



**Original: English**

**No. ICC-01/04/01/07  
Date: 13 November 2015**

**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 THE CONGO  
IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA**

**Public document**

**Decision on the review concerning reduction of sentence of Mr Germain Katanga**

**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  
Ms Helen Brady

**Counsel for Mr Germain Katanga**  
Mr David Hooper  
Ms Caroline Buisman

**Legal Representative of Victims**  
Mr Fidel Nsita Luvengika

**REGISTRY**

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**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 Germain Katanga pursuant to article 110 of the Statute,

*Render* unanimously the following

## DECISION

1. Pursuant to the review conducted under article 110 (3) of the Statute, the original sentence of Mr Germain Katanga is reduced by 3 years and 8 months.
2. The date of completion of Mr Katanga's sentence is set to 18 January 2016.

## REASONS

### I. PROCEDURAL HISTORY

1. On 7 March 2014, Trial Chamber II (hereinafter: "Trial Chamber") rendered a decision pursuant to article 74 of the Statute (hereinafter: "Conviction Decision"),<sup>1</sup> in which it convicted, by majority,<sup>2</sup> Mr Germain Katanga (hereinafter: "Mr Katanga") of having committed, as an accessory under article 25 (3) (d) of the Statute, crimes against humanity and war crimes in Bogoro, Democratic Republic of the Congo (hereinafter: "DRC") on 24 February 2003.<sup>3</sup> In that same decision, Mr Katanga was acquitted, under article 25 (3) (d) of the Statute, of rape and sexual slavery as crimes against humanity and as war crimes and, under article 25 (3) (a) of the Statute, of using children under the age of 15 years to participate actively in hostilities as a war crime under article 8 (2) (e) (vii) of the Statute.<sup>4</sup>

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<sup>1</sup> "Judgment pursuant to article 74 of the Statute", dated 7 March 2014 and registered on 20 April 2015, [ICC-01/04-01/07-3436-tENG](#); original French version, 7 March 2014 ([ICC-01/04-01/07-3436](#)).

<sup>2</sup> "Minority Opinion of Judge Christine Van den Wyngaert", 7 March 2014, [ICC-01/04-01/07-3436-AnxI](#) annexed to [Conviction Decision](#).

<sup>3</sup> [Conviction Decision](#), pp. 658-659.

<sup>4</sup> [Conviction Decision](#), p. 659.

2. On 23 May 2014, the Trial Chamber rendered a decision pursuant to article 76 of the Statute (hereinafter: “Sentencing Decision”),<sup>5</sup> in which it sentenced, by majority,<sup>6</sup> Mr Katanga to a term of 12 years imprisonment.<sup>7</sup>

3. On 25 June 2014, Mr Katanga withdrew his appeal against the Conviction Decision.<sup>8</sup> In a declaration annexed to the notice of withdrawal, Mr Katanga informed the Appeals Chamber of his decision not to appeal the sentence imposed in the Sentencing Decision.<sup>9</sup> Mr Katanga also stated that he accepted the conclusions in the Conviction Decision regarding his role and conduct, and expressed his sincere regrets to all those who suffered due to his conduct, including the victims of Bogoro.<sup>10</sup>

4. Also on 25 June 2014, the Prosecutor withdrew her appeal against the Conviction Decision.<sup>11</sup> In her notice of withdrawal, the Prosecutor noted Mr Katanga’s withdrawal of his appeal, his decision not to appeal the Sentencing Decision, as well as, “[i]n particular”, Mr Katanga’s acceptance of the conclusions in the Conviction Decision and his “expression of sincere regret”.<sup>12</sup> The Prosecutor went on to state that, “[b]ased on the above considerations”, she “discontinues [her] appeal against the [Conviction Decision]”.<sup>13</sup> The Prosecutor did not file an appeal against the Sentencing Decision.

5. On 3 August 2015, the Appeals Chamber, noting that, on 18 September 2015, Mr Katanga will have served two thirds of his sentence, issued the “Decision appointing three judges of the Appeals Chamber for the review concerning reduction

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<sup>5</sup> “Decision on Sentence pursuant to article 76 of the Statute”, registered on 22 September 2015, [ICC-01/04-01/07-3484-tENG-Corr](#); original French version, 23 May 2015 ([ICC-01/04-01/07-3484](#)).

<sup>6</sup> “Dissenting Opinion of Judge Christine Van den Wyngaert”, [ICC-01/04-01/07-3484-Anx1](#) annexed to the [Sentencing Decision](#).

<sup>7</sup> [Sentencing Decision](#), para. 170.

<sup>8</sup> “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”, [ICC-01/04-01/07-3497](#) (A), p. 3.

<sup>9</sup> Annex A to “[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, [ICC-01/04-01/07-3497-AnxA](#) (A) (hereinafter: “Mr Katanga’s Declaration of Withdrawal of Appeal”), p. 3.

<sup>10</sup> [Mr Katanga’s Declaration of Withdrawal of Appeal](#), p. 3.

<sup>11</sup> “Notice of Discontinuance of the Prosecution’s Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga”, [ICC-01/04-01/07-3498](#) (hereinafter: “Prosecutor’s Declaration of Withdrawal of Appeal”).

<sup>12</sup> [Prosecutor’s Declaration of Withdrawal of Appeal](#), paras 1-2.

<sup>13</sup> [Prosecutor’s Declaration of Withdrawal of Appeal](#), para. 3.

of sentence of Germain Katanga”,<sup>14</sup> in which it appointed Judges Sanji Monageng, Christine Van den Wyngaert and Piotr Hofmański (hereinafter: “Panel”), for purposes of conducting the review concerning reduction of Mr Katanga’s sentence (hereinafter: “Sentence Review”).

6. On 13 August 2015, the Panel appointed Judge Piotr Hofmański as presiding judge<sup>15</sup> and, that same day, issued the “Scheduling order for the review concerning reduction of sentence of Mr Germain Katanga”,<sup>16</sup> in which it, *inter alia*, convened a hearing on Tuesday, 6 October 2015 (hereinafter: “Sentence Review Hearing”).<sup>17</sup> In accordance with rule 224 of the Rules of Procedure and Evidence and in order to ensure the efficient conduct of the Sentence Review Hearing, the Panel requested that the Registrar, Mr Katanga, the Prosecutor and the legal representatives of victims submit written observations in advance of the hearing.<sup>18</sup>

7. On 31 August 2015, following requests from the Prosecutor<sup>19</sup> and the principal group of victims represented by Mr Luvengika (hereinafter: “Victims”),<sup>20</sup> the Panel rendered its “Decision on the requests to modify the schedule for written submissions”,<sup>21</sup> permitting the Prosecutor and the Victims to submit their observations subsequent to those submitted by Mr Katanga.

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<sup>14</sup> [ICC-01/04-01/07-3572](#) (RW).

<sup>15</sup> “Decision on the Presiding Judge in the review concerning reduction of sentence of Mr Germain Katanga”, [ICC-01/04-01/06-3573](#) (RW).

<sup>16</sup> [ICC-01/04-01/07-3574](#) (RW) (hereinafter: “Scheduling Order”).

<sup>17</sup> [Scheduling Order](#), para. 1.

<sup>18</sup> [Scheduling Order](#), paras 1, 4.

<sup>19</sup> “Prosecution’s urgent request to modify the schedule for written submissions for Germain Katanga’s sentence review”, 26 August 2015, [ICC-01/04-01/07-3575](#) (RW). On 27 August 2015, Mr Katanga responded that he did not oppose the Prosecutor’s request (“Defence Response to Prosecution’s urgent request to modify the schedule for written submissions for Germain Katanga’s sentence review”, [ICC-01/04-01/07-3576](#) (RW), p. 3).

<sup>20</sup> “Requête urgente du Représentant légal en modification des délais pour soumettre ses observations sur la réduction de peine de Germain Katanga”, 27 August 2015, [ICC-01/04-01/07-3577](#) (RW). On 28 August 2015, the Prosecutor responded that she did not oppose the Victims’ request (“Prosecution’s response to the Legal Representative for Victims’ request to modify the schedule for written submissions for Germain Katanga’s sentence review”, [ICC-01/04-01/07-3578](#) (RW)). On that same day, the Panel invited Mr Katanga to respond to the Victims’ request (“Order on the filing of a response by Mr Katanga”, [ICC-01/04-01/07-3579](#) (RW), p. 3). Also on 28 August 2015, Mr Katanga responded that he did not oppose the Victims’ request (“Defence Response to Requête urgente du Représentant légal en modification des délais pour soumettre ses observations sur la réduction de peine de Germain Katanga”, registered on 31 August 2015, [ICC-01/04-01/07-3580](#) (RW)).

<sup>21</sup> [ICC-01/04-01/07-3581](#) (RW), paras 13-14.

8. On 4 September 2015, the Registrar filed the “Registrar’s Observations on the criteria set out in rule 223 of the Rules of Procedure and Evidence”<sup>22</sup> (hereinafter: “Registrar’s Submissions”).
9. On 9 September 2015, following a request by Mr Katanga,<sup>23</sup> the Panel granted Mr Katanga an extension of the page limit for his observations and also extended the page limit for the written submissions of the Prosecutor and the Victims.<sup>24</sup>
10. On 11 September 2015, Mr Katanga filed the “Defence Observations on the reduction of sentence of Mr Germain Katanga”<sup>25</sup> (hereinafter: “Mr Katanga’s Submissions”).
11. On 18 September 2015, the Victims<sup>26</sup> and the Prosecutor<sup>27</sup> filed their respective observations (hereinafter: “Victims’ Submissions” and “Prosecutor’s Submissions”, respectively).
12. On 28 September 2015, the Registrar transmitted, as an annex, written observations from the authorities of the Democratic Republic of the Congo (hereinafter: “DRC”) on the factors under rule 223 of the Rules of Procedure and Evidence (hereinafter: “Observations of the DRC authorities”).<sup>28</sup>

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<sup>22</sup> [ICC-01/04-01/07-3584](#) (RW).

<sup>23</sup> “Defence Request for Extension of Page Limit”, 8 September 2015, [ICC-01/04-01/07-3588](#) (RW).

