Cour Pénale Internationale

International Criminal Court

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THREE JUDGES OF THE APPEALS CHAMBER APPOINTED FOR THE REVIEW CONCERNING REDUCTION OF SENTENCE

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA

Public
With Public Annexes 1-8

Defence Observations on the reduction of sentence of Mr Germain Katanga

Source: **Defence for Mr Germain Katanga**

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

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INTRODUCTION

1. On 7 March 2014, Trial Chamber II sentenced Mr Germain Katanga to a term of twelve years' imprisonment.[1]

2. On 13 August 2015, noting that Mr Germain Katanga on 18 September 2015 will have served two thirds of his sentence, three judges of the Appeals Chamber ('the Panel') issued a Scheduling order for the review, pursuant to Article 110 of the Rome Statute, concerning reduction of sentence of Mr Germain Katanga.[2] They invited the Registrar, Prosecutor, Legal Representatives of Victims, and Mr Germain Katanga, to submit written observations in preparation of the review hearing scheduled for 6th October 2015. On 31 August 2015, the panel consented to requests by the Prosecutor and the Legal Representative for Victims that they submit their observations subsequent to those made on behalf of Mr Katanga.[3] On 4 September the Registrar submitted his observations on the criteria set out in Rule 223(a) to (c) of the Rules of Procedure and Evidence.[4]

3. The defence for Mr Katanga (the "defence") hereby respectfully submits its observations.

4. As a preliminary point, the defence notes that the Chamber invited both Legal Representatives of Victims to submit observations. Mr Katanga was acquitted of the charge of using child soldiers and Trial Chamber II expressely stated that "*La Chambre tient à relever que la position qu'elle a prise sur la charge d'utilisation d'enfants soldats ne permet plus au Représentant légal de ce groupe de victimes de participer désormais à la procédure. »*[5] The defence respectfully submits that the legal representative of the group of child soldier victims should therefore not be authorised to submit observations.

[1] ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute.
[2] ICC-01/04-01/07-3574.
[3] ICC-01/04-01/07-3581, Decision on the requests to modify the schedule for written submissions.
[4] ICC-01/04-01/07-3584, Registrar's Observations on the criteria set out in rule 223 of the Rules of Procedure and Evidence.
[5] ICC-01/04-01/07-3437, 7 March 2014, para. 4.

APPLICABLE LAW

5. The principle applicable law is found in Article 110 of the Rome Statute and Rule 223 of the Rules of Procedure and Evidence ("RPE").

INTERPRETATION

6. The option of early release for convicted individuals exists in most national jurisdictions and the ad hoc tribunals. The aim of reducing the sentence is the same in these various jurisdictions, namely, to stimulate re-adjustment and social reintegration of convicted individuals and to encourage good conduct in prison. As observed by one commentator:

> Probably all criminal justice systems provide for early release of prisoners, under specific circumstances. Not only does the possibility of early release create an incentive to the prisoner that promotes good behaviour while in detention, it is also consistent with the spirit of universal human rights norms. According to the International Covenant on Civil and Political Rights, '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which is the suitability of the prisoner for reformation and social rehabilitation. But many prisoners may be suitable for reformation and social rehabilitation almost immediately, upon beginning the service of their sentence. This is especially true with international crimes, which generally take place within a context of civil strife and armed conflict. […] Many of the post-Second World War prisoners benefited from dramatic reductions in their prison terms. […] At the *ad hoc* tribunals, prisoners are released as a general rule after having served two-thirds of their sentence.[6]

7. The President of the International Criminal Tribunal for Rwanda (« ICTR ») has expressed the view that there is no difference between the notion of « provisional release » under the rules of the ICTR and the International Criminal Tribunal for the former Yugoslavia (« ICTY »), on the one hand, and « reduction of sentence » under article 110 of the Rome Statute on the other, as both notions refer to reduction of the

[6] William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 2nd ed. (Oxford University Press 2013), p. 1102.

sentence or a « commutation » of the sentence.[7] Accordingly, the jurisprudence of the ad hoc tribunals is directly relevant to the proper interpretation of Article 110 of the Rome Statute and Rule 223 of the RPE, and more specifically, the determination of whether a reduction of Mr Katanga's sentence is warranted. Pursuant to article 21(1)(b) of the Rome Statute, where appropriate, the Court shall apply international legal principles. In this case, where ICC jurisprudence does not yet exist in relation to the question of reduction of sentence, it would be appropriate to consider the jurisprudence of the *ad hoc* tribunals in relation to this issue. The Court should be guided by these fundamental objectives in their review of the sentence.[8]

ARTICLE 110(4)/RULE 223 FACTORS

8. Only one factor need be present in order to reduce a detainee's sentence. Indeed, according to the *Commentary on the Law of the International Criminal Court* ('CLICC Commentary'), "[r]eduction of sentence is already permissible if only one of [the Article 110(4)] factors is present."[9] Moreover, such factors "are all focused on the present and future, not on the past. They give regard to special preventative considerations rather than retaliation. This understanding is in line with the general principle that the execution of sentences should be mainly oriented towards rehabilitation and reinsertion, while criteria of retaliation and atonement have already been taken account when determining the length of the sentence."[10]

