resettlement of the sentenced person".[86]

50. The Prosecutor submits that she has no information showing that Mr Lubanga satisfies this criterion.[87] She notes that the Registrar's Observations on this matter "are equivocal at best".[88] The Prosecutor argues that consequently, this criterion "should be considered to be neutral" and therefore "cannot assist [Mr] Lubanga in seeking early release".[89] Regarding Mr Lubanga's plan to resume post-graduate studies, the Prosecutor suggests that the likelihood of this occurring is questionable, given that Mr Lubanga has not yet applied to the university, there is no guarantee that he will be accepted in the program and the DRC authorities still need to approve his

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[82] Mr Lubanga's Observations, para. 23.
[83] Mr Lubanga's Observations, para. 23, referring to Annex 2 to Mr Lubanga's Observations, ICC-01/04-01/06-3151-Anx2-tENG.
[84] Mr Lubanga's Observations, para. 24, referring to *Rugambarara* Decision, para. 15 where Mr Lubanga argues that Juvénal Rugambarara's absence of previous criminal record had been considered by the President of the ICTR.
[85] Registrar's Observations, para. 5, referring to "Standard Minimum Rules for the Treatment of Prisoners", 30 August 1955, approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, para. 61, which states: "The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners". In that regard, the Registrar indicates that the Detention Centre does not have the required expertise for assessing this criterion because it is not "designed" for the detention of convicted persons and does not have the "specialist staff with the requisite skills" for that purpose.
[86] Registrar's Observations, para. 5.
[87] Prosecutor's Observations, para. 18.
[88] Prosecutor's Observations, para. 18, referring to Registrar's Observations, para. 5.
[89] Prosecutor's Observations, para. 18.

admission.[90] The Prosecutor also argues that there is a "plausible doubt" as to whether this is his true intention, pointing to various statements made by Mr Lubanga to suggest that his real intention may be to return to Ituri.[91]

51. The Victims argue that a reinsertion of Mr Lubanga in the community in a spirit of peace and reconciliation is not possible.[92] They aver that if Mr Lubanga has such motivation, this should be translated in his attitude towards them.[93]

(b) Determination of the Panel

52. The Panel notes that Mr Lubanga has family in the DRC with whom he currently maintains regular contact. Additionally, the Panel notes that Mr Lubanga has taken steps to arrange to be a post-graduate student following his incarceration. The Panel does not find the Prosecutor's arguments in relation to Mr Lubanga's "true" intention to return to Ituri, as opposed to Kisangani, to be persuasive and considers these arguments to amount to mere speculation, to which little to no weight should be afforded. In this same regard, the Panel does not find that the fact that Mr Lubanga must complete additional steps to complete his enrolment at university or that his eventual admission is subject to the approval of other individuals to be a basis for doubting the veracity of his intention to resume his studies in Kisangani if he is released.

53. Accordingly, on the basis of the information received, the Panel finds that there is a prospect for the resocialization and successful resettlement of Mr Lubanga in the DRC. Accordingly, the Panel considers that the factor laid out in rule 223 (c) of the Rules of Procedure and Evidence is present. Below, in section C, this factor will be weighed with any other factors found to be present in order to determine whether it (or they) is (or are) sufficient to justify reducing Mr Lubanga's sentence.

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[90] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 17, lines 8-14.
[91] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 17, lines 17-24.
[92] Victims' Observations, para. 11.
[93] Victims' Observations, para. 11.

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

(a) Submissions of the participants

54. The Registrar submits that, while he cannot at this point provide "reliable conclusions", he emphasizes consideration of, inter alia: (i) the timing of the potential release; (ii) the potential political instability within the *Union des Patriotes Congolais* (hereinafter: "UPC"); and (iii) local community views.[94]

55. Regarding the timing of the release, the Registrar submits that, if Mr Lubanga's release coincides with the local and provincial elections and the reorganization of the existing provinces, the deadline for which has been set to 30 June 2016, this could be problematic.[95]

56. Regarding the potential political instability within the UPC, the Registrar states that Mr Lubanga "remains a powerful figurehead for the UPC", however, there is a possibility that rivals from within the party may emerge to stand in the elections.[96]

