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No.: **ICC-01/04-01/07**
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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 Document
with
Public Annex A**

Prosecution's submissions on Germain Katanga's sentence review

Source: Office of the Prosecutor

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

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Introduction

1. On 7 March 2014, Germain Katanga was convicted of crimes against humanity and war crimes that took place in Bogoro on 24 February 2003.¹ In particular, he was found guilty, as an accessory under article 25(3)(d) of the Rome Statute, of murder as both a crime against humanity and a war crime; attack against a civilian population as a war crime; destruction of enemy property as a war crime; and pillaging as a war crime.² On 23 May 2014, he was sentenced to 12 years' imprisonment.³ One month later, on 25 June 2014, Mr Katanga withdrew his appeal against the Trial Judgment.⁴ He also decided not to appeal the sentence imposed on him.⁵

2. Notably, by discontinuing his appeal against the Trial Judgment, Mr Katanga accepted the Court's verdict against him. In a declaration attached to his withdrawal of appeal, he stated publicly that he accepted the Trial Judgment and the Chamber's findings entered on his role and conduct.⁶ In doing so, he expressed his sincere regret to those who had suffered because of his conduct, including the victims of Bogoro.⁷ At the same time, by not appealing his sentence, he accepted the 12 year sentence imposed.⁸ Moreover, his conduct in detention, as reported by the Registrar, is said to have contributed to the smooth running of the detention unit and to the well-being of the rest of the detention community.⁹

¹ ICC-01/04-01/07-3436-tENG ("Katanga Trial Judgment" or "Trial Judgment"), pp. 658-659.

² Katanga Trial Judgment, pp. 658-659.

³ ICC-01/04-01/07-3484 ("Sentencing Judgment"), para. 170.

⁴ ICC-01/04-01/07-3497 ("Defence's Notice of Discontinuance of Appeal"); ICC-01/04-01/07-3497-AnxA ("Defence's Submissions on Discontinuance of Appeal").

⁵ Defence's Submissions on Discontinuance of Appeal, p. 2.

⁶ Defence's Submissions on Discontinuance of Appeal, pp. 2-3.

⁷ Defence's Submissions on Discontinuance of Appeal, p. 3.

⁸ ICC-01/04-01/07-3498 ("Prosecution's Notice of Discontinuance of Appeal"), para. 2.

⁹ ICC-01/04-01/07-3584 ("Registrar's Observations"), para. 2.

3. The Prosecution also notes the Defence's submission that—based on their interactions with a cross-section of persons in the Ituri region—Mr Katanga's release would not destabilise the region. Some state that his return may even be welcomed to assist in reconciliation.¹⁰ The Prosecution equally acknowledges that the affected communities, especially in Bogoro, may perceive Mr Katanga's early release negatively.¹¹ The Registrar's Observations state that the victims have had negative reactions to Mr Katanga's statements to them.¹² The Prosecution has informed the Legal Representative for Victims¹³ of its position and now awaits receipt of the LRV's own written submissions.¹⁴ In the interim, the Prosecution has no further independent information.

4. Based on the information available to the Prosecution at this stage, the Prosecution does not oppose Mr Katanga's early release. In particular, the Prosecution considers that his decision last year to accept this Court's findings on his role and conduct in the Bogoro crimes of 24 February 2003, and his expression of regret for the victims of the Bogoro crimes, appears to illustrate a genuine dissociation from his crimes. The Prosecution considers that this factor, and taken in light of the other information currently available, is behaviour which could be considered to meet Mr Katanga's burden under rule 223(a) of the Rules of Procedure and Evidence.

¹⁰ ICC-01/04-01/07-3594 ("Defence's Observations"), paras. 38-57.

¹¹ Registrar's Observations, p. 6; Defence's Observations, paras. 53-54, 59.

¹² Registrar's Observations, paras. 9, 10, stating that Mr Katanga's oral statement in the courtroom "had provoked very strong—negative—reactions amongst victims."; also "[...] some victims have already expressed the view that presenting the dissemination of an apology from Mr Katanga as a possible reparations measure would be inconsiderate towards the victims."

¹³ LRV.

¹⁴ See generally OTP Policy Paper on Victims' Participation, April 2010.