<sup>24</sup> “Decision on Mr Katanga’s request for an extension of the page limit”, [ICC-01/04-01/07-3590](#) (RW), paras 11-13.

<sup>25</sup> [ICC-01/04-01/07-3594](#) (RW), registered 16 September 2015, with Annex 1, [ICC-01/04-01/07-3594-Anx1](#) (RW); Annex 2, [ICC-01/04-01/07-3594-Anx2](#) (RW); Annex 3, [ICC-01/04-01/07-3594-Anx3](#) (RW); Annex 4, [ICC-01/04-01/07-3594-Anx4](#) (RW); Annex 5, [ICC-01/04-01/07-3594-Anx5](#) (RW); Annex 6, [ICC-01/04-01/07-3594-Anx6](#) (RW); Annex 7, [ICC-01/04-01/07-3594-Anx7](#) (RW); and Annex 8, [ICC-01/04-01/07-3594-Anx8](#) (RW).

<sup>26</sup> “Legal Representative’s observations on the reduction of sentence of Germain Katanga”, [ICC-01/04-01/07-3597](#) (RW), with Annex A, [ICC-01/04-01/07-3597-AnxA-Red2](#) (RW), and Annex B, [ICC-01/04-01/07-3597-AnxB-tENG](#), registered on 24 September 2015; original French version [ICC-01/04-01/07-3597-AnxB](#) (RW).

<sup>27</sup> “Prosecution’s submissions on Germain Katanga’s sentence review”, [ICC-01/04-01/07-3598](#) (RW), with Annex A, [ICC-01/04-01/07-3598-AnxA](#) (RW).

<sup>28</sup> Annex 2 to “Observations from the Democratic Republic of the Congo on the criteria set out in rule 223 of the Rules of Procedure and Evidence”, registered on 29 September 2015, [ICC-01/04-01/07-3602-Anx2-tENG](#) (RW); original French version registered on 29 September 2015, ([ICC-01/04-01/07-3602-Anx2](#) (RW)). This document was reclassified as public pursuant to the Panel’s instruction of 2 October 2015.

13. On 6 October 2015, the Sentence Review Hearing was held.<sup>29</sup>

14. On 8 October 2015, Mr Katanga filed a video recording, which he had referred to at the Sentence Review Hearing,<sup>30</sup> wherein he publically apologizes to the victims of the crimes for which he was convicted,<sup>31</sup> as well as a transcript of that filmed apology.<sup>32</sup>

## 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 continuing 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

(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.

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<sup>29</sup> Transcript of Sentence Review Hearing, [ICC-01/04-01/07-T-347-ENG](#) (RW).

<sup>30</sup> At the Sentence Review Hearing, the Panel instructed the participants that any documents used or referred to should be filed as an annex by Friday, 9 October 2015 ([Transcript of Sentence Review Hearing](#), p. 4).

<sup>31</sup> “Defence Submission of a Video Recording of Mr Germain Katanga”, [ICC-01/04-01/07-3606](#) (RW) with Annex 1, ICC-01/04-01/07-3606-Conf-Anx1 (RW), and “Transcript & Translation”, [ICC-01/04-01/07-3606-Anx2](#) (RW) (hereinafter: “Transcript & Translation of Video Recording”).

<sup>32</sup> [Transcript & Translation of Video Recording](#).

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.<sup>33</sup> As previously determined, “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” (emphasis added).<sup>34</sup> Therefore, the factors set out in the Court’s legal texts, specifically article 110 (4) (a) and (b), and the factors listed in rule 223 (a) - (e), are those that can be taken into account for purposes of considering whether to reduce a sentence.<sup>35</sup> Specifically, article 110 (4) (c) of the Statute allows for the reduction of sentence if a Panel finds “other factors establishing a clear and significant *change of circumstances* sufficient to justify the reduction of sentence” (emphasis added). In this regard, given that the factors under rule 223 (b) and (c) of the Rules of Procedure and Evidence will be considered for the first time, it is necessary to find that there are changed circumstances in relation

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<sup>33</sup> “Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo”, 22 September 2015, [ICC-01/04-01/06-3173](#) (RW) (hereinafter: “*Lubanga Sentence Review Decision*”), para. 19.

<sup>34</sup> [Lubanga Sentence Review Decision](#), para. 25.

<sup>35</sup> [Lubanga Sentence Review Decision](#), para. 25.



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.<sup>36</sup>

## **B. Review of Mr Katanga's sentence**

20. At the outset, the Panel recalls that, pursuant to article 110 (4) of the Statute, a decision on whether to reduce a sentence is discretionary in nature (“the Court may reduce”). In order to determine whether it is appropriate to reduce a sentence, it is necessary to determine whether the factors under article 110 (4) of the Statute and rule 223 of the Rules of Procedure and Evidence are in fact present. In this regard, the Panel recalls that

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.<sup>37</sup>

21. 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.<sup>38</sup> All participants in the Sentence Review, not only the sentenced person, are required to 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.<sup>39</sup> 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.<sup>40</sup>

22. In making this determination, the Panel has taken into account all of the information submitted in writing and orally from the participants of the Sentence Review proceedings, as well as from the Registrar and the DRC authorities, that is

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<sup>36</sup> [Lubanga Sentence Review Decision](#), para. 28.

<sup>37</sup> [Lubanga Sentence Review Decision](#), para. 22.

<sup>38</sup> [Lubanga Sentence Review Decision](#), para. 32.

<sup>39</sup> [Lubanga Sentence Review Decision](#), para. 32.

<sup>40</sup> [Lubanga Sentence Review Decision](#), para. 32.

of relevance to each factor even if they are not exhaustively summarised in the sections below.

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**

23. Mr Katanga does not make any observations on this factor in his written submissions. However, at the Sentence Review Hearing, Mr Katanga argued that this factor is met by certain actions he took during trial coupled with the withdrawal of his appeal post-sentence.<sup>41</sup> In this regard, Mr Katanga argued that his cooperation during the trial, specifically his testimony upon which regulation 55 of the Regulations of the Court was invoked by the Trial Chamber and which, he argues, resulted in his conviction being based “almost entirely on the evidence that he himself provided to the Court”, qualifies as “early” cooperation within the meaning of article 110 (4) (a) of the Statute.<sup>42</sup> He argued that this willingness to cooperate, “continued” by the withdrawal of his appeal and acceptance of his “culpability for the crimes he has committed”, which saved the Court time and expense, a fact that he notes the Prosecutor also acknowledges.<sup>43</sup>

24. In her written submissions, the Prosecutor reiterates and incorporates by reference the position she expressed in the sentence review proceedings relevant to Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”),<sup>44</sup> which is that cooperation by a sentenced person within the meaning of article 110 (4) (a) of the Statute

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<sup>41</sup> [Transcript of Sentence Review Hearing](#), p. 5, line 18 - p. 6, line 6. *See also ibid.* p. 27, lines 16-23, wherein Mr Katanga argues that, “in response to the Prosecutor's submissions, in respect of the Defence submissions relating to the relevance of Article 110(4), that is early and continuing cooperation, we're not taking just the fact that he withdrew his appeal as the starting point. We're going right back to the history of the case, and we put it this way: Were the Judges of the Trial Chamber assisted by Germain Katanga's cooperation in the course of that case? And we'd say they were substantially and that, therefore, the withdrawal of the appeal should be seen in that context”.

<sup>42</sup> [Transcript of Sentence Review Hearing](#), p. 5, line 18 - p. 6, line 2.

<sup>43</sup> [Transcript of Sentence Review Hearing](#), p. 6, lines 2-6.

<sup>44</sup> [Prosecutor's Submissions](#), para. 26, referring to “[Prosecution's submissions regarding Thomas Lubanga Dyilo's sentence review](#)”, ICC-01/04-01/06-3150-Conf-Exp (hereinafter: “Prosecutor's Observations on *Lubanga* sentence review”), paras 7-10; 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).

“should impact ‘the efficient administration of justice’”.<sup>45</sup> In this regard, referring to the case law of other international tribunals, the Prosecutor submits that examples of such qualifying cooperation would be “testimony, interviews and/or a guilty plea”.<sup>46</sup>

25. At the Sentence Review Hearing, the Prosecutor argued that this factor was not met.<sup>47</sup> In response to Mr Katanga’s submissions on this point, the Prosecutor submits that “[a]s a matter of law, a mere withdrawal of an appeal or a decision to leave a sentence unchallenged does not qualify as cooperation under Article 110(4)”,<sup>48</sup> arguing that the withdrawal of an appeal is a “one-time action [...], often the result of strategic choices by counsel and not the convicted person themselves”.<sup>49</sup>

### (b) Determination of the Panel

26. The Panel recalls that article 110 (4) (a) of the Statute refers to the “early and continuing willingness of the person to cooperate” with the Court’s investigations and prosecutions and 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, 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.<sup>50</sup> However, the fact that a person’s cooperation has not continued post-conviction and was taken into account

<sup>45</sup> [Prosecutor’s Submissions](#), footnote 53, referring to [Prosecutor’s Observations on Lubanga sentence review](#), para. 8, referring to 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*”), para. 30.

<sup>46</sup> [Prosecutor’s Submissions](#), footnote 53, referring to [Prosecutor’s Observations on Lubanga sentence review](#), 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, paras 11-14; ICTR, *The Prosecutor v. Juvénal Rugambarara*, “[Decision on the Early Release Request of Juvénal Rugambarara](#)”, 8 February 2012, ICTR-00-59, 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; [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 2003 and registered on 7 March 2003, IT-95-8-ES, pp. 3-4; ICTY, *Prosecutor v. Miodrag Jokić*, “[Decision of the President on request for early release](#)”, 1 September 2008, IT-01-42/1-ES, para. 15.

<sup>47</sup> [Transcript of Sentence Review Hearing](#), p. 19, lines 2-15.

<sup>48</sup> [Transcript of Sentence Review Hearing](#), p. 19, lines 4-6.

<sup>49</sup> [Transcript of Sentence Review Hearing](#), p. 6, lines 13-14.