57. Regarding the local community views, the Registrar submits that, although the local population and the respective ethnic communities have not been consulted on the issue of Mr Lubanga's potential early release, the "prevailing sentiment" is that the "UPC will await his return and maintain their loyalty".[97] Given that Mr Lubanga is considered a "hero/martyr figure" by UPC supporters, there may be possible disturbances if large crowd gatherings occur.[98] However, the Registrar indicates that it is a "working assumption at this stage that any such disturbances would remain localized and could be sufficiently controlled by [the] DRC authorities and UN peacekeepers".[99]

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[94] Registrar's Observations, para. 6.
[95] Registrar's Observations, para. 6. In this regard, the Registrar explains that a consequence of the reorganization is that Ituri would become a province "in its own right" and the political leaders in Ituri (including within the UPC) "have indicated intent to strive for greater autonomy or even full independence for Ituri" *See ibid.*, para. 6.
[96] Registrar's Observations, para. 6.
[97] Registrar's Observations, para. 6.
[98] Registrar's Observations, para. 6.
[99] Registrar's Observations, para. 6.

58. The DRC authorities express great reservations regarding this factor.[100] They submit that Mr Lubanga's conviction for only the war crime of conscripting, enlisting and using children under the age of 15 years in hostilities was not well received by the population of Ituri, which witnessed other crimes of a more serious nature.[101] The possible early release of Mr Lubanga and his return in Ituri could aggravate this perception and re-traumatize victims.[102] The DRC authorities also indicate that they are concerned that there could be detrimental consequences if Mr Lubanga is released when the *Ntaganda* case has not yet started.[103] Moreover, they state that it would be unfortunate if Mr Lubanga were released while another individual is serving a 10 year sentence after being convicted by the Military High Court of the DRC, as this would give the impression of a two-tier justice system in the DRC.[104]

59. Mr Lubanga submits that this factor must be assessed with caution because it is based on unverified allegations and opinions regarding a particular social and political situation, and the possible consequences of the release of an individual therein.[105] He argues that his return in Kisangani will not give rise to significant social instability, but rather is an essential element in the reconciliation process between communities.[106] He avers that nothing suggests that his release would affect the social stability of the city of Kisangani, given that it is situated 800 km from the city of Bunia.[107] According to Mr Lubanga, his return to the city of Kisangani is a solution recommended by individuals who gave statements to the Prosecutor.[108] Mr Lubanga argues further that the social, political and security situation of Ituri has been stabilized[109] and that the population of Ituri and in particular, the Hema and Lendu

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[100] Observations of the DRC authorities, para. 5. a.
[101] Observations of the DRC authorities, para. 5. a.
[102] Observations of the DRC authorities, para. 5.
[103] Observations of the DRC authorities, para. 5. c.
[104] Observations of the DRC authorities, para. 5. c.
[105] Mr Lubanga's Observations, para. 25, referring to Travaux Préparatoires, PCNICC/1999/L.5/Rev/Add.1, note 127; PCNICC/2000/WGRPE(10)/RT.1, note 5.
[106] Mr Lubanga's Observations, paras 26, 31.
[107] Mr Lubanga's Observations, para, 27.
[108] Mr Lubanga's Observations, para. 28, referring to Annexes 2 (ICC-01/04-01/06-3150-Anx2-Red), 3 (ICC-01/04-01/06-3150-Anx3-Red), 4 (ICC-01/04-01/06-3150-Anx4-Red) to the Prosecutor's Observations.
[109] Mr Lubanga's Observations, para. 29, referring to Annex 3 to Mr Lubanga's Observations, ICC-01/04-01/06-3151-Anx3-Red.

communities, live today together in peace.[110] He adds that community leaders in Ituri have confirmed that his return will be an important factor for reconciliation, that he will be able to contribute to intercommunity cohabitation, and indicated that the release of Mr Mathieu Ngudjolo had not caused any problems.[111]