Art 110(4)(a) Willingness to cooperate in investigations and prosecutions

9. The ad hoc tribunals have held that the lack of cooperation with the prosecution by a convicted individual cannot be an obstacle to a reduction of his or her sentence, in particular where the prosecutor did not seek such cooperation.[11] The CLICC Commentary refers to the *ad hoc* jurisprudence and notes that "cooperation with the

[7] ICTR, *Pros. v Bagaragaza*, NoICTR-05-86-S, Decision of 24 October 2011, para. 9, referring to an internal memorandum drafted by President Byron, dated 20 October 2010. See also W. SCHABAS, The International Criminal Court – A commentary on the Rome Statute, Oxford University Press, 2010, p.1105.
[8] Par ex. W. SCHABAS, Ibid, p.1102 ; J. FERNANDEZ et X. PACREAU, Statut de Rome de la Cour pénale internationale – commentaire article par article, Pedone, Paris, Tome II, 2012, p.1996
[9] *Idem.*
[10] *Idem.*
[11] See ICTY, Naletelić Case, NoIT-98-34-ES, Decision of 26 March 2013, para. 30 ; MTPI, Kordić Case, NoMICT-14-68-ES, Decision of 6 June 2014, para. 26, quoting MTPI, Sagahutu Case, NoMICT-13-43-ES, Decision of 13 May 2014, para. 22.

authorities was considered as a neutral factor, as cooperation had not been sought by part of the OTP."[12]

10. Many individuals have been released after serving two thirds of their imprisonment even if they never admitted guilt.[13] For instance, in *Jokic*, ICTY President Robinson did not consider that the lack of Jokic's substantial cooperation with the Prosecution should hold sway among the relevant factors to be considered in early release applications.[14] In this respect, President Robinson recalled the Appeals Chamber's holding that "an accused is not obliged to assist the Prosecution in proving its case and that any evidence of willingness on the part of an accused to be voluntarily interviewed by the Prosecution is evidence of a degree of cooperation, which he is entitled to withhold without adverse inference being drawn therefrom."[15]

11. In the ICTR case of Ruzindana, it was similarly noted:

> At the outset that entering a guilty plea promotes the efficient administration of justice and constitutes cooperation with the Prosecution. However, an accused person is under no obligation to plead guilty or, in the absence of a plea agreement, to cooperate with the Prosecution. I also note that the Prosecution does not indicate whether it or the Office of the Prosecutor of the ICTR sought Ruzindana's cooperation at any point during his trial or after he was convicted. I therefore consider that Ruzindana's lack of cooperation with the Prosecution or the Office of the Prosecutor of the ICTR is a neutral factor in my determination of whether to grant him early release.[16]

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[12] Anna Oehmichen, "Article 110(4)", in *CLICC*.
[13] For instance M. Muvunyi, M. Ruzindaza, M. Ntakirutimana, M. Žigić, M. Blagojević, M. Kovač, M. Krajišnik.
[14] *Pros. v. Dragan Jokic and Contempt Proceedings Against Dragan Jokic*, Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Dragan Jokic of 8 December 2009, IT-02-60-ES / IT-05-88-R77.1-ES, 13 January 2010, para. 17, at https://www.legal-tools.org/uploads/tx_ltpdb/100113.pdf
[15] *Idem.*
[16] *Pros. v. Obed Ruzindana*, Decision of the President on the Early Release of Obed Ruzindana, MICT-12-10-ES, 13 March 2014, para. 21, at http://www.unmict.org/sites/default/files/casedocuments/mict-12-10/president%E2%80%99s-orders/en/140313.pdf See also: *Pros. v. Momcilo Krajisnik*, Decision of the President on Early Release of Momcilo Krajisnik, IT-OO-39-ES, 2 July 2013, para. 29, at https://www.legal-tools.org/uploads/tx_ltpdb/130702.pdf; *Pros. v. Vidoje Blagojevic*, Decision of the President on Early Release of Vidoje Blagojevic, IT-02-60-ES, 3 February 2012, para. 24, at https://www.legal-tools.org/uploads/tx_ltpdb/120203.pdf; *Pros. v. Milomir Stakic*, Decision of President on Early Release of Milomir Stakic, IT-97-24-ES, 15 July 2011, para. 37, at https://www.legal-tools.org/uploads/tx_ltpdb/110715.pdf; *Pros. v. Haradin Bala*, Decision on

12. The factor under article 110(4)(a), namely 'The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions' should be interpreted in the same light. In particular where the Prosecution did not seek the cooperation of the detainee, this cannot go against the reduction of a detainee's sentence. Indeed, willingness to cooperate is not tantamount to taking the initiative to do so. Accordingly, if the Prosecution does not engage with the accused and does not even request to interview him, an accused is not expected to take the initiative in contacting the prosecution to demonstrate his willingness to cooperate.