<sup>50</sup> [Lubanga Sentence Review Decision](#), para. 30.

in the original sentence may not always result in the automatic non-consideration of these acts.<sup>51</sup> Whether information taken into account at sentencing regarding a person's cooperation with the Court is relevant to a review of sentence under article 110 of the Statute, is to be assessed on a case by case basis.<sup>52</sup>

27. As a preliminary matter, the Panel notes the Prosecutor's submissions in the *Lubanga* sentence review, which she incorporates in her submissions in the present Sentence Review<sup>53</sup> that, *inter alia*, an accused's cooperative conduct during trial is merely what is to be expected and does not qualify as "cooperation" within the meaning of article 110 (4) (a) of the Statute.<sup>54</sup> Conversely, Mr Katanga submits that certain aspects of his conduct during trial, specifically his testimony, qualify as early cooperation with the Court.<sup>55</sup>

28. The Panel is of the view that the "cooperation" referred to as a mitigating circumstance pursuant to rule 145 (2) (a) (ii) of the Rules of Procedure and Evidence and referred to in article 110 (4) (a) of the Statute may, as a general matter, be understood to have the same meaning. To the extent that a Trial Chamber determines that an accused's conduct during trial qualifies as "cooperation", within the meaning of rule 145 (2) (a) (ii) of the Rules of Procedure and Evidence, deference is given to a Trial Chamber's findings in this respect and a panel conducting a sentence review will not generally revisit this initial determination. Thus, whether conduct during trial qualifies as "cooperation" within the meaning of article 110 (4) (a) of the Statute will be determined on a case by case basis, taking into account the Trial Chamber's findings, if any, in this regard in the context of sentencing.

29. In this respect, the Panel notes that, in the Sentencing Decision, the Trial Chamber held that cooperation at trial "must exceed mere good behaviour,

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<sup>51</sup> [Lubanga Sentence Review Decision](#), para. 30.

<sup>52</sup> [Lubanga Sentence Review Decision](#), para. 30.

<sup>53</sup> *See supra* para. 24.

<sup>54</sup> *See* [Prosecutor's Observations on Lubanga sentence review](#), paras 7-8.

<sup>55</sup> *See supra* para. 23.

which, albeit welcome, cannot on its own amount to a circumstance that could mitigate the sentence to be imposed”.<sup>56</sup>

30. The Trial Chamber then went on to find that

[i]n the instant case the Chamber notes that Germain Katanga did give a lengthy testimony, readily answered the questions from the parties, the participants and the Bench, and volunteered information and detail. *To a certain degree, the Chamber will take into account this positive attitude in determining the sentence.* However, it cannot take into account Germain Katanga’s attendance and his good behaviour in court or towards court staff or guards, which is behaviour any Chamber may expect of any accused person. [Emphasis added, footnote omitted.]<sup>57</sup>

31. The Panel notes in particular that, in finding that Mr Katanga’s conduct amounted to cooperation, the Trial Chamber cited to the Conviction Decision, wherein it recalled, in the context of its decision pursuant to regulation 55 of the Regulations of the Court, that Mr Katanga’s “decision to testify was deliberate”,<sup>58</sup> and that he had “spontaneously presented various accounts, explanations and comments to the Chamber in the knowledge that they might later be used to incriminate him”.<sup>59</sup>

32. The Panel therefore considers that it has been established that Mr Katanga cooperated at an early stage within the meaning of article 110 (4) (a) of the Statute. Accordingly, the Panel will now turn to whether there are any other indications of cooperation on the part of Mr Katanga that either began or continued past the imposition of sentence.

33. In this regard, the submissions of the participants focus exclusively on the question of whether the withdrawal of Mr Katanga’s appeal qualifies as “cooperation” under article 110 (4) (a) of the Statute. At the outset, the Panel notes that the Prosecutor’s oral submissions appear to be somewhat at odds with her

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<sup>56</sup> [Sentencing Decision](#), para. 127.

<sup>57</sup> [Sentencing Decision](#), para. 128.

<sup>58</sup> [Conviction Decision](#), para. 1529.

<sup>59</sup> [Conviction Decision](#), para. 1529, quoting *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, 21 November 2012, [ICC-01/04-01/07-3319-tENG/FRA](#), paras 49-51; original version registered on 17 December 2012 ([ICC-01/04-01/07-3319](#)). See specifically *ibid.* para. 51.

written submissions. The Panel first recalls that, in her oral submissions, the Prosecutor stated that a withdrawal of an appeal should be construed as a mere “strategic choice by counsel”, and not “cooperation” within the meaning of article 110 (4) (a) of the Statute.<sup>60</sup> However, the Prosecutor stops short of explaining why a withdrawal of an appeal, coupled with a public apology and acknowledgment of the crimes committed, does not equate to the examples she cites in her written submissions as qualifying as “cooperation”, particularly in regards to a guilty plea.<sup>61</sup> Second, the Panel notes that, in the Prosecutor’s Submissions, she argues that, in order to fall within the meaning of article 110 (4) (a) of the Statute, cooperation “should impact ‘the efficient administration of justice’”<sup>62</sup> and goes on to submit that “by discontinuing his appeal, Mr Katanga *has contributed to the efficient administration of justice*” (emphasis added) by, *inter alia*, “saving the Court’s time and resources”.<sup>63</sup>

34. The Panel concurs with the Prosecutor’s written submissions in that “cooperation” within the meaning of article 110 (4) (a) must contribute to the efficient administration of justice at the Court. A convicted person has a statutory right to lodge an appeal against his conviction. The non-exercise of this statutory right should not automatically, and in and of itself, be seen as cooperation with the Court. However, the Panel observes that should a convicted person choose not to exercise this right as a result of acknowledging that he or she is guilty of the crimes committed and publicly apologising therefor, as is the case with Mr Katanga when he chose to withdraw his appeal, such an act prevents the unnecessary prolongation of the proceedings. It furthermore brings finality to the proceedings against him or her and allows the reparations phase of a case to commence in a timely manner, a factor which is of particular importance in the context of the ICC. The Panel therefore considers that a withdrawal of an appeal, in the circumstances described in the present case, advances the efficient administration of justice post-sentence in the same manner as a guilty plea prior to a sentence, and accordingly can be considered to demonstrate cooperation with the Court within the meaning of article 110 (4) (a)

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<sup>60</sup> See *supra* para. 25.

<sup>61</sup> See *supra* para. 24.

<sup>62</sup> See *supra* para. 24.

<sup>63</sup> [Prosecutor’s Submissions](#), para. 13.

of the Statute. In the present circumstances, the Panel considers that, by virtue of the withdrawal of his appeal, it has been established that Mr Katanga cooperated with the Court within the meaning of article 110 (4) (a) of the Statute and that this act of cooperation, occurring after the end of the trial and the imposition of sentence, establishes that his cooperation with the Court was of a continuous nature.

35. Accordingly, on the basis of the information received, the Panel finds that there has been an early and continuing willingness to cooperate with the Court's investigations and prosecutions on the part of Mr Katanga. The Panel therefore considers that the factor set out in article 110 (4) (a) of the Statute is present. Below, in section II.C, this factor will be weighed with any other factors found to be present in order to determine whether it is appropriate to reduce Mr Katanga'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**

36. None of the participants argue that this factor is present.

**(b) Determination of the Panel**

37. In the absence of any information demonstrating voluntary assistance rendered by Mr Katanga in enabling the enforcement of the Court's judgments and orders in other cases, the Panel finds that the factor under article 110 (4) (b) is not present for purposes of determining whether it is appropriate to reduce Mr Katanga's sentence.

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

**(a) Submissions of the participants**

38. The Registrar submits that, with the exception of one disciplinary incident which occurred more than four years ago, Mr Katanga's behaviour in detention has been "very good and respectful" towards the other detainees and the Detention Centre staff.<sup>64</sup> In addition, the Registrar submits that Mr Katanga is "well behaved

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<sup>64</sup> [Registrar's Submissions](#), para. 2.

and contributes actively [...] to the smooth running of the detention wing and to the well-being of the rest of the detention community”.<sup>65</sup>

39. In their Observations, the DRC authorities submit that any dissociation on the part of Mr Katanga from his crime must be “public and unequivocal”.<sup>66</sup>

40. Mr Katanga submits that being in detention has profoundly affected him and given him the time to reconsider his behaviour, which he submits is demonstrated by the withdrawal of his appeal against the Conviction Decision, his acceptance of the conclusions reached therein, and his expression of remorse for these crimes.<sup>67</sup> In his view, given the years that have passed, he is a “more mature and thoughtful man”.<sup>68</sup>

41. Mr Katanga also submits that “there is not, and never has been, any suggestion of any difficulties arising due to ethnic differences” with other detainees.<sup>69</sup> In particular, Mr Katanga asserts that his conduct thus far in detention demonstrates that he “now has no difficulties responding to authority”, he is capable of complying with demands and rules, and has a “high capacity” for socialising with people “drawn from a broad spectrum”.<sup>70</sup> Lastly, Mr Katanga submits that during his time in detention he has not “sought to maintain or re-establish links with any unlawful or militia element in the [DRC]”.<sup>71</sup>

42. On the basis of this factor, the Prosecutor does not oppose Mr Katanga’s early release and submits that the information currently available meets the threshold for sentence reduction.<sup>72</sup> Specifically, the Prosecutor submits that

[b]ased 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

<sup>65</sup> [Registrar’s Submissions](#), para. 2.

<sup>66</sup> [Observations of the DRC authorities](#), p. 2.

<sup>67</sup> [Mr Katanga’s Submissions](#), para. 31; [Transcript of Sentence Review Hearing](#), p. 6, lines 7-14, 20-25.

<sup>68</sup> [Mr Katanga’s Submissions](#), para. 34.

<sup>69</sup> [Mr Katanga’s Submissions](#), para. 35.

<sup>70</sup> [Mr Katanga’s Submissions](#), para. 36.

<sup>71</sup> [Mr Katanga’s Submissions](#), para. 37; [Transcript of Sentence Review Hearing](#), p. 7, lines 4-5.