Submissions

A. Mr Katanga bears the burden to show he has earned his early release

5. Early release at the two-thirds mark of a sentence is not automatic.¹⁵ The privilege of early release must be earned. Mr Katanga bears the burden of demonstrating that he merits such early release.¹⁶ The text of article 110 of the Statute is clear. Only the *review* of a sentence at the two-thirds mark is mandatory. But, the review in itself does *not* guarantee early release. Nor does it imply that such release is a foregone conclusion. The Panel retains the discretion to deny early release, regardless if conditions are met.¹⁷

6. Commentators on the Statute also confirm this understanding.¹⁸ Indeed, the Panel cannot pardon, commute or grant parole—concepts that are antithetical to the seriousness of the offences within the Court’s jurisdiction.¹⁹ Instead, Mr Katanga must convince the Panel on objective grounds that he deserves such early release.

7. As shown below, the Prosecution considers that Mr Katanga appears to have advanced such objective considerations under rule 223(a).

¹⁵ *Contra* Defence’s Observations, para. 10. Reliance on *ad hoc* tribunal case law to claim automatic release at the two-thirds mark is inapposite. The wording of article 110, clearly showing that only the review—not the release—is mandatory, is easily distinguished on this point.

¹⁶ *Contra* Defence’s Observations, paras. 9-16, 55.

¹⁷ Article 110(3), stating “[w]hen the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court *shall* review the sentence to determine whether it should be reduced. [...]”; article 110(4), stating “[i]n its review under paragraph 3, the Court *may* reduce the sentence if it finds that one or more of the following factors are present.”; article 110(5), stating “[i]f the Court determines in its initial review under paragraph 3 *that it is not appropriate to reduce the sentence* [...]” (emphasis added).

¹⁸ See e.g., Schabas, W, p.1105; See Chimimba, T, p.355 (the Court may consider the gravity of the crimes).

¹⁹ See Chimimba, T, p.355; Bassiouni, M C, pp. 741-742, fn. 829.

B. Mr Katanga's conduct in detention (rule 223(a))

8. Rule 223(a) requires Mr Katanga to demonstrate that his conduct while in detention shows “a genuine dissociation from his crime.” Such conduct should constitute “a clear and significant change of circumstances sufficient to justify the reduction of sentence[...].”²⁰ The case record, so far based on submissions from the Katanga Defence and the Registrar, appears to indicate behaviour which could be considered to show such dissociation.

9. Germain Katanga discontinued his appeal against the Trial Judgment. Although the discontinuance of an appeal *per se* is insufficient to merit early release,²¹ Mr Katanga did not only discontinue his appeal. At the same time he declared his public acceptance of the Trial Chamber's Judgment, and notably, his public acceptance of the judicial findings on his role and conduct in the crimes committed in Bogoro on 24 February 2003. As the public record of the case shows, and in the words of Counsel representing him:

*[Germain Katanga] accepte le jugement de la Cour et ses conclusions relatives à son rôle et à sa conduite. Il est en détention depuis 2005 et il est conscient de l'anxiété expérimentée à la fois par sa famille et par lui-même en raison de cette situation, jusqu'à ce jour. Il croit que l'intérêt de la justice sera servi en mettant un terme au procès et en fournissant une solution définitive.*²²

²⁰ Rule 223(a) read with article 110(4)(c).

²¹ Mere discontinuance of appeals—absent acceptance of the findings on criminal conduct—does not show dissociation from the crimes. Nor is it considered “cooperation”. See *e.g.*, *Ojdanić* Decision of 29 August 2013, para. 21, finding that Ojdanić's decision to withdraw his appeal did not demonstrate his assistance to the Prosecution. The absence of his assistance to the Prosecution was considered a neutral factor and accordingly, irrelevant to the overall assessment to his application for early release.

²² Defence's Submissions on Discontinuance of Appeal, pp. 2-3.

10. Moreover, when withdrawing his appeal, Mr Katanga stated the following: *“J’accepte les conclusions rendues à mon encontre dans ce Jugement et j’exprime mes sincères regrets à tous ceux qui ont souffert en raison de ma conduite, y compris les victimes de Bogoro.”*²³ The Defence further submits that “[d]etention has profoundly affected Mr Katanga: he has had the time to reconsider his behaviour[...],” leading him to discontinue his appeal against the Trial Judgment.²⁴

11. In addition, it appears from the Registrar’s submissions that Mr Katanga’s behaviour in detention has been good.²⁵ Good behaviour in detention cannot, on its own, show a “clear and significant change of circumstances”; it is comportment expected of all detainees, and cannot, on its own, count towards early release. However, according to the Registrar, Mr Katanga also contributed “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.”²⁶ Nevertheless, Mr Katanga’s behaviour within the ICC Detention Centre cannot, on its own, qualify him for early release. It can only be considered in conjunction with his acceptance of the Chamber’s findings on his role and conduct.