13. As noted in the CLICC Commentary, "[i]t is important that it is the (demonstrated) willingness to cooperate that may weigh in favor of release, not actually effected cooperation; whether cooperation will actually be possible would be a question out of reach for the detainee, and it would be unfair if a lack of cooperation would weigh against him while no authority wanted the latter from him."[17]

14. The CLICC Commentary further notes that "cooperation with the authorities is a factor that will necessarily be considered already at the level of sentencing. Therefore, it is questionable in how far this factor should play such a prominent role again when it comes to the reduction of sentences".[18]

Art 110(4)(b) Voluntary assistance in enforcement of judgments and orders in other cases and locating assets

15. According to Oehmichen, "[i]t is new to explicitly regulate this criterion in international criminal law. Voluntary assistance can consist in voluntary surrender as well as in locating assets."[19] Again, this factor should not be given too much weight, as it is a factor already considered in determining the appropriate sentence. Indeed, in Gvero, the ICTY President stated that 'voluntary surrender' was not an explicit factor of early release but was rather a mitigating factor taken into account at the sentencing

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Applicatiom of Haradin Bala for Sentence Remission, IT-03-66-ES, 15 October 2010, para. 27, at https://www.legal-tools.org/uploads/tx_ltpdb/101015.pdf.
[17] Anna Oehmichen, "Article 110(4)", in *CLICC*.
[18] *Idem.*
[19] *Idem.*

stage.[20]

Art 110(4)(c) Clear and significant change of circumstances

16. This factor does not stand alone but must be read in light of the factors set out in Rule 223. Indeed, Oehmichen notes that "[w]hile the first two factors are explicitly phrased in [Articles 110(4)(a) and (b)], the 'other factors' mentioned under [Article 110(4)(c)] are further explained under Rule 223".[21]

Criteria (a) Rule 223 RPE – conduct in detention

17. According to the CLICC Commentary, "[i]n domestic law, this is usually the most important criterion. The conduct during detention gives the closest indication as to the risk of the prisoner to re-offend upon release and thus serves to indicate the prisoner's ability for rehabilitation. It is actually a sub-category of resocialization, which makes it difficult to draw the line between [articles 223(a)] and [223(b)]."[22]

18. At the *ad hoc* tribunals, good behavior during detention as a sign of rehabilitation has been a ground for granting early release in many cases.[23] Good relationships with

[20] *Prosecutor v. Milan Gvero*, Decision of President on Early Release of Milan Gvero, IT-05-88-ES, 28 June 2010, para. 5, at http://www.icty.org/x/cases/popovic/presdec/en/100628.pdf
[21] Anna Oehmichen, "Article 110(4)", in *CLICC*.
[22] Anna Oehmichen, "Rule 223", in *CLICC*, at http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rules-of-procedure-and-evidence/.
[23] *Idem.* For the ICTY, cf., e.g., *Prosecutor v Blaskic*, No. IT-95-14, Order of the President on the Application for Early Release of Tihomir Blaskic, 29 July 2004, para. 8; *Prosecutor v Milojica Kos*, No. IT-98-30/1-A, Order of the President for the Early Release of Milojica Kos, 30 July 2002; *Prosecutor v. Mucic*, No. IT-96-21, Order of the President in Response to Zdravako Mucic's Request for Early Release, 9 July 2003; *Prosecutor v. Damir Dosen*, IT-95-8-S, Order of the President on the Early Release of Damir Dosen, 28 Feb. 2003; *Prosecutor v Furundzija*, Order of the President on the Application for the Early Release of Anto Furundzija, 19 July 2004, No. IT-95-17/1; *Prosecutor v Aleksovski*, No. IT-95-14/1, Order of the President for the Early Release of Zlatko Aleksovski, 14 November 2001, para. 4, for the ICTR, see *Prosecutor v. Muvunyi*, No. ICTR-00-055A-T, Decision on Tharcisse Muvunyi's Application for Early Release, 6 March 2012, para. 6; Bagaragaza, Decision on the Early Release of Michel Bagaragaza, ICTR 05-86-S, 24 October 2011, para. 12; *Prosecutor v. Rugambarara*, Decision on the Early Release of Juvénal Rugambarara, No. ICTR-00-59, 8 February 2012, para. 13; *Prosecutor v. Tihomir Blaskic*, Order of the President on the Application for the Early Release of Tihomir Blaskic, IT-95-14-A, 29 July 2004, para. 5, at http://www.genderjurisprudence.org/documents/icty/ICTY_-_Judgments,_Orders_&_Indictments/Blaskic_(Lasva_Valley)_IT-95-14/Orders/Orders_of_the_President/2004-07-29,_Blaskic-Order_on_Applctn_for_Early_Release_of.pdf, para. 5 ; *Prosecutor v. Tharcisse Muvunyi*, Decision on Tharcisse Muvunyi's Application for Early Release, ICTR-00-055A-T, 6 March 2012, para. 6, at http://41.220.139.198/Portals/0/Case%5CEnglish%5CMuvunyi%5Cdecisions%5C120306.pdf ; *Prosecutor v. Michel Bagaragaza*, Decision on the Early Release of Michel Bagaragaza, ICTR-05-86-S, 24 October 2011, para. 12, at http://www.worldcourts.com/ictr/eng/decisions/2011.10.24_Prosecutor_v_Bagaragaza.pdf.