<sup>72</sup> [Prosecutor’s Submissions](#), paras 4-7, 27; [Transcript of Sentence Review Hearing](#), p. 13, lines 6-14.



which could be considered to meet Mr Katanga's burden under rule 223 (a) of the [Rules of Procedure and Evidence].<sup>73</sup>

43. The Prosecutor draws on similarities between the factors found to justify the early release of Mr Dragoljub Ojdanić at the ICTY, factors which the Prosecutor submits "all [...] appear to equally exist in Mr Katanga's case".<sup>74</sup> Furthermore, the Prosecutor submits that, "while Mr Katanga's statements in the sentencing hearing fell more within [the category of merely expressing opposition to certain criminal acts in the abstract], [...] his conduct and statements post-sentence hearing fall more with the [category of accepting responsibility and expressing remorse for the crimes for which he was convicted]"<sup>75</sup> and therefore these latter acts could be considered to demonstrate a genuine dissociation from his crimes within the meaning of the factor under rule 223 (a) of the Rules of Procedure and Evidence.<sup>76</sup>

44. The Victims note that Mr Katanga's Submissions under this factor must be treated with caution and observe that the "conduct of the sentenced person in detention may be a simple survival strategy adopted in an environment where resocialization of some kind may be necessary".<sup>77</sup>

45. At the Sentence Review Hearing, the Victims recalled the Trial Chamber's findings in the Sentencing Decision, submitting that these findings demonstrate that, at that time, Mr Katanga had neither accepted responsibility for the crimes for which he was convicted, nor demonstrated genuine remorse.<sup>78</sup> Regarding Mr Katanga's post-sentence acts, the Victims submit that his expressions of remorse and apologies were "in general terms" and not specific to the victims of the crimes for which he was convicted, i.e. the victims of the Bogoro attack,<sup>79</sup> and also submit that,

although Mr Katanga decided not to appeal his sentence and made a statement at that juncture, in no way was that equivalent to dissociation from his crimes. It was not a recognition of the crimes that were addressed in the [Conviction Decision]. This was not a dissociation from the crimes. He did what he did for

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<sup>73</sup> [Prosecutor's Submissions](#), para. 4. *See also* [Transcript of Sentence Review Hearing](#), p. 13, line 24 - p. 14, line 11; p. 15, lines 3-9; p. 19, line 21 - p. 20, line 2.

<sup>74</sup> [Prosecutor's Submissions](#), para. 12.

<sup>75</sup> [Transcript of Sentence Review Hearing](#), p. 14, lines 19-22.

<sup>76</sup> *See generally* [Transcript of Sentence Review Hearing](#), p. 14, line 12 - p. 15, line 9.

<sup>77</sup> [Victims' Submissions](#), para. 33.

<sup>78</sup> [Transcript of Sentence Review Hearing](#), p. 22, lines 15-17.

<sup>79</sup> [Transcript of Sentence Review Hearing](#), p. 22, lines 18-21.

strategic reasons, obvious reasons, with a clear objective; namely, to avoid a harsher sentence, anything harsher than the lenient sentence of 12 years that he received, rather, Mr Katanga thought he would not gamble.<sup>80</sup>

46. In his personal address at the Sentence Review Hearing, Mr Katanga stated the following:

[W]hen an accused person is found guilty his very value as a human being collapses while his credibility and his word suffer as a result. This is the awkward situation in which I find myself today. And I am not saying this merely because I wish to be released at all costs. [...] What I'm saying comes from the bottom of my heart and it is a reflection of my deepest conviction. This is all the more true when it comes to the victims of my actions and that is because their pain is immense. I am fully aware of that.

I have personally experienced such pain with the death of my younger brother as well as with the very recent passing of my father. This experience has enabled me to better understand how painful the loss of a loved one can be. The situation is even worse in the case of the Bogoro victims who lost their own loved ones in violent circumstances. [...] The fact of the matter is that in the course of the trial I had to come to terms with the role that I personally played in the attack on Bogoro as well as with the degree or scope of suffering inflicted upon the victims of that attack.

Today, [...] I would like to address myself to the victims whose pain as expressed in their statements has profoundly affected me. I sincerely hope that my message will eventually reach them. [...] I have read the reactions of the victims as conveyed by their Legal Representative. I have heard their cries of pain and suffering with a feeling of deep respect. The suffering inflicted upon the victims is real. I have already acknowledged that. I have expressed my regrets for that before and I am once again expressing my regrets today. This is something that I will never take lightly. I would like to reassure [...] all the victims of the sincerity of my regrets and of the sadness that I feel.<sup>81</sup>

#### **(b) Determination of the Panel**

47. The plain meaning of this factor requires that the conduct of the sentenced person demonstrate a genuine dissociation from his or her crime.<sup>82</sup> “Good conduct while in detention generally or vis-à-vis other detainees and the Detention Centre staff” is not “sufficient on its own to establish the necessary connection between this conduct and a dissociation from the crimes [of conviction]”.<sup>83</sup> Furthermore, there is a difference between a person expressing opposition to a particular criminal act in

<sup>80</sup> [Transcript of Sentence Review Hearing](#), p. 22, lines 8-14.

<sup>81</sup> [Transcript of Sentence Review Hearing](#), p. 32, line 25 - p. 34, line 3.

<sup>82</sup> [Lubanga Sentence Review Decision](#), para. 45.

<sup>83</sup> [Lubanga Sentence Review Decision](#), para. 45.

the abstract and that person accepting responsibility and expressing remorse for having committed those criminal acts.<sup>84</sup> This factor is primarily concerned with the latter, and not the former.<sup>85</sup> Furthermore, it is necessary to find that there are changed circumstances in relation to this factor from the time that the sentence was imposed.<sup>86</sup> In this regard, article 110 (4) (c) of the Statute provides that the change of circumstances must be “clear and significant”. “Clear” is defined as “free from doubt”, “unambiguous” and “very obvious”,<sup>87</sup> while “significant” is defined as “large enough to be noticed or have an effect” or “of a measurable large amount”.<sup>88</sup>

48. The Panel notes that, in the Sentencing Decision, the Trial Chamber considered that “a statement of remorse may be taken into account as a mitigating circumstance [pursuant to rule 145 (2) (a) of the Rules of Procedure and Evidence]”, but only if such a statement is “sincere”.<sup>89</sup> In declining to consider Mr Katanga’s statements at the sentencing hearing as a mitigating circumstance, the Trial Chamber noted that

during the [sentencing hearing] proceedings Germain Katanga made no statement that can be interpreted as an expression of deep and genuine remorse. The Chamber notes that at best he made some statements attesting to his compassion for the victims and his desire for justice. The Chamber further notes that, at the end of the hearing for the determination of the sentence, in making his statement as provided by article 67(1)(h), Germain Katanga expressed his compassion in general for the victims of that war (the one ongoing in Ituri) and then described his feelings specifically with respect to the victims from his own community.

The Chamber considers the statements to be mere convention and that in actual fact Germain Katanga found it very difficult to acknowledge the crimes committed.<sup>90</sup>

49. Therefore, it appears that at the time of the imposition of sentence, Mr Katanga had not genuinely dissociated from his crimes. However, as discussed

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<sup>84</sup> [Lubanga Sentence Review Decision](#), para. 46.

<sup>85</sup> [Lubanga Sentence Review Decision](#), para. 46.

<sup>86</sup> [Lubanga Sentence Review Decision](#), para. 28.

<sup>87</sup> “Clear”, Black’s Law Dictionary, (West, 9<sup>th</sup> ed., 2011). *See also* “Clear”, Merriam-Webster Dictionary, 2015, accessed at <http://www.merriam-webster.com/dictionary/clear>.

<sup>88</sup> “Significant”, Oxford English Dictionary, 2015, accessed at <http://www.oxforddictionaries.com/definition/learner/significant>.

<sup>89</sup> [Sentencing Decision](#), para. 117.

<sup>90</sup> [Sentencing Decision](#), para. 118.

above,<sup>91</sup> what is determinative in these proceedings is not what was found at the time of sentencing, but rather whether “there are changed circumstances in relation to this factor from the time that the sentence was imposed”.

50. First, the Panel takes note of Mr Katanga’s decision last year to withdraw his appeal against the Conviction Decision, coupled with his acceptance of the Trial Chamber’s findings on his role and conduct in the Bogoro crimes and his expression of regret to the victims of Bogoro, attached to the notice of withdrawal. Second, the Panel also takes into account the video recording containing Mr Katanga’s filmed apology that was made available to various communities in the DRC. With respect to the Victims’ submissions regarding the general nature of his expressions of regret and apologies, the Panel does not agree with this characterisation of Mr Katanga’s post-sentence statements and notes in particular that, at the Sentence Review Hearing, Mr Katanga spoke directly to and about the victims of the crimes for which he was convicted. The Panel considers that, post-sentence, Mr Katanga has repeatedly and publically taken responsibility for the crimes for which he was convicted, as well as expressed regret for the harm caused to the victims by his actions. For these reasons, the Panel considers that there has been a clear and significant change in circumstances in relation to this factor and that Mr Katanga has, post-sentence, genuinely dissociated from his crimes.

51. Accordingly, on the basis of the information received, the Panel finds that Mr Katanga’s conduct while in detention shows a genuine dissociation from his crimes. Accordingly, the Panel considers that the factor laid out in rule 223 (a) of the Rules of Procedure and Evidence is present. Below, in section II.C, this factor will be weighed with any other factors found to be present in order to determine whether it is appropriate to reduce Mr Katanga’s sentence.

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

**(a) Submissions of the participants**

52. The Registrar notes that since Mr Katanga’s conviction he has not been introduced to a rehabilitation programme due to his continued detention at the ICC

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<sup>91</sup> See *supra* para. 19.