12. Based on the information provided by the Defence and the Registrar, Mr Katanga’s situation is largely similar to Dragoljub Ojdanić (a convicted person at the ICTY) who was granted early release. Like Mr Katanga, Mr Ojdanić had also withdrawn his appeal “[...] fully accept[ing] all of the findings made in the judgement.”²⁷ Like Mr Katanga, Mr Ojdanić also “express[ed] [his] sincere regret to

²³ Defence’s Submissions on Discontinuance of Appeal, p. 3.

²⁴ Defence’s Observations, para. 31.

²⁵ Registrar’s Observations, para. 2, stating “[...] Mr Katanga’s behaviour in detention has been very good and respectful towards the detention personnel, guards and his co-detainees in general. Mr Katanga is well behaved[...].”

²⁶ Registrar’s Observations, para. 2.

²⁷ Ojdanić Notice of Withdrawal of Appeal, paras. 1-6. Ojdanić Notice of Withdrawal of Appeal, Annex A; See also Ojdanić Decision of 31 January 2013, p. 1, noting that Ojdanić “accepts the findings in the Trial Judgement as to his conduct, conviction and sentence”, that he has expressed regret “to all of those who suffered as a result of the conduct for which he has been convicted”, and that he “believes that the interests of justice for all concerned would be served by the finality of the process in his case”.

all of those who suffered as a result of the conduct for which [he had] been convicted.”²⁸ Following this, Ojdanić’s application for early release was granted. Among other factors weighing in favour of Ojdanić’s early release, the ICTY President was persuaded by the existence of “positive indicators of his rehabilitation while in prison.”²⁹ The President noted, in particular, that “Ojdanić’s acceptance of the Trial Chamber’s findings as evidenced by the withdrawal of his appeal, his expression of regret to the victims, and his generally good and productive behaviour whilst detained in UNDU are positive indicators of Ojdanić’s rehabilitation.”³⁰ Based on the Court’s documentation, all of these factors appear to equally exist in Mr Katanga’s case. The Prosecution has no information to the contrary.

13. Additionally, by discontinuing his appeal, Mr Katanga has contributed to the efficient administration of justice on appeal. Mr Katanga’s discontinuance of his appeal, also resulting in the discontinuance of the Prosecution’s appeal, lent finality to the Trial Judgment and the 12 year sentence imposed. The proceedings against Mr Katanga were brought to a definitive close, saving the Court’s time and resources that would have been otherwise expended on the appellate process. In general, appeal proceedings can be time and resource consuming. For example, in *Lubanga*, the appeal proceedings lasted for more than 30 months.³¹ Likewise, in *Ngudjolo*, the appeal proceedings took approximately 26 months to finish.³²

14. Although the Prosecution accepts the Defence’s narration of Mr Katanga’s good behaviour while in detention, as corroborated by the Registrar, the Prosecution

²⁸ *Ojdanić* Notice of Withdrawal of Appeal, para. 5 and *Ojdanić* Notice of Withdrawal of Appeal, Annex A.

²⁹ *Ojdanić* Decision of 29 August 2013, para. 25. (The President found that three factors weighed in favour of Ojdanić’s early release: positive indicators of his rehabilitation while in prison, humanitarian concerns, and that he had served two-thirds of his sentence).

³⁰ *Ojdanić* Decision of 29 August 2013, para. 19.

³¹ *Lubanga*: date of trial judgment: 14 March 2012; date of sentencing judgment: 10 July 2012; date of appeal judgment: 1 December 2014.

³² *Ngudjolo*: date of trial judgment: 18 December 2012; date of appeal judgment: 27 February 2015.

does not encourage Mr Katanga's reliance on his "close bond" with Mr Lubanga.³³ As the record shows, the Prosecution has grounds to believe that Thomas Lubanga has been involved in a scheme of witness interference in the *Bosco Ntaganda* case.³⁴ For this reason (among others), the Prosecution has opposed Mr Lubanga's early release on this ground and maintains its position.³⁵ In these circumstances, Mr Katanga is not assisted by this reference in seeking early release.