fellow inmates (especially of different ethnicities/nationalities) has been accepted as a sign of rehabilitation and may equally be evidence of good conduct.[24] Expressions of remorse can also be considered as a factor reducing the sentence, provided it amounts to a "genuine dissociation from his crime".[25]

Criteria (b) Rule 223 RPE – resocialisation and resettlement

19. One commentator avers that "[r]esocialization and social rehabilitation are generally factors that […], together with public security, are considered by domestic courts. However, in a situation of macro-criminality the relevance of this factor is questionable. Unlike in cases of 'ordinary' crimes, perpetrators of international crimes act, as a rule, in conformity with their immediate social environment. As a consequence, the majority of them will not be likely to reoffend after release".[26] In this regard, "[a]t the *ad hoc* tribunals, indications for a sincere attempt for social reintegration were seen in the involvement of rehabilitation programmes at prison":[27]

20. At the *ad hoc* tribunals, the following types of conduct have been considered as capable of amounting to sincere attempts to achieve social reintegration: the involvement of rehabilitation programmes at prison,[28] participation in language classes,[29] and working at the prison in a reliable position, e.g. as kitchen assistant.[30]

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[24] Cf. ICTY, *Prosecutor v. Strugar*, No. IT-01-42-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Pavle Strugar, 16 January 2009, para. 10; *Prosecutor v Rajic*, No. IT-95-12-ES, Decision of President on Early Release of Ivica Rajic, 22 August 2011, para. 18.
[25] Cf. *Prosecutor v Landzo*, No. IT-96-21-ES, Order on Commutation of Sentence, 15 July 2008, para. 7; *Prosecutor v. Dusko Sikirica, Damir Dosen and Dragan Kolundzija*, Order of the President on the Early Release of Damir Dosen, IT-95-8-S, 28 February 2003, p. 3, at http://www.icty.org/x/cases/sikirica/presord/en/030228.pdf; Anna Oehmichen, "Rule 223", in Dr. Mark Klamberg, *The Commentary on the Law of the International Criminal Court*, at http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rules-of-procedure-and-evidence/; *Prosecutor v. Esad Landzo*, Order of the President on Commutation of Sentence, IT-96-21-ES, 13 April 2006, para. 7, at http://www.icty.org/x/cases/mucic/presord/en/080715.pdf.
[26] Anna Oehmichen, "Rule 223", in *CLICC*.
[27] *Idem.*
[28] *Prosecutor v. Serushago*, No. MICT-12-28-ES, MICT, Public Redacted Version of Decision of the President on the Early Release of Omar Serushago, 13 December 2012, para. 21.
[29] *Prosecutor v Banovic*, No. IT-02-65/1-ES, ICTY, Decision of the President on Commutation of Sentence, 3 September 2008, para. 13; *Prosecutor v. Bala*, No. IT-03-66-ES, ICTY, Public Redacted Version of the 28 June 2012 Decision of the President on Early Release of Haradin Bala, para. 24; *Prosecutor v Rajic*, No. IT-95-12-ES, Decision of the President on Early Release of Ivica Rajic, 22 August 2011, para. 18.
[30] *Prosecutor v Obrenovic*, No. IT-02-60/2-ES, Decision of the President on Early Release of Dragan Obrenovic, 21 September 2011, para. 21;*Prosecutor v. Dusko Tadic*, IT-94-I-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Dusko Tadic, 17 July 2008, para. 8, 16.

Prospects to obtain employment after release also play an important role in evaluating the factor of social reintegration.[31] The CLICC Commentary also provides that "[a]s [Rule 223(b)] specifically mentions the prospects of 'successful resettlement', prospects to obtain employment after release will play an important role. This was an aspect often also considered by the *ad hoc* tribunals".[32]

21. The personal and family situation of the convicted individual allow the judges to evaluate the chances of a successful rehabilitation of a detainee when reintegrating into society. Accordingly, having a spouse and children and/or other family relations are factors in favour of a deduction of the sentence.[33] The prisoner's attachment to his family,[34] e.g. the decision of the family to stand by the prisoner in spite of retributive actions against the family,[35] may also be considered as an indication of social reinsertion.