60. Mr Lubanga also avers that representatives of communities grouped under the organization *Union des Associations Culturelles et de Développement de l'Ituri* (Union of Cultural and Development Associations of Ituri) are not opposed to his return in Ituri and consider that his reinsertion would fulfill their objectives that focus on unity and reconciliation.[112] Likewise, Mr Lubanga maintains that representatives of civil society in Ituri have declared that his return and reinsertion into society will not disrupt the process of reconciliation, but will instead constitute a necessary condition to the achievement of this process.[113]

61. The Prosecutor submits that while the Registrar cannot at this moment provide conclusive observations on this criterion, he "raises some key issues that may threaten the region's social stability".[114] The Prosecutor notes that Mr Lubanga's return would likely prompt agitations in Bunia and its suburbs, particularly in ethnic communities that do not support Mr Lubanga.[115]

62. The Victims submit that based on Mr Lubanga's current attitude, they fear that his release and return in the region would give rise to tensions between communities, even within his own community from which some victims originate.[116] The Victims

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[110] Mr Lubanga's Observations, para. 29, referring to Annex 6 to Mr Lubanga's Observations, ICC-01/04-01/06-3151- Anx6-Red).
[111] Mr Lubanga's Observations, para. 30, referring to Annexes 2 (ICC-01/04-01/06-3150-Anx2-Red) 3 (ICC-01/04-01/06-3150-Anx3-Red), 5 (ICC-01/04-01/06-3151-Anx5-Red) to Mr Lubanga's Observations.
[112] Mr Lubanga's Observations, para. 30, referring to Annex 4 to Mr Lubanga's Observations, ICC-01/04-01/06-3151-Anx4-Red.
[113] Mr Lubanga's Observations, para. 30, referring to Annex 5 to Mr Lubanga's Observations, ICC-01/04-01/06-3151-Anx5-Red.
[114] Prosecutor's Observations, para. 19, referring to Registrar's Observations, p. 5.
[115] Prosecutor's Observations, para. 19, referring to Annexes 2 (ICC-01/04-01/06-3150-Anx2-Red), 3 (ICC-01/04-01/06-3150-Anx3-Red), 4 (ICC-01/04-01/06-3150-Anx4-Red) to the Prosecutor's Observations.
[116] Victims' Observations, para. 12.

fear this would give rise to the resumption of the armed conflict and potentially to new war crimes.[117]

(b) Determination of the Panel

63. The Panel concurs with Mr Lubanga that this factor should be assessed with caution, although for different reasons. The Panel notes that this factor was the subject of much debate during the drafting of the Court's legal texts. According to one commentator, the Preparatory Commission struggled to capture the concept of considering the political conditions in the territorial State as a factor in review for early release.[118] The delegations to the Commission ultimately agreed that the central concern for the Court was whether early release would result in social instability within the territorial State.[119] In terms of how this factor is to be assessed, another commentator has suggested that this factor "leaves a great margin of discretion".[120] This is because, on the one hand, this factor is "formulated in a negative manner as an excluding criterion, i.e. if no social instability is caused by the release, the absence of this element would weigh in favour of the release",[121] but on the other hand, in other circumstances, the potential social instability could be weighed against existing factors favouring sentence reduction.[122]

64. The Panel considers that conflicting information has been presented by various sources suggesting that Mr Lubanga's early release: (i) would be beneficial to the reconciliation process; (ii) would have some destabilizing effect, but that this could be lessened by his resettlement in an area other than Bunia; or (iii) would risk causing significant social instability, particularly in light of the upcoming elections. The Panel considers that, on balance, the information presented suggests that Mr Lubanga's release would give rise to some level of social instability, but that this instability has not been demonstrated to be "significant" as required under this factor. Accordingly,

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[117] Victims' Observations, para. 12.
[118] K. Post, "Enforcement", in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) (hereinafter: "Lee"), p. 673, at p. 700.
[119] Lee, at p. 700.
[120] A. Oehmichen, "Commentary Rules of Procedure and Evidence", in *Commentary on the Law of the International Criminal Court*, Case Matrix Network (hereinafter: Oehmichen Rules Commentary), para. 403.
[121] Oehmichen Rules Commentary, para. 403.
[122] Oehmichen Rules Commentary, para. 403.

on the basis of the information received, the Panel 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 of Procedure and Evidence 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) Submissions of the participants