C. Mr Katanga's resocialisation and successful resettlement (rule 223(b))

15. Although Mr Katanga has not been introduced to a rehabilitation programme at the ICC Detention Centre, the Registrar submits that Mr Katanga's interaction with other detainees, staff and custody officers in detention "does not suggest any impediment to his resocialisation."³⁶

16. According to the Defence, if released, Mr Katanga "hopes to continue his army life and hopes to play a role in maintaining peace and promoting reconciliation between the different communities."³⁷ If he is unable to return to the army, Mr Katanga intends to "farm in Aru" a location some distance away from Bogoro and Aveba, but also within Ituri. Mr Katanga also mentions "studying law at some time in the future."³⁸ Although Mr Katanga's intentions about what he will do post-release are not yet concrete, it appears, based on the Defence's submissions, that he will be

³³ Defence's Observations, para. 35.

³⁴ ICC-01/04-01/06-3150-Red3 ("Prosecution's submissions on Thomas Lubanga's sentence review"), paras. 3, 11-17, 23.

³⁵ For the same reasons, the Prosecution notes that some of the Annexes to the Defence Observations claim support for Thomas Lubanga's early release (*see e.g.* Annex 4, Annex 5; Annex 6; Annex 7). The Prosecution opposes these claims. Again, Mr Katanga is not assisted by these references.

³⁶ Registrar's Observations, paras. 3-4.

³⁷ Defence's Observations, para. 42.

³⁸ *Ibid.*, para. 42.

assisted by “civilian population and authorities in Ituri” in his reintegration process.³⁹

17. The Prosecution has no further information at its disposal on this criterion at this stage.

D. The impact of Mr Katanga’s release on the social stability (rule 223(c))

18. The Defence states that it has met a cross-section of people in the Ituri region. These include: *membres du clergé et notables d’Aveba, femmes notables d’Aveba, la jeunesse d’Aveba, notables des communautés Lendu et Ngiti de Bunia, membres du Comité Directeur de l’UNADI, notables Hema de Bunia, and représentants de l’UPC*. According to the information presented, the Hema and Ngiti communities have since reconciled. Further, none of the persons interviewed by the Defence oppose Mr Katanga’s release; some even welcome it. In particular, it appears from the Defence’s Observations that some members of the Hema community are positive about Mr Katanga’s return to the region.⁴⁰

19. Further, as both the Registrar and the Defence note, although Mr Katanga is a former leader of the *Force de résistance patriotique en Ituri* (FRPI), the information available does not suggest that this militia could reorganise around him, should he

³⁹ Defence’s Observations, paras. 42-43. Although the Defence’s Observations do not elaborate on the exact nature of support that Mr Katanga may expect from the authorities, the Prosecution notes, for example, that the *Comité Directeur de l’UNADI* (*Union des Associations culturelles et du Développement de l’Ituri*) (Annex 5, p. 5) appears to be one of them. Moreover, several of the notables relied on are Aveba and Bunia based, and not in Aru.

⁴⁰ Defence’s Observations, para. 54; Annexes 1-7.

return to the DRC.⁴¹ The Defence further states that Mr Katanga “is willing to assist in any manner he can to help end the militia threat to the peace of the area.”⁴²

20. However, the Prosecution does note that the Registrar is not in a position to reliably conclude on the possible impact of Mr Katanga’s release on the social stability in the region. Indeed, the Registrar’s submissions are contingent, among others, on the position of the Congolese government on the matter, which is currently unavailable.⁴³ Likewise, the Prosecution’s investigations into the matter are still ongoing, including waiting to hear the views of the Congolese government which have been sought but not yet received. If further information is so received as a result of its investigations into this matter, the Prosecution will present it before or at the hearing.

E. Significant action taken by Mr Katanga for the benefit of the victims and the impact of Mr Katanga’s release on the victims and their families (rule 223(d))

21. The Prosecution notes, as reflected in both the Registrar and the Defence submissions, that the affected communities in Bogoro perceive the notion of Mr Katanga’s early release negatively.⁴⁴ It also appears, from the Registrar’s Observations that Mr Katanga’s oral statement in the courtroom during the sentencing hearing has “provoked very strong—negative—reactions amongst victims.”⁴⁵ At the same time—with respect to a documentary movie where Mr Katanga has expressed “apologies” to any victims and their next of kin— some victims have stated that “presenting the dissemination of an apology from Mr

⁴¹ Registrar’s Observations, p. 5; Defence’s Observations, paras. 44-51.

⁴² Defence’s Observations, para. 50.

⁴³ Registrar’s Observations, para. 5. The Registrar may also file further submissions.

⁴⁴ Registrar’s Observations, pp. 6-7; Defence’s Observations, paras. 53-55.