22. Demonstrated remorse can equally play an important role with regards to re-socialisation.[36] Furthermore, Oehmichen notes that "[r]efraining from incitement against peace and security and positive contributions to peace and reconciliation such as public acknowledgement of guilt, public support for peace projects, public apology to victims or victim's restitution (…) may also qualify as indications for good prospects for resocialization and resettlement, although they may as well qualify

[31] *Prosecutor v Banovic*, No. IT-02-65/1-ES, ICTY, Decision of the President on Commutation of Sentence, 3 September 2008, para. 13; *Prosecutor v. Simic*, No. IT-95-9/2, Order of the President on the Application for Early Release of Milan Simic, 27 Oct. 2003; *Prosecutor v. Damir Dosen*, IT-95-8-S, Order of the President on the Early Release of Damir Dosen, 28 Feb. 2003;*Prosecutor v. Mucic*, No. IT-96-21-A bis, Order of the President in Response to Zdravko Mucic's Request for Early Release, 9 July 2003; *Prosecutor v Dragan Kolundzija*, No. IT-95-8, Order of the president on the Early Release of Dragan Kolundzija, 5 December 2001; *Prosecutor v. Milan Simic*, Order of the President on the Application for the Early Release of Milan Simic, IT-95-9/2, 27 October 2003, p. 2, at http://www.icty.org/x/cases/milan_simic/presord/en/031027.pdf
[32] Anna Oehmichen, "Rule 223", in *CLICC*.
[33] MTPI : *Kordić Case*, No MICT-14-68-ES, Decision of 6 June 2014, paras 22-23; *Pros. v Bisengimana*, op. cit., para. 25. ICTR: *Pros. v Bagaragaza*, op. cit., para. 12. ICTY : *Pros. v Kolundžija*, NoIT-95-8-S, Decision of 5 December 2001; *Pros. v Šljivančanin*, NoIT-95-13/1-ES, Decision of 5 July 2011, para. 25.
[34] *Prosecutor v. Mucic*, No. IT-96-21, Order of the President in Response to Zdravako Mucic's Request for Early Release, 9 July 2003; *Prosecutor v Blaskic*, No. IT-95-14, Order of the President on the Application for Early Release of Tihomir Blaskic, 29 July 2004, para. 8; *Prosecutor v Milojica Kos*, No. IT-98-30/1-A, Order of the President for the Early Release of Milojica Kos, 30 July 2002; *Prosecutor v. Zaric*, No. IT-95-9, Order of the President on the Application for Early Release of Simo Zaric, 21 Jan. 2004.
[35] cf.*Prosecutor v Delic*, No. IT-96-21-ES, Order on Commutation of Sentence, 24 June 2008, para. 21.
[36] Cf.*Prosecutor v Landzo*, No. IT-96-21-ES, Order on Commutation of Sentence, 15 July 2008, para. 7; Anna Oehmichen, "Rule 223", in *CLICC*.

under [Rules 223(c) and 223(d)]."[37]

Criteria (c) Rule 223 RPE – social instability

23. Refraining from incitement against peace and security and positive contributions to peace and reconciliation, may also qualify as indicating the unlikeliness of the prisoner to cause social instability on release and of being a good prospect for resettlement.

24. This factor -'whether the early release of the sentenced person would give rise to significant social instability'- must be approached with caution. It requires the Chamber to make a determination as to a possible consequence of release based invariably on hearsay and speculative opinion, which may be prejudiced against the prisoner and which cannot be verified[38] and in respect of a complex social and political situation.

25. Also, while potential social instability may be taken into account, it is submitted that this should have a limited affect on the prisoner's right to have his sentence reduced, especially if he himself does not intend to cause social instability.

Criteria (d) Rule 223 RPE – 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

26. Actions for the benefit of the victims may include contributions to the victim's trust fund, payments of civil damages in certain cases, and also the expression of sincere apologies and regret. As to 'any impact on the victims' this again merits caution as it does not seem fair to deny sentence reduction on the basis that others may protest against early release without presenting an appropriate basis for such protest.

27. As provided in the CLICC Commentary, "[c]ompassion for the victims may save judicial time and contribute to the process of national reconciliation".[39] In this regard, the ICTR President noted in *Rugambarara* that "[the detainee's] guilty plea and

[37] Anna Oehmichen, "Rule 223", in *CLICC*.
[38] Travaux prép. : PCNICC/1999/L.5/Rev.1/Add.1, note 127; PCNICC/2000/WGRPE(10)/RT.1, note 5.
[39] Anna Oehmichen, "Rule 223", in *CLICC*.

expression of remorse saved judicial time and resources and may contribute to the process of national reconciliation in Rwanda."[40]

Criteria (e) Rule 223 RPE – individual circumstances

28. Factor e) concerns individual circumstances that relate to the detainee's life in general and encompasses a broad span of factors. Some he may not have any influence over (e.g. sickness). In most cases, these factors will include compassionate [41] or humanitarian[42] grounds.

29. The CLICC Commentary explains that "[t]his factor relates to circumstances that are found in the individual situation of the sentenced person but on which he will have only limited or no influence himself. These circumstances may be of compassionate nature (sickness, advanced age). They can also be humanitarian circumstances that may call for early release under international humanitarian law".[43] However, "at the ICTY, also 'good physical and mental health' served as a criterion favouring early release":[44]

DEFENCE SUBMISSIONS

30. Germain Katanga is 37 years old, having been born 28 April 1978. At the time of the offences he was 24. He was arrested and detained in DRC from February 2005, and transferred into the custody of the ICC in 2007. On September 18th this year he will have served eight years in ICC detention and been in prison for over ten and a half years - the major portion of his adult life. Those years have led to a marked change in him.