65. The Prosecutor submits that the record does not show that Mr Lubanga "has taken any 'significant action' to benefit the victims".[123] She refers to the observations of the DRC authorities, in which they expressed concerns about the possibility of victims being re-traumatised, and to statements that voiced similar concerns from local authorities and members of the community.[124]

66. The Victims submit that Mr Lubanga's attitude has and will continue to have a direct impact on how the victims that are participating in the reparation proceedings will be perceived by their communities and even by their own families.[125] They further submit that his attitude will affect the reparation process as implementing reparations will require the collaboration of local communities and their leaders, some of whom are closely linked to Mr Lubanga's political group.[126]

67. The Victims also point out that, on 2 July 2015, they communicated via e-mail with counsel for Mr Lubanga suggesting actions that Mr Lubanga could undertake that would promote social stability in Ituri and reconciliation between communities and within them, such as, *inter alia*, his participation in the reparation process and a

[123] Prosecutor's Observations, para. 21.
[124] Prosecutor's Observations, para. 21, referring to the Observations of the DRC authorities, para. 5; Annexes 2 (ICC-01/04-01/06-3150-Anx2-Red), 3 (ICC-01/04-01/06-3150-Anx3-Red), 4 (ICC-01/04-01/06-3150-Anx4-Red) to the Prosecutor's Observations.
[125] Victims' Observations, para. 13.
[126] Victims' Observations, para. 14.

demonstration of regret.[127] The Victims indicate that Mr Lubanga has not responded to this e-mail.[128]

68. Mr Lubanga argues that the statements annexed to his observations show that his early release will be perfectly accepted by the civil population affected by the crimes committed in the district of Ituri during 2002-2003.[129] With respect to the Victims' email correspondence, at the Sentence Review Hearing, Mr Lubanga's counsel stated:

> Now, finally, a few words about Mr Lubanga's attitude to the clients of Mr Walleyn, in other words, the people who came together and formed a group, group of victims in the Lubanga case. We are told that a dialogue is necessary. One must begin a dialogue. And I am very sorry, this dialogue is not a forum, but if we are to speak to the victims, the question is this: Who are we speaking to? Ever since the very beginning of this case, the victims, this group of people who have come together and are represented by my colleague, have disappeared into anonymity. Those who actually appeared before the Trial Chamber all were disqualified. Their false testimony was revealed for what it is -- was. The judges dismissed their testimony. They withdrew their status as victims.[130]

(b) Determination of the Panel

69. The Panel recalls that it must first establish whether there is any evidence to support a finding of the presence of "significant action" taken by Mr Lubanga for the benefit of the victims of the crimes for which he was convicted. In this regard, the Panel notes that none of the participants have presented any information that could potentially establish the presence of such an action by Mr Lubanga. Furthermore, Mr Lubanga himself does not submit that he has taken any significant action for the benefit of victims. Indeed, the Panel observes that Mr Lubanga has not responded to the Victims' suggestion regarding his involvement in, *inter alia*, the reparation process or a demonstration of regret, which could be acts considered to be of relevance to this factor. On the contrary, the Panel observes that during the Sentence Review Hearing Mr Lubanga's counsel continued to challenge the Victims' status.

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[127] Victims' Observations, para. 15, referring to Annex 1 to the Victims' Observations, ICC-01/04-01/06-3149-Conf-Anx1-tENG. Annex 1 is a copy for the email sent on 2 July 2015 by the Victims to Counsel of Mr Lubanga.
[128] Victims' Observations, para. 16.
[129] Mr Lubanga's Observations, para. 36.
[130] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 25, lines 7-16.