Detention Centre.<sup>92</sup> Nonetheless, the Registrar submits that Mr Katanga’s interaction with other detainees and staff of the Detention Centre “does not suggest any impediment to his resocialization”.<sup>93</sup>

53. The DRC authorities submit that the attitude of a convicted person in detention does not always reflect the real possibility of his or her resocialization and successful resettlement and that such an attitude can, in many cases, be intended to deceive.<sup>94</sup>

54. Mr Katanga submits that there is every indication that he can re-enter society in a positive and successful manner.<sup>95</sup> He maintains close family relations with his immediate and extended family and submits that if released, he intends to join his family in Aru, an area “far from the Ngiti homeland and Bogoro”.<sup>96</sup> Mr Katanga submits further that prior to his arrest he was a Brigadier General in the DRC army. He submits that if released, and if he can, he “hopes to continue his army life [...] to play a role in maintaining peace and promoting reconciliation between the different communities”.<sup>97</sup> If his return to the army is not an option, then Mr Katanga submits that he will farm in Aru. Mr Katanga also indicates an interest in studying law at the Kisangani University.<sup>98</sup> Lastly, Mr Katanga asserts that in relation to his plans for resettlement, he has the support of his family and “all communities (including the Hema and [*Union des Patriotes Congolais*]) in Bunia and Aveba”.<sup>99</sup>

55. On the basis of the information provided by Mr Katanga and the Registrar on this factor, the Prosecutor submits that it is possible that Mr Katanga could be successfully resettled.<sup>100</sup> The Prosecutor also recalls that Mr Katanga’s young age and his family situation have been previously found by the Trial Chamber to be factors that may ease his reintegration but were accorded limited weight in

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<sup>92</sup> [Registrar’s Submissions](#), para. 3.

<sup>93</sup> [Registrar’s Submissions](#), para. 4.

<sup>94</sup> [Observations of the DRC authorities](#), p. 2.

<sup>95</sup> [Mr Katanga’s Submissions](#), para. 40.

<sup>96</sup> [Mr Katanga’s Submissions](#), para. 41.

<sup>97</sup> [Mr Katanga’s Submissions](#), para. 42.

<sup>98</sup> [Mr Katanga’s Submissions](#), para. 42.

<sup>99</sup> [Mr Katanga’s Submissions](#), para. 43.

<sup>100</sup> [Transcript of Sentence Review Hearing](#), p. 16, lines 6-15.

mitigation of his sentence.<sup>101</sup> The Prosecutor notes further that based on the observations of the DRC, Mr Katanga may face national proceedings against him should he return to the DRC which may have an impact on his resettlement.<sup>102</sup>

56. The Victims disagree with Mr Katanga's assertion that he has the support of the Hema community for his resocialization plans. In their submission, Mr Katanga's support appears to emanate from the Hema of Bunia, communities that are not reflective of the Bahema Sud community, of which the victims of the Bogoro attack are members.<sup>103</sup> In the Victims' view, Mr Katanga's reliance on the support of individuals, who are not members of the community affected by the crimes committed in Bogoro, is an approach that is "inappropriate and illegitimate".<sup>104</sup> At the Sentence Review Hearing, the Victims were critical of the lack of specific information concerning Mr Katanga's resocialization plans and questioned the possibility of his plans actually materialising.<sup>105</sup>

#### **(b) Determination of the Panel**

57. The Panel notes, preliminarily, that information concerning Mr Katanga's age and family situation were previously taken into account as a mitigating factor by the Trial Chamber in the Sentencing Decision, on the basis that these individual circumstances could facilitate Mr Katanga's *reintegration*.<sup>106</sup> The Panel considers that by the terms of article 78 (1) of the Statute read with rule 145 of the Rules of Procedure and Evidence, the notion of reintegration or resocialization into society is one that is not ordinarily taken into account when considering an appropriate term of imprisonment to impose. Instead, the notion is more appropriately addressed in proceedings relating to the review of sentence, given that it is at this point in time that there is a possibility of the sentenced person being released. Thus, in the Panel's view, notwithstanding the Trial Chamber's findings in this regard, the prospect of the resocialization and successful resettlement of Mr Katanga will be considered for the first time to determine whether a reduction of his sentence is justified.

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<sup>101</sup> [Transcript of Sentence Review Hearing](#), p. 16, lines 6-9, referring to [Sentencing Decision](#), paras 88, 144.

<sup>102</sup> [Transcript of Sentence Review Hearing](#), p. 16, lines 16-24.

<sup>103</sup> [Victims' Submissions](#), para. 36.

<sup>104</sup> [Victims' Submissions](#), para. 37.

<sup>105</sup> [Transcript of Sentence Review Hearing](#), p. 23, lines 16-, p. 24, line 5.

<sup>106</sup> [Sentencing Decision](#), paras 85, 144.

58. In support of his submission that this criterion is fully satisfied, Mr Katanga states that he is 37 years old with strong family ties that he has maintained while in detention.<sup>107</sup> In addition, he indicates that, if he is unable to continue his career in the DRC army, he intends to engage in farming in Aru, where his family resides and which is a fair distance away from his Ngiti homeland as well as Bogoro.<sup>108</sup> Mr Katanga also aspires to study law in the future and submits that his plans for resettlement, if released early, are supported by his family and “all communities (including the Hema and [*Union des Patriotes Congolais*]) in Bunia and Aveba”.<sup>109</sup> The Panel considers that in light of these submissions, Mr Katanga’s envisaged resettlement plans demonstrate a feasible prospect for his resocialization and successful resettlement should he be granted early release.

59. As to the Victims argument regarding Mr Katanga’s reliance on the support of individuals who are not members of the community affected by the crimes committed in Bogoro, the Panel notes that while this may be true, there does appear to be support for his reintegration that emanates from communities that are Hema and those who reside in areas which are closer in proximity to the area where Mr Katanga indicates that he would resettle.

60. In relation to the potential national proceedings that Mr Katanga could face should he return to the DRC, the Panel considers this information to be irrelevant to this Sentence Review. In the Panel’s view, taking this type of information into account would shift the focus of a sentence review from the relationship between the factors under article 110 (4) of the Statute and rule 223 of the Rules of Procedure and Evidence with the crimes for which the person was convicted of by this Court to an evaluation of the relationship between these factors and other potential proceedings that are unrelated to those at the Court. The Panel therefore will not consider this information in its determination on whether Mr Katanga’s sentence should be reduced.

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<sup>107</sup> [Mr Katanga’s Submissions](#), paras 30, 40; [Transcript of Sentence Review Hearing](#), p. 7, lines 13-17.

<sup>108</sup> [Mr Katanga’s Submissions](#), paras 41- 42.

<sup>109</sup> [Mr Katanga’s Submissions](#), paras 42- 43.

61. Accordingly, on the basis of the information received, the Panel finds that there is a prospect for the resocialization and successful resettlement of Mr Katanga in the DRC. The Panel therefore considers that the factor laid out in rule 223 (b) of the Rules of Procedure and Evidence is present. Below, in section II.C, this factor will be weighed with any other factors found to be present in order to determine whether it is appropriate to reduce Mr Katanga's sentence.

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

**(a) Submissions of the participants**

62. Based on the information available to him, the Registrar submits that he is not able to provide reliable conclusions on the impact that the potential early release of Mr Katanga would have on social stability in the DRC.<sup>110</sup> However, the Registrar emphasizes consideration of: i) the timing of early release; ii) the potential impact on the *Force de résistance patriotique en Ituri* (hereinafter: "FRPI") militia; and iii) local grievances and perceptions.<sup>111</sup>

63. With respect to the timing of an early release, the Registrar emphasizes the likelihood of rising tensions across the country during the national and local elections to be held from October 2015 through to November 2016<sup>112</sup> and observes that election related violence is already occurring in Kinshasa and regional capitals.<sup>113</sup> The Registrar submits that tensions may potentially emerge from the political use of armed groups to collect electoral campaign funds, and from the "on-going administrative process aimed at dividing the country's 11 provinces into 26".<sup>114</sup> The Registrar concludes that, while not directly related to Mr Katanga's potential early release, the above-mentioned information suggests that "the timing of early release may be still more problematic should it coincide with local elections".<sup>115</sup>

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<sup>110</sup> [Registrar's Submissions](#), para. 5.

<sup>111</sup> [Registrar's Submissions](#), paras 6 (i) - 6 (iii).

<sup>112</sup> [Registrar's Submissions](#), para. 6 (i).

<sup>113</sup> [Registrar's Submissions](#), para. 6 (i).

<sup>114</sup> [Registrar's Submissions](#), para. 6 (i).

<sup>115</sup> [Registrar's Submissions](#), para. 6 (i).



64. As to the potential impact on the FRPI militia, the Registrar submits that “there is currently no information indicating that Mr Katanga’s return to Ituri would lead to either the strengthening of FRPI” or “triggering of significant social instability”.<sup>116</sup> In this regard, the Registrar notes that the available information does not suggest that the FRPI could reorganise around Mr Katanga and observes that the militia’s chain of command has been “weakened” and “reportedly disrupted”.<sup>117</sup> The Registrar also points out that the return of Mr Mathieu Ngudjolo Chui (hereinafter: “Mr Ngudjolo”) to Ituri did not trigger social instability.<sup>118</sup>

65. With regard to local grievances and perceptions, the Registrar submits that initial reports from local communities suggest that the affected communities, particularly Bogoro, may perceive Mr Katanga’s potential early release negatively.<sup>119</sup> However, he submits that “[t]he potential level of antagonism and tensions that early release could trigger has not yet been assessed”.<sup>120</sup>

66. Mr Katanga submits that there is “no objective material before the Chamber to suggest that [he] poses any threat” to the stability of the Ituri province.<sup>121</sup>

67. Regarding the FRPI, Mr Katanga clarifies that the present militia group calling itself FRPI and operating in Walendu Bindi “has little or nothing to do with the FRPI that [he] led” until early 2005.<sup>122</sup> Mr Katanga submits that, while he has severed all links with the FRPI and has no intention of taking part in any militia activity, local communities believe he can assist in the negotiations between the army and the militia<sup>123</sup> and he is “willing to assist in any manner he can to help end the militia threat”.<sup>124</sup> In this regard, Mr Katanga submits that a member of MONUSCO (the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo) has expressed an interest in working with him in

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<sup>116</sup> [Registrar’s Submissions](#), para. 6 (ii).

<sup>117</sup> [Registrar’s Submissions](#), para. 6 (ii).