[40] *Prosecutor v. Juvenal Rugambarara*, Decision on the Early Release Request of Juvenal Rugambarara, ICTR-00-59, 8 February 2012, para. 9, at http://41.220.139.198/Portals/0/Case%5CEnglish%5CRugambarara%5Cdecisions%5C120208.pdf
[41] Cf. for the UK e.g. Section 30(1) of the Crime (Sentences) Act 1997.
[42] Cf. Principle 14 of Recommendation no. R (93) 6 of the Committee of Ministers to member states concerning prison and criminological aspects of the control of transmissible diseases including Aids and related health problems in prison, which states that Prisoners with terminal HIV disease should be granted early release, cf. van Kempen 2010, p. 956.
[43] Anna Oehmichen, "Rule 223", in *CLICC*.
[44] Anna Oehmichen, "Rule 223", in *CLICC*. See also *Prosecutor v. Blagoje Simic, Miroslav Tadic and Simo Zaric*, Oder of the President on the Application for the Early Release of Simo Zaric, IT-95-9, 21 January 2004, at http://www.icty.org/x/cases/simic/presord/en/040121.htm.

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

31. Detention has profoundly affected Mr Katanga; he has had the time to reconsider his behaviour, which led him, inter alia, to decide, on 25 June 2014, to withdraw his appeal against the Judgment pursuant to article 74 of the Statute. He indicated that: *"J'accepte les conclusions rendues à mon encontre dans ce Jugement. »*

32. The Registrar notes, essentially, that Mr Katanga's conduct has been 'very good and respectful towards the detention personnel, guards and co-detainees in general. Mr Katanga is well behaved and contributes actively, including by his work –e.g. cooking -to the smooth running of the detention wing and to the well-being of the rest of the detention community.'[45] It is apparent to the defence team that he has a very positive relationship with the prison staff and is grateful for the work that they have done.[46]. Indeed, one of staff members, previously a professional chef, led him to develop a keen interest in cookery.

33. He has good relations with his fellow detainees and has positively assisted one elderly party at a time when the latter had considerable health difficulties. Mr Katanga is very sensitive to the needs of others.

34. He has also used the time spent in detention to improve his French and to learn English. He has kept himself extremely fit, engages in sport with others, reads widely and follows current affairs. He is, given the many years that have passed, a more mature and thoughtful man.

35. It is to be particularly noted that there is not, and never has been, any suggestion of any difficulties arising due to ethnic differences. On the contrary, Mr Katanga and Mr Lubanga, drawn respectively from the Ngiti and Hema communities, have a close bond and regard one another as brothers.

36. His conduct in detention demonstrates a man who now has no difficulties responding to authority, who complies with demands and rules, has a high capacity for socialising

[45] ICC-01/04-01/07-3584, para. 2.
[46] See also ICC-01/04-01/07-3456-Conf, Defence Observations on Sentencing, paras 122-126.

with people (staff and inmates) drawn from a broad spectrum, and who can control his emotions despite the considerable pressures placed upon him by long term incarceration.

37. There is no suggestion that Mr Katanga, during his time in detention, has sought to maintain or re-establish links with any unlawful or militia element in DRC.

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

38. Mr Katanga has not participated in a rehabilitation program as no such program exists at the ICC. The defence over the past several years has sought to have some such facility extended to him – such as cookery classes, farming and husbandry courses, or general work opportunities. Despite the efforts of some persons to put it in place the funding has not been made available. The Registrar explains that "[t]he ICC Detention Centre is not mandated by the Court's legal texts to undertake those responsibilities, does not have the specialist staff with the requisite skills and is not designed for that purpose".[47]

39. Despite this regretful lack of facility- which may be in breach of international standards - the Registrar is of the view that "Mr Katanga's interaction with other detainees, staff and custody officers in detention does not suggest any impediment to his resocialization".[48]

40. The defence submits that there is every indication that Mr Katanga can re-enter society in a positive and successful manner. He is still a young man and has learnt and observed much over the past years. He has a family to return to and who require his support. He has been married to his wife, Denise, since 18 November 2002. They have three children of their own (Samson, Anita and Carolina), the youngest born four years ago. They have also adopted two children. While in detention, Mr Katanga has kept in almost daily contact with them. He maintains tight family relations with other family members, most notably his brothers, sister, mother and step-mother and, until his recent death, his father.

[47] ICC-01/04-01/07-3584, para. 3.
[48] ICC-01/04-01/07-3584, para. 4.

41. Denise and their children currently live in a rented house in Aru. Once released, Mr Katanga intends to join his family there. It is to be noted that Aru is far from the Ngiti homeland and Bogoro.