70. The Panel further notes 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.

71. Accordingly, on the basis of the information received, the Panel finds that there is no indication of any significant action taken by Mr Lubanga for the benefit of the victims within the meaning of rule 223 (d) of the Rules of Procedure and Evidence 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) Submissions of the participants

72. Mr Lubanga argues with respect to his individual circumstances that the period of time he spent in detention in the DRC prior to his surrender to the Court and the fact that he spent much of his sentence in detention prior to his conviction must be taken into account when deciding whether his sentence should be reduced.[131] He argues that the latter "unusual" circumstance is the consequence of delays caused by the two stays of proceedings at trial because of the Prosecutor's conduct.[132] He submits that "[t]he sentence he has already served was aggravated" by this situation and accordingly "the Court has a duty to do something to undo this harm, this prejudice [that he] suffered".[133]

73. The Prosecutor submits that she "is not aware of any individual circumstances that may warrant [Mr] Lubanga's early release".[134] Additionally, the Prosecutor submits that the Panel should "simply ignore" Mr Lubanga's submission that his prior period of home arrest and detention in the DRC be taken into account as individual

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[131] Lubanga's Observations, paras 32-34; Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 23, line 5 to p. 24, line 2.
[132] Lubanga's Observations, para. 34.
[133] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 23, lines 18-25.
[134] Prosecutor's Observations, para. 22.

circumstances, because they "do not fall within this provision which refers to circumstances such as age or infirmity", and "are not individual circumstances".[135]

(b) Determination of the Panel

74. The Panel understands Mr Lubanga to argue that a reduction of sentence should serve as a remedy for alleged violations of his human rights that occurred prior to and during the trial proceedings.[136] As a preliminary matter, the Panel notes that this concept of reduction of sentence as a remedy for a human rights violation is not reflected in either article 110 (4) or rule 223 of the Rules of Procedure and Evidence. For the proceedings at hand, the Panel does not find it necessary to decide whether it would *per se* be permissible to take into account such alleged violations.

75. Indeed, the Panel notes that similar arguments were considered and rejected in the Sentencing Decision, and rejected again on appeal in the Sentencing Judgment.[137] In these circumstances, the Panel is of the view that it is not appropriate to deal with these matters again at the stage of sentence review.

76. In light of the information submitted by all the participants relevant to this factor, the Panel determines that there are no individual circumstances which should be taken into consideration within the meaning of rule 223 (e) of the Rules of Procedure and Evidence in determining whether it is appropriate to reduce Mr Lubanga's sentence.

C. The Panel's determination of whether it is appropriate to reduce Mr Lubanga's sentence

77. The Panel has determined in accordance with rule 223 (c) of the Rules of Procedure and Evidence, that there is a prospect for the resocialization and successful resettlement of Mr Lubanga in the DRC.[138] However, the Panel considers that in the absence of any other factors in favour of reduction, a reduction of Mr Lubanga's

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[135] Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 19, lines 9-14.
[136] *See* Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 23, lines 17-18.
[137] *See* Sentencing Decision, paras 89-90, 100-102; Sentencing Judgment, B. Ground 2: Alleged failure to take into account violations of Mr Lubanga's fundamental rights, pp. 43-46, pp. 47-48.
[138] *Supra* para. 53.

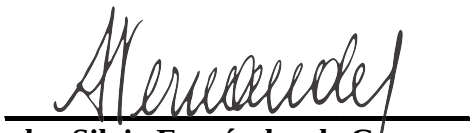
sentence cannot be justified. The Panel therefore decides that it is not appropriate to reduce Mr Lubanga's sentence pursuant to article 110 (3) of the Statute.

III. DISPOSITION

78. Having decided that it is not appropriate to reduce Mr Lubanga's sentence, the Panel will now address the question of subsequent reviews. Where the Panel has decided in its initial review not to reduce the sentence, article 110 (5) of the Statute provides in relevant part that the Court "shall thereafter review the question of reduction of sentence at such intervals […] as provided for in the [Rules of Procedure and Evidence]". Rule 224 (3) of the Rules of Procedure and Evidence provides that the Panel "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".

79. The Panel recalls that Mr Lubanga was sentenced to a term of 14 years imprisonment.[139] Thus, Mr Lubanga currently has less than four and a half years left to serve of his total sentence. In these circumstances, the Panel does not consider that a three year interval until the next review of sentence is appropriate and decides that it will review Mr Lubanga's sentence pursuant to article 110 (5) of the Statute two years from the issuance of this decision, the specific date to be set and communicated to the review participants at a later time.

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



Judge Silvia Fernández de Gurmendi
Presiding Judge

Dated this 22nd day of September 2015

At The Hague, The Netherlands

[139] *Supra* para. 2.