<sup>118</sup> [Registrar’s Submissions](#), para. 6 (ii).

<sup>119</sup> [Registrar’s Submissions](#), para. 6 (iii).

<sup>120</sup> [Registrar’s Submissions](#), para. 6 (iii).

<sup>121</sup> [Mr Katanga’s Submissions](#), para. 55.

<sup>122</sup> [Mr Katanga’s Submissions](#), para. 45.

<sup>123</sup> [Mr Katanga’s Submissions](#), para. 51.

<sup>124</sup> [Mr Katanga’s Submissions](#), paras 46 - 50.

respect of resolving the militia issue.<sup>125</sup> This, Mr Katanga avers, indicates that his offer to assist will be accepted and he could then “have a *highly positive impact on stability* in the region” (emphasis added).<sup>126</sup>

68. Mr Katanga acknowledges that his early release may be perceived negatively by the affected community in Bogoro<sup>127</sup> and submits that it is understandable that the victims 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 [him]”.<sup>128</sup> However, in discussions with the Legal Representative of victims and a number of victims in Bogoro, Mr Katanga submits that his Defence team “heard no expression of belief that Mr Katanga’s return to Ituri would cause social instability”.<sup>129</sup> Instead, Mr Katanga notes that the victims were focused on the reparations procedure not having been concluded and concerned that the sentence imposed on Mr Katanga was insufficient for the crimes committed.<sup>130</sup>

69. As to the Registrar’s observations concerning the timing of release and election related violence in the DRC, Mr Katanga submits that these factors are not directly related to the issue of his early release. Mr Katanga argues that to try to establish a link between possible instability - not attributable to him - and the timing of his release “seems highly speculative and was not borne out by comments made by those the [D]efence met when on mission”.<sup>131</sup>

70. The Prosecutor submits that her investigations into the matter are ongoing and that she is therefore unable to give a conclusive view on the impact of Mr Katanga’s potential early release on the social stability of the region.<sup>132</sup> Nonetheless, the Prosecutor reiterates the submissions of the Registrar and Mr Katanga, emphasizing that the information available to the Registrar and to Mr Katanga suggests that the

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<sup>125</sup> [Mr Katanga’s Submissions](#), para. 52.

<sup>126</sup> [Mr Katanga’s Submissions](#), para. 52.

<sup>127</sup> [Mr Katanga’s Submissions](#), para. 53.

<sup>128</sup> [Mr Katanga’s Submissions](#), para. 54.

<sup>129</sup> [Mr Katanga’s Submissions](#), para. 54.

<sup>130</sup> [Mr Katanga’s Submissions](#), para. 54.

<sup>131</sup> [Mr Katanga’s Submissions](#), para. 56.

<sup>132</sup> [Prosecutor’s Submissions](#), para. 20.

Hema and Ngiti communities have reconciled, and that the information further provides no indication that the FRPI would reorganize around Katanga.<sup>133</sup>

71. The Victims submit that the reconciliation between the affected communities is not as “deep” as Mr Katanga suggests.<sup>134</sup> Rather, the Victims believe lasting reconciliation is not possible while land disputes remain unresolved,<sup>135</sup> and while operational militias are present in the region.<sup>136</sup> The Victims observe that Mr Katanga’s Submissions reference victim statements supporting legitimate concerns that “the situation on the ground is in fact conducive” to Mr Katanga’s return to his prior position of authority.<sup>137</sup> However, they emphasize that the Bahema Sud community, the only community to have suffered from the attack, has been “implicitly exclude[d]” from Mr Katanga’s Submissions.<sup>138</sup> In addition, the Victims emphasize their “deep dissatisfaction about the length of the sentence” and the anticipated timing of release,<sup>139</sup> submitting that the original 12 year sentence is “not proportionate to the crimes committed” and that Mr Katanga’s release would “merely exacerbate the feeling of injustice shared by all the victims”.<sup>140</sup>

72. The DRC authorities have serious reservations regarding this factor.<sup>141</sup> They submit that Mr Katanga’s sentence of 12 years was not well received by the affected population of Ituri, who, the DRC authorities submit, expected a higher sentence, given the nature of the crimes committed.<sup>142</sup> Thus, they argue that the early release of Mr Katanga could aggravate the already existing frustrations of the victims and affected communities.<sup>143</sup> They also particularly highlight that the early release of Mr Katanga could have detrimental consequences on other court proceedings both at the Court, referring to the case of *The Prosecutor v. Bosco*

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<sup>133</sup> [Prosecutor’s Submissions](#), paras 18-19.

<sup>134</sup> [Victims’ Submissions](#), para. 38.

<sup>135</sup> [Victims’ Submissions](#), para. 39.

<sup>136</sup> [Victims’ Submissions](#), para. 44.

<sup>137</sup> [Victims’ Submissions](#), para. 46, referring to Annexes 1 and 2 to [Mr Katanga’s Submissions](#).

<sup>138</sup> [Victims’ Submissions](#), para. 43.

<sup>139</sup> [Victims’ Submissions](#), para. 47.

<sup>140</sup> [Victims’ Submissions](#), para. 47.

<sup>141</sup> [Observations of the DRC authorities](#), pp. 3-4.

<sup>142</sup> [Observations of the DRC authorities](#), p. 4.

<sup>143</sup> [Observations of the DRC authorities](#), p. 4.

*Ntaganda*,<sup>144</sup> and in the DRC domestic courts, referring to the case of *Mr Goda Supka et al.*<sup>145</sup>

73. At the Sentence Review Hearing, in response to the Victims Submissions and the Observations of the DRC authorities, Mr Katanga argued that “[w]hat really is perhaps reflected in the reaction of the people of Bogoro is upset rather than any social instability”<sup>146</sup> and that there is no information suggesting a potential for social instability, such as rioting caused by a reduction in Mr Katanga’s sentence.<sup>147</sup>

#### (b) Determination of the Panel

74. This factor should be assessed with caution, keeping in mind the intent of the Preparatory Commission to include consideration of the political conditions in the territorial State “as a factor in review for early release”.<sup>148</sup> This cautionary approach results from the inclusion of the factor as an “excluding criterion”, meaning that if a reduction in sentence would not cause any social instability, then the factor could weigh in favour of release.<sup>149</sup> In other circumstances, “potential social instability could be weighed against existing factors favouring sentence reduction”.<sup>150</sup> Significant social instability may be demonstrated by information indicating that the sentenced person’s return to the State at issue could, *inter alia*, undermine public safety, cause social unrest such as riots or acts of ethnic-based violence, lead to the commission of new international crimes by the sentenced person or by his or her supporters, or undermine public confidence in the domestic legal system.<sup>151</sup>

75. The Panel considers that conflicting information has been presented by various sources suggesting that Mr Katanga’s early release: (i) would cause no social instability and potentially be beneficial for reconciliation efforts, particularly with regard to the militias operating in the DRC; or (ii) would have some destabilizing

<sup>144</sup> ICC-01/04-02/06.

<sup>145</sup> [Observations of the DRC authorities](#), p. 4.

<sup>146</sup> [Transcript of Sentence Review Hearing](#), p. 10, lines 23-24. *See also ibid.*, p. 11, lines 22-25.

<sup>147</sup> [Transcript of Sentence Review Hearing](#), p. 10, line 25; p. 11, line 24 - p. 12, line 1.

<sup>148</sup> [Lubanga Sentence Review Decision](#), para. 63, referring to K. Post, “Enforcement”, in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 673, at p. 700.

<sup>149</sup> [Lubanga Sentence Review Decision](#), para 63, referring to 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.

<sup>150</sup> [Lubanga Sentence Review Decision](#), para. 63.

<sup>151</sup> *See e.g.* [Oehmichen Rules Commentary](#), para. 403.

effect, particularly in light of the upcoming elections and the already occurring election-related violence in the DRC. In these circumstances, the Panel considers that it has not received any information indicating that Mr Katanga's return to the DRC would result in significant social instability. In this regard, the Panel observes that Mr Katanga, if granted early release, intends to settle in Aru which is some distance away from Bogoro. Notably, the Panel gives particular weight to the Registrar's assessment with respect to the FRPI militias, which is that there is no indication that Mr Katanga's return would strengthen the FRPI, that the FRPI would reorganise around Mr Katanga, or that his return would "trigger significant social instability" that could be attributed to the FRPI.<sup>152</sup> Furthermore, the Panel also takes note of the Registrar's Submissions regarding the fact that the return of Mr Ngudjolo, an acquitted person, to the DRC has not resulted in social instability.

76. The Panel considers that, on balance, the information presented suggests that Mr Katanga's release would give rise to some degree of social instability, but that this instability has not been demonstrated to be "significant" as required under this factor.

77. With respect to the Victims' Submissions and the Observations of the DRC authorities regarding the Victims' continuing negative feelings regarding the length of Mr Katanga's original sentence, the Panel concurs with Mr Katanga's submissions that these negative emotions cannot be equated to social instability within the meaning of this factor. The Panel notes in this regard that it is required to assess "any impact on the victims and their families as a result of the early release" under rule 223 (d) of the Rules of Procedure and Evidence. The Panel therefore considers that these submissions of the Victims and DRC authorities are relevant to the factor under rule 223 (d) of the Rules of Procedure and Evidence and not this factor under rule 223 (c) of the Rules of Procedure and Evidence.

78. With respect to the DRC authorities' submissions regarding the potential "detrimental consequences on other court proceedings", the Panel notes that, beyond this bald assertion, it has not been presented with any information to support this

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<sup>152</sup> See *supra* para. 64, referring to [Registrar's Submissions](#), para. 6 (ii).

claim. Absent any relevant information by which to evaluate this claim, the Panel considers this argument to be unsupported and will not consider it further.