42. When arrested, Mr Katanga held the ranks of Brigadier General in the DRC army, having been demobilised from the militia and awarded that rank by President Kabila. It is unclear whether he will be able to continue in the Army upon his return. If he can, then he hopes to continue his army life and hopes to play a role in maintaining peace and promoting reconciliation between the different communities. If return to his position in the army is no longer an option, Mr Katanga will farm in Aru. The civilian population and authorities in Ituri have indicated that, upon his return, they will assist Mr Katanga in his reintegration process and help to find him a job should this be more difficult than anticipated. Mr Katanga has also mentioned studying law at sometime in the future. If that were to happen then he would apply to join the law course at Kisangani University.

43. Mr Katanga will not be alone in his resettlement and has the support of his family and, significantly, all communities (including the Hema community and UPC) in Bunia and Aveba.[49] They are all very firm in their view that Mr Katanga's resettlement will be successful.[50]

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

44. Mr Katanga was convicted for his involvement in the Bogoro attack through his position within the FRPI militia.

45. There is, currently, a militia group in Walendu Bindi that titles itself the FRPI. It is important, the defence submits, to recognise that the present FRPI has little or nothing to do with the FRPI that Germain Katanga led up unto his joining the FARDC in early 2005. This is attested to by many people met by the defence in Ituri during its recent mission.

[49] See Annexes 1 to 8.
[50] *Idem*.

46. The defence stresses that Mr Katanga severed all links with the FRPI in 2005 and has no intention of taking part in any militia activity. This is also evidenced by his monitored telephone records. Nor has he any intention of returning to live in Walendu Bindi, or even Bunia, but intends to join his family in distant Aru, far from the Ngiti territory and the Bogoro area.

47. The FRPI, as now constituted, appears to be a militia without an objective, composed of disaffected persons from various ethnic groups and preying on the Ngiti community. As the Registry observes "the FRPI appears to be composed of small groups focused on their survival […]".[51]

48. The Registry observations support the defence submission and state that 'Information available to date does not suggest that FRPI could reorganise around Mr Katanga...." and that "…no information that Mr Katanga's return to Ituri would lead to either the strengthening of FRPI, regrouping and mobilising around his return, or triggering of significant social instability." [52]

49. Additionally, the Registry points out that the return of Matthieu Ngudjolo – a leader of the FNI/ FRPI - 'has not triggered any social instability'.[53] There is no reason why Mr Katanga's return will have a different reaction.

50. As the annexed statements indicate the militia were almost at the point of agreeing to relinquish arms when they were attacked by the Army and MONUC in June. The militia remains a nuisance and concern. In this respect Mr Katanga is willing to assist in any manner he can to help end the militia threat to the peace of the area.

51. Mr Katanga's return could assist the community and further stabilise the area. Mr Katanga has previously demonstrated his peaceful intentions when commander of the FRPI and helping organise the demobilisation of militia and child soldiers. Local communities are of the view that Mr Katanga could play a role in bringing peace to

[51] ICC-01/04-01/07-3584, para. 6(ii).
[52] ICC-01/04-01/07-3584, para. 6(ii).
[53] ICC-01/04-01/07-3584, para. 6(ii).

Ituri and assist in the negotiation process between the army and the militia. Whilst Mr Katanga has lost his ties and influence with the militia, he may understand their position as no other and be sufficiently regarded by them to help broker a lasting peace. This is a realistic perspective given that the militia came close to accepting terms with the Congolese army and authorities.[54]

52. The Defence recently spoke informally with a highly placed member of MONUSCO who expressed an interest in cooperating with Mr Katanga in seeking a permanent solution in respect of the remaining militia. Given the weakened position of the militiamen and their lack of real objective, this is a good opportunity for the DRC authorities and MONUSCO to accept his offer to assist. His early release could then have a highly positive impact on stability in the region.

53. The Defence confirms the Registry's initial reports that early release may be perceived negatively by the affected community of Bogoro.[55] The defence stresses that their view was not shared by the wider members of the Hema community met by the defence in Bunia and who were very positive about Mr Katanga's return and whose attestations are attached.

54. In the presence of the Victim Representative, the Defence met, and discussed Mr. Katanga's potential early release with a significant number of victims in Bogoro. It is understandable that those who were present in Bogoro at the time of the attack, or suffered as a consequence of it, remain angry and direct that anger at Mr Katanga, even if they lack any direct knowledge of him or the role he played. However, the defence heard no expression of belief that Mr Katanga's return to Ituri would cause social instability. Rather their concerns were focuse. d on the reparations procedure not having been concluded – the argument being that in their culture you first have reparations and then forgiveness or pardon – and, secondly, concern that the sentence was insufficient for the crimes committed. As to the latter, it appeared to the defence that the community had not understood the difference between the original allegations and the eventual finding of the Trial Chamber upon which the sentence was based. In the submission of the defence neither of these two matters can relate, in a significant

[54] See Annex 5.
[55] ICC-01/04-01/07-3584, para. 6(iii).

way, to the review issue presently before the Appeals Chamber. The Defence understands the victims viewpoint, and their frustration at lengthy reparation proceedings, but these factors cannot constitute sufficient reason not to release Mr Katanga. None of the victims suggested that Mr Katanga's early release would or could jeopardise social instability. As previously stated, the Hema communities and the UPC based in Bunia were highly positive as to Mr Katanga's return and reintegration. They took the view that Mr Katanga's return may have a positive impact on the social instability situation in Ituri.[56]

55. There is no objective material before the Chamber to suggest that Mr Katanga poses any threat or difficulty in respect of the stability of Ituri Province.