⁴⁵ Registrar’s Observations, para. 9. *See also* Sentencing Judgment, paras. 116-121.

Katanga as a possible reparations measure would be inconsiderate towards the victims.”⁴⁶ The Defence confirms that, during its recent mission to the DRC, it did not show the segments of this documentary movie to the victims of Bogoro.⁴⁷ The Registrar notes that the victims and affected communities have not yet been specifically consulted on Mr Katanga’s potential early release.⁴⁸ The Prosecution notes that the Legal Representative for the Victims will be best placed to convey their views and concerns.

22. Nevertheless, the Prosecution notes Mr Katanga’s intention to “apologise in person” to the victims or to make a “communal apology” along with the Ngiti community.⁴⁹ The Prosecution notes that, if Mr Katanga is permitted to make a personal address at the scheduled hearing, he may be able to make full use of this opportunity as a way to reach out to the victims to convey his message.⁵⁰

23. The Prosecution further notes that early release, once granted, puts the convicted person out of the Court’s reach. The Prosecution also notes that, as the experience of the *ad hoc* tribunals shows and as it had submitted before the *Lubanga* sentence review Panel, once early release is granted, promises of good behaviour can be quickly forgotten and words of regret and remorse retracted. Bearing this in mind, Mr Katanga may equally use his personal address at the hearing to assure the Panel, the victims, the Parties and participants that even if he were granted early release, he would continue to stand by his acceptance of the Trial Judgment, its findings on his role and conduct, and his expression of sincere regret to all those who suffered, and in particular, the victims of Bogoro.

⁴⁶ Registrar’s Observations, para. 10.

⁴⁷ Defence’s Observations, para. 59.

⁴⁸ Registrar’s Observations, para. 8.

⁴⁹ Defence’s Observations, para. 60.

⁵⁰ See ICC-01/04-01/07-3574 (“Scheduling Order of 13 August 2015”), p. 4. See *e.g.*, ICC-01/04-01/06-3155 (“*Lubanga* Order of 7 August 2015”), p. 4, permitting Thomas Lubanga Dyilo to make a personal address at the hearing.

F. Mr Katanga's individual circumstances (rule 223(e))

24. The Prosecution does not have any independent information on Mr Katanga's individual circumstances.⁵¹

G. "Cooperation" under article 110(4)(a) and article 110(4)(b)

25. The Defence does not argue that Mr Katanga has cooperated with the Prosecution or the Court to satisfy his burden under articles 110(4)(a) and 110(4)(b) of the Statute. It only advances its understanding of the article 110(4) criteria.⁵² Although the discussion is irrelevant to Mr Katanga's early release (because he does not rely on these criteria), the Prosecution disagrees with the Defence's interpretation of "cooperation" under article 110(4).

26. The Prosecution reiterates its position, previously advanced in its submissions in Thomas Lubanga's sentence review, consistent with the language of article 110(4).⁵³ First, unlike the *ad hoc* tribunals, neither articles 110(4)(a) or 110(4)(b) require the Prosecution or the Court to approach a convicted person to cooperate.⁵⁴ The convicted person may equally take the initiative to discharge his burden to show that he deserves early release.⁵⁵ Second, a convicted person's stated willingness to cooperate or mere compliance with the statutory framework and a Chamber's orders

⁵¹ Registrar's Observations, paras. 12-13; Defence's Observations, para. 61.

⁵² Defence's Observations, paras. 9-15.

⁵³ See Prosecution's submissions on Thomas Lubanga's sentence review, paras. 7-10.

⁵⁴ Article 110(4)(a) requires "early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions." Similarly, article 110(4)(a) uses the phrase "voluntary assistance of the person".

⁵⁵ *Contra* Defence's Observations, paras. 9-12.

is insufficient to discharge his burden.⁵⁶ Article 110(4) requires actual cooperation to advance the Court's work.

Relief

27. For the reasons explained above, and based on the information available, the Prosecution does not oppose Mr Katanga's early release. At the least, Mr Katanga's behaviour could be considered to meet the criterion in rule 223(a). Because of the ongoing nature of the Prosecution's investigations, the Prosecution may make further submissions, in particular on the criterion in rule 223(c), before or at the hearing. The Prosecution will also address any further submissions from the Registrar, or the Parties and participants, before or at the hearing.



Fatou Bensouda, Prosecutor

Dated this 18th day of September 2015

At The Hague, The Netherlands

Word Count: 3762⁵⁷

⁵⁶ *Contra* Defence's Observations, para. 13.

⁵⁷ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.