79. Accordingly, on the basis of the information received, the Panel finds that the factor under rule 223 (c) of the Rules of Procedure and Evidence concerning whether the early release of Mr Katanga would give rise to significant social instability is not present for purposes of weighing this factor against the reduction of sentence. However, while the Panel has found that Mr Katanga's early release would not give rise to significant social instability; it has found that it would give rise to a degree of social instability. As the Panel has not entered findings as to whether a reduction of Mr Katanga's sentence would be beneficial for social *stability* through a reconciliation process or would not cause *any* social instability, this factor will not be weighed in favour of reducing Mr Katanga's sentence either. Accordingly, the Panel considers this factor to have neutral value, weighing neither for nor against a reduction in Mr Katanga's 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**

80. The Registrar emphasizes that the language of this factor requires an action to be "significant" and "for the benefit of the victims".<sup>153</sup> The Registrar notes that Mr Katanga has contributed to a documentary where he apologizes to the Victims and their families, but submits that he cannot reach any conclusion as to the impact it might have had.<sup>154</sup> However, the Registrar observes that some victims have already expressed negative reactions to the use of such an apology as a reparation measure.<sup>155</sup>

81. The Registrar further submits that the Panel may find the *amicus curiae* submissions on reparations by the Queen's University of Belfast Human Rights

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<sup>153</sup> [Registrar's Submissions](#), para. 7.

<sup>154</sup> [Registrar's Submissions](#), para. 10.

<sup>155</sup> [Registrar's Submissions](#), para. 10.

Centre and the University of Ulster's Transitional Justice Institute<sup>156</sup> (hereinafter: "HRC/TJI Observations on Reparations") useful for the Panel's assessment.<sup>157</sup>

82. Mr Katanga submits that he has taken the following actions on behalf of the Victims: i) withdrawing his appeal, which, he submits, provided the Victims with a "definitive solution" and contained his expression of regret; ii) "seek[ing] to do all he can to bring the two communities together"; iii) supporting the Victims in their applications for individual reparations; iv) "express[ing] his apologies publically on film to the [V]ictims"; and v) offering to meet personally with the Victims to apologise.<sup>158</sup> Regarding iii), Mr Katanga notes that this recorded apology was taken on a mission to the DRC, and that most of those who viewed the film accepted the apology.<sup>159</sup> He submits that his Defence team refrained from showing it to victims in Bogoro out of concern that it may be misunderstood or, as had been suggested by them, be perceived as "inconsiderate".<sup>160</sup>

83. The Prosecutor recalls that the Victims submit that "Mr Katanga's early release to Ituri would relieve their trauma and their sense of impunity".<sup>161</sup> With regard to any significant action taken by Mr Katanga, she notes that the reparations proceedings in this case are still ongoing and that "[i]t is too early to tell if any of the actions Mr Katanga may take during reparations would benefit the [V]ictims".<sup>162</sup> She also notes that the Victims appear to have rejected Mr Katanga's apologies.<sup>163</sup> For these reasons, she submits that this factor is not met.<sup>164</sup>

84. The Victims submit that they have not benefited from any significant actions taken by Mr Katanga.<sup>165</sup> The Victims note that they received news of Mr Katanga's

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<sup>156</sup> Trial Chamber II, "Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute", 14 May 2015, [ICC-01/04-01/07-3551](#).

<sup>157</sup> [Registrar's Submissions](#), para. 11.

<sup>158</sup> [Transcript of Sentence Review Hearing](#), p. 12, lines 5-16.

<sup>159</sup> [Mr Katanga's Submissions](#), para. 59.

<sup>160</sup> [Mr Katanga's Submissions](#), para. 59.

<sup>161</sup> [Transcript of Sentence Review Hearing](#), p. 18, lines 7-9.

<sup>162</sup> [Transcript of Sentence Review Hearing](#), p. 18, lines 17-19.

<sup>163</sup> [Transcript of Sentence Review Hearing](#), p. 18, lines 19-20.

<sup>164</sup> [Transcript of Sentence Review Hearing](#), p. 18, lines 21-24.

<sup>165</sup> [Victims' Submissions](#), para. 52.

filmed apology with caution, and that the meeting with Mr Katanga's Defence team in Bogoro exposed some victims to "further trauma".<sup>166</sup> The Victims submit that the relevance of Mr Katanga's filmed apology as a significant action is questionable given that the affected victims have not seen the film.<sup>167</sup> Moreover, the Victims submit that the notion of apologies at this point in time is "at odds with a fundamental principle in Hema culture, according to which a person who has done someone harm must make amends before he or she makes an apology".<sup>168</sup>

85. The Victims also submit that the timing of the review on the reduction of sentence is particularly unfortunate as they are currently being interviewed about the harm they suffered and the forms of reparations they would like to receive.<sup>169</sup> In their view, to release Mr Katanga before the allocation of reparations would merely "reinforce their trauma and their sense of impunity".<sup>170</sup>

86. The DRC authorities submit that, while only Mr Katanga can decide what action, if any, to take on behalf of victims, he could, for example, assist the Registrar in identifying and locating his assets for purposes of advancing the reparations proceedings currently underway at the Court.<sup>171</sup>

#### **(b) Determination of the Panel**

87. The Panel must first establish whether there is any evidence to support a finding of the presence of "significant action" taken by Mr Katanga for the benefit of the victims of the crimes for which he was convicted. Involvement in, *inter alia*, the reparation process or a demonstration of regret could be acts considered to be relevant to this factor.<sup>172</sup>

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<sup>166</sup> [Victims' Submissions](#), para. 53.

<sup>167</sup> [Victims' Submissions](#), para. 56.

<sup>168</sup> [Victims' Submissions](#), para. 54.

<sup>169</sup> [Victims' Submissions](#), para. 49.

<sup>170</sup> [Victims' Submissions](#), para. 50.

<sup>171</sup> [Observations of the DRC authorities](#), p. 3.

<sup>172</sup> [Lubanga Sentence Review Decision](#), para. 69. *See also* [Oehmichen Rules Commentary](#), para. 404, stating that qualifying actions could include "contributions to the victim's trust fund, payments of civil damages in certain cases, but also the expression of sincere apologies and regret".



88. The Panel notes that, as argued by the Prosecutor,<sup>173</sup> Mr Katanga had not taken any significant actions to the benefit of the Victims at the time of the imposition of sentence. Mr Katanga argues that, since that time, he has undertaken various actions that amount to a “significant action” for the benefit of the Victims. The Victims reject the assertion that they have benefited from these post-sentence actions.

89. Before considering the submissions relevant to the present Sentence Review, the Panel will first address how a “significant action” is to be assessed under this factor.

90. The Panel considers that the factor under rule 223 (d) of the Rules of Procedure and Evidence needs to be considered in conjunction with the factor under rule 223 (a) of the Rules of Procedure and Evidence. In this regard, the Panel notes that, while it is considering mainly the same information (or actions) under these two factors, how these actions are assessed differs under each factor. The Panel considers that rule 223 (a) of the Rules of Procedure and Evidence requires it to consider actions from the perspective of, or impact on, the sentenced person, i.e. whether certain actions indicate a genuine dissociation from his or her crime. Rule 223 (d) of the Rules of Procedure and Evidence requires the Panel to consider actions taken by the sentenced person, as well as the perspective of the victims regarding those actions, i.e. whether the victims consider that the actions taken by the sentenced person have benefited them and whether they consider those actions to have been significant.

91. The Panel notes that this view is in line with that expressed by some academic commentators regarding this factor.<sup>174</sup> According to one such commentator, whether an action qualifies as significant should be assessed mainly by the impact of said action on the victims.<sup>175</sup> However, this same commentator cautions that overemphasizing the victims’ assessments of a sentenced person’s actions risks arbitrary and unequal results because this assessment may be influenced by the

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<sup>173</sup> [Transcript of Sentence Review Hearing](#), p. 18, lines 11-14, referring to the [Sentencing Decision](#), paras 120-121.

<sup>174</sup> See e.g. [Oehmichen Rules Commentary](#), paras 404-405; E. Gumboh, “[The Penalty of Life Imprisonment under International Criminal Law](#)”, *11 African Human Rights Law Journal* (2011) (hereinafter: “Gumboh Article”), p.75.

<sup>175</sup> [Gumboh Article](#), p. 89.

victims' ability to heal and to forgive.<sup>176</sup> The Panel concurs that, while the perspective of victims should be considered under this factor, an assessment can only be done on a case by case basis, taking into account an objective evaluation of the actions taken by the sentenced person balanced against the reasonableness of the victims' objections that they have not benefited from those actions.

92. The Panel will now turn to the actions identified by Mr Katanga as qualifying as a "significant action" for the benefit of the Victims within the meaning of rule 223 (d) of the Rules of Procedure and Evidence.

93. First, regarding Mr Katanga's withdrawal of his appeal against the Conviction Decision, the Panel considers the specific circumstances of the *Katanga* case to be of particular relevance. The Panel recalls that, in the Conviction Decision, Mr Katanga was also acquitted of other charges and that, as a result of Mr Katanga's withdrawal of his appeal, the Prosecutor also withdrew her appeal against the Conviction Decision.<sup>177</sup> The Panel is aware that the Prosecutor's withdrawal of her appeal was not well received by the Victims<sup>178</sup> and, as laid out above,<sup>179</sup> that the Victims have repeatedly made clear their frustration with the sentence imposed by the Trial Chamber, which they consider to be inadequate. In light of these specific circumstances, the Panel does not consider that the withdrawal of Mr Katanga's appeal against the Conviction Decision qualifies as an action that benefitted the Victims within the meaning of rule 223 (d) of the Rules of Procedure and Evidence.

94. Second, regarding Mr Katanga's argument that he is seeking to do all he can to bring the affected communities together,<sup>180</sup> the Panel understands this to be an aspirational statement on the part of Mr Katanga regarding what he intends to do after he has completed his sentence and returned to the DRC. However, the Panel considers that it has not received sufficient information regarding an *action* that Mr Katanga has taken in this regard or on how that action benefits the Victims.

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<sup>176</sup> [Gumboh Article](#), p. 90.

<sup>177</sup> *See supra* para. 4.

<sup>178</sup> *See*, in this respect, Annex to the « Communication du Représentant légal des victimes enfants soldats relative au double désistement d'appel dans le dossier *Le Procureur c. Germain Katanga* », 30 June 2014, ICC-01/04-01/07-3501-Anx; « Observations des victimes sur le désistement d'appel du Procureur contre le jugement concernant G. Katanga », 26 June 2014, [ICC-01/04-01/07-3499](#).