56. The defence notes the references in the Registrar's observations concerning the timing of release (paragraph 6) and 'election-related violence'- with particular reference to 'Kinshasa and regional capitals' – the use of armed groups to collect funds for the elections – and that 'tensions could emerge from the ongoing administrative process'. These factors, as the Registrar correctly observes "are not directly related to the issue of early release of Mr Katanga" but nonetheless seeks to draw some connection between possible instability – not attributable to Mr Katanga – and the timing of his release. This seems highly speculative and was not borne out by the comments made by those the defence met when on mission. Mr Katanga is not political and does not have or seek support from any group or party, nor has any group or party expressed opposition at the prospect of his return. There is no tangible basis for the concern expressed by the Registrar and nothing that indicates that, even with elections etc, Mr Katanga's return will contribute to jeopardising the stability of the area.

57. It is most important to note that all the persons met by the defence in their recent mission to Ituri, and these numbered 200 or so and were equally drawn from Ngiti and Hema and other ethnic groups, volunteered the view that the enmity that existed between the communities at the time of Bogoro (and they said that that was as a result of manipulation by outside parties) has long since disappeared. A common phrase was that 'now we eat together, we live together, we marry together'. This reconciliation

[56] See Annexes 6-7.

between the communities is profound.

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

58. On 25 June 2014, Mr Katanga withdrew his appeal against the Judgment pursuant to article 74 of the Statute,[57] having accepted the findings of the Trial Chamber against him and considering that *"l'intérêt de la justice sera servi en mettant un terme au process et en fournissant une solution definitive."* He indicated that:
"j'exprime mes sincères regrets à tous ceux qui ont souffert en raison de ma conduite, y compris les victimes de Bogoro. »[58]

59. The Registrar correctly noted that Mr Katanga has been interviewed by a journalist during which he apologised the victims in Bogoro for the role he played in the Bogoro attack.[59] The context was that the journalist had earlier spoken to a young woman who, though she had no personal knowledge of his role, expressed anger against Mr Katanga whom she held responsible for the death of her parents at Bogoro. The journalist then sought his reaction to this statement and filmed it in the course of a longer interview. Mr Katanga expressed his profound regret at her loss and the part he played in the attack. The Defence took this sequence on mission. Most people to whom the Defence showed the segment had a positive reaction and accepted his apology.[60] The Defence, did not show it to the victims in Bogoro out of a concern that it would be misunderstood or, as had been suggested by them, be perceived as "inconsiderate".[61]

60. There is nothing more Mr Katanga can do at this time in order to show that he is genuinely sorry or take any other action for the benefit of the victims. He has no means with which to compensate them. When the time is ripe, Mr Katanga can apologise in person as he also states in his video-taped apology. Mr Katanga may

[57] ICC-01/04-01/07-3497, Defence Notice of Discontinuance of Appeal against the '*Jugement rendu en application de l'article 74 du Statut'* rendered by Trial Chamber II on 7 April 2014, 25 June 2014.
[58] ICC-01/04-01/07-3497-AnxA, Notification du retrait par Germain Katanga de son appel contre le Jugement rendu en application de l'article 74 par la Chambre de première instance II, 25 June 2014.
[59] ICC-01/04-01/07-3584, para. 10.
[60] See Annexes 5-7.
[61] ICC-01/04-01/07-3584, para. 10.

follow the Bogoro chief's advice that he should not come alone but with the Ngiti community and make a communal apology. However, nothing of the sort can be done before Mr Katanga is released. Therefore, it is not for lack of voluntariness. He could also have done or said nothing, but instead he took the decision to apologise. The Defence submits that his intention counts for something.

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

61. Mr Katanga's father died at the beginning of August 2015. He was the pivot of the family and an important financial support for his mother, brothers and sisters. Last year, one of Mr Katanga's brothers died of illness. The early release of Mr Katanga, now the eldest of the family, would allow him to organise the succession of his father and to bring some support to his family. His younger brother, who is unemployed, currently bears responsibility for his own children and those of the deceased brother. In addition, Mr Katanga's mother and his step-mother are in poor health. Having lost both his father and his brother, it would be hard for Mr. Katanga to endure further loss while in prison.

CONCLUSION

62. For the above reasons, the defence respectfully requests the Chamber to order the early release of Mr Katanga.

Respectfully submitted,

David Hooper Q.C.

Dated this 11 September 2015,
London