<sup>179</sup> *See supra* paras 71-72, 77.

<sup>180</sup> *Supra* para. 82.

Accordingly, the Panel does not consider that Mr Katanga seeking to bring the affected communities together qualifies as an action that benefits the Victims within the meaning of rule 223 (d) of the Rules of Procedure and Evidence.

95. Regarding the final three actions identified by Mr Katanga, i.e. that he has supported the Victims' individual reparations requests and has apologised on video as well as offering to apologise personally to the Victims, the Panel will first address one issue that is common to all three of these actions before considering these actions individually.

96. The Panel notes that one of the main objections of the Victims with respect to these actions relates to the fact that the reparations proceedings in the *Katanga* case have not yet concluded. In this regard, the Panel notes the relatively short amount of time between the completion of the criminal proceedings against Mr Katanga and these Sentence Review proceedings, which amount to approximately one year and two and a half months.<sup>181</sup> The reparations proceedings in the *Katanga* case only effectively began in August 2014,<sup>182</sup> shortly after the criminal proceedings against Mr Katanga concluded due to the withdrawal of his and the Prosecutor's appeal. In rejecting Mr Katanga's offers to apologise, the Victims highlight that accepting this apology would be "at odds with a fundamental principle in Hema culture, according to which a person who has done someone harm must make amends before he or she makes an apology".<sup>183</sup> In other words, an apology should follow the making of reparations to victims, not precede reparations. Finally, the Panel recalls the Prosecutor's argument that it is too early in the reparations proceedings to tell if any of Mr Katanga's actions in those proceedings benefit the Victims.<sup>184</sup>

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<sup>181</sup> *Supra* paras 3-5, wherein it is noted that Mr Katanga and the Prosecutor withdrew their respective appeals on 25 June 2014 and that, on 18 September 2015, Mr Katanga had reached the two thirds threshold of sentence served. The Panel also notes that some of the written submissions relevant to the Sentence Review were received in advance of the two thirds threshold date. *See* Scheduling Order.

<sup>182</sup> *See* "Order instructing the Registry to report on applications for reparations", 27 August 2014, [ICC-01/04-01/07-3508](#). *See also* "Decision replacing two judges in Trial Chamber II", 16 April 2014, [ICC-01/04-01/07-3468](#); French translation, registered on 3 June 2014, ([ICC-01/04-01/07-3468-tFRA](#)).

<sup>183</sup> *See* [Victims' Submissions](#), paras 54-55.

<sup>184</sup> *Supra* para. 83.

97. The Panel has held that this factor is to be analysed on a “case by case basis”.<sup>185</sup> It considers that the timing of the present Sentence Review relevant to the pace of the separate criminal and reparations proceedings reflects circumstances specific to the *Katanga* case and accordingly are relevant for purposes of assessing Mr Katanga’s actions for the benefit of the Victims in this case. Given the fact that the non-completion of the reparations proceedings prior to this Sentencing Review is not attributable to Mr Katanga, the Panel considers that this fact cannot be held against him, but rather is relevant to establishing the frame of reference for evaluating his actions. Thus, Mr Katanga’s actions will be assessed in light of the stage of proceedings in which they occurred. Accordingly, the Panel will evaluate: i) whether Mr Katanga’s support for the Victims’ individual reparations requests, as well as the filmed apology and offer to apologise personally, are objectively significant actions, individually or collectively, for the benefit of the Victims in the context of *ongoing* reparations proceedings and ii) whether the Victims’ objections that they have not benefitted from these actions are reasonable in the context of reparations proceedings that are not yet concluded.

98. Regarding Mr Katanga’s submission that he has supported the Victims in their requests for individual reparations, the Panel understands Mr Katanga to be referring to his support for individual reparations as the appropriate form of reparations to be ordered in the *Katanga* case, pursuant to rule 98 of the Rules of Procedure and Evidence.<sup>186</sup> The Panel notes Mr Katanga’s submission in those proceedings,<sup>187</sup> under the heading of “Form of reparations”, that “the Trial Chamber should favour individual reparations, *being the wish of the majority of victims* who have been consulted and the one most appropriate in the circumstances of the case” (emphasis added).<sup>188</sup> The Panel considers that supporting individual reparations as the appropriate form of reparations, when done on the basis that it is the form of reparations that the victims themselves consider will best repair the harm they have suffered, is an action that qualifies as being for the benefit of victims. However, such

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<sup>185</sup> *Supra* para. 91.

<sup>186</sup> This rule provides that reparations may be ordered on an individual basis, collective, or both.

<sup>187</sup> See Trial Chamber II, “Defence Consolidated Response to the Parties, Participants and Other Interested Persons’ Observations on Reparations”, 16 June 2015, [ICC-01/04-01/07-3564](#) (hereinafter: “Mr Katanga’s Reparations Response”).

<sup>188</sup> [Mr Katanga’s Reparations Response](#), para. 97. See also *ibid.*, para. 131.

an action has a lesser benefit for victims than, for example, supporting the granting of any particular individual request for reparations filed pursuant to rule 94 of the Rules of Procedure and Evidence<sup>189</sup> or, as submitted by the authorities of the DRC,<sup>190</sup> identifying and locating assets for purposes of advancing the ongoing reparations proceedings. Furthermore, the Panel notes that specifying the form of reparations ordered is a required element of any reparations order issued by a Trial Chamber. Accordingly, submissions advocating for one form over another by participants in reparations proceedings is a usual part of the process. The Panel therefore does not consider that the fact that the views of a sentenced person in this regard coincide with those of the victims, can be said to be a significant action taken by the sentenced person. In these circumstances, the Panel considers that Mr Katanga's support of the Victims in their requests for individual reparations as the appropriate form of reparations to be ordered, in the context of ongoing reparations proceedings, is, without more, only of marginal benefit to the Victims and is accordingly not a significant action that benefits the Victims within the meaning of rule 223 (d) of the Rules of Procedure and Evidence.

99. Regarding Mr Katanga's filmed apology and his offer to apologise personally, the Panel notes, as suggested by the Registrar, the HRC/TJI Observations on Reparations, which contains, *inter alia*, an analysis of the steps a sentenced person can take to attempt to maximize the impact and prospect of acceptance of his or her apology. The HRC/TJI Observations on Reparations state in this regard that

[t]hus far, it appears that [Mr] Katanga's apology has been found to be inadequate for victims, and the Registry's [r]eport suggests that some victims were angry and emotional at his apology. It appears that more effort is required to carefully craft an apology that is acceptable to those affected. [...] It may also be beneficial, if possible, to arrange for dialogue to occur between [Mr] Katanga and victims or their representatives. *This would enable the shaping of an apology more specifically suited to the needs of those affected [...].* [Footnote omitted.]<sup>191</sup>

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<sup>189</sup> The Panel notes that this distinction is clear in Mr Katanga's Reparations Response, wherein he states that "[i]ndividual reparations are appropriate, subject to their being made in respect of persons who have truly suffered harm as a result of the crimes and where that harm is proved to a satisfactory degree. See [Mr Katanga's Reparations Response](#), para. 97.

<sup>190</sup> *Supra* para. 86.

<sup>191</sup> [HRC/TJI Observations on Reparations](#), para. 86.

100. The Panel considers that any steps taken by a sentenced person to attempt to ensure the broadest degree of acceptance and positive impact of that apology coupled with the reaction of the victims to such steps may be relevant to determining whether such an apology or offer to apologise is a “significant action” that benefits victims.

101. With respect to Mr Katanga’s filmed apology to the Victims, the Panel considers that, in principle, there may be a benefit to victims from an apology being seen, not only by them, but also by the broader affected community, including those who may be considered “supporters” of the sentenced person. Such an apology may lead to the broader community more readily accepting the historical narrative of what occurred as found by the Court, which can also lead to a broader recognition and acknowledgement of the harms that were done to the victims. In this regard, the Panel considers that actions that can foster greater communal awareness and acceptance of the crimes that occurred and the harm they caused to the victims may, as a general matter, qualify as an action for the benefit of victims.

102. However, in the present case, the Panel observes that the filmed apology was not initially aimed at the broader community, but rather was actually triggered in response to a specific victim of the Bogoro attack who held Mr Katanga responsible,<sup>192</sup> which then led, in the context of the reparations proceedings, to the idea that “Mr Katanga could in fact extend that exercise to more [V]ictims”.<sup>193</sup> Thus, the purpose of this filmed apology was specifically targeted to the Victims themselves. However, the Panel notes that it has not received any information that the manner in which this apology was delivered was informed by considerations of whether it would be acceptable to the Victims. Indeed, the Panel notes that Mr Katanga acknowledges that the video was purposefully not shown to the Victims out of concern that it would cause further upset.<sup>194</sup> Instead, Mr Katanga appears to have subsequently shown the filmed apology to members of the broader community. In light of the negative reaction of the actual Victims to the video, the Panel finds their rejection of this filmed apology as benefitting them to be reasonable. Accordingly, while the Panel considers that the filmed apology may indeed be of significance to the

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<sup>192</sup> See [Mr Katanga’s Submissions](#), para. 59.

<sup>193</sup> [Mr Katanga’s Reparations Response](#), para. 151.

<sup>194</sup> *Supra* paras 82, 84.

broader affected communities in the DRC and that there may be a degree of indirect benefit to the Victims in this regard, it can only be said to be of minimal, if any, benefit to the Victims in this case and does not, on its own, qualify as a significant action taken by Mr Katanga for the benefit of the Victims.

103. With respect to the last identified action, i.e. Mr Katanga's offer to meet personally with the Victims to apologise, the Panel considers that a more personal form of an apology, such as a face to face meeting between a sentenced person and the victims may, on its own or in combination with other actions, amount to a significant action that benefits victims. In the circumstances of the present case, the Panel observes that it is unclear if the Victims wish to have a face to face encounter with Mr Katanga or whether this action might also cause further upset. Thus, the Panel considers that while Mr Katanga's offer to meet with Victims in order to apologise to them is an action that potentially benefits the Victims, it is not on its own a significant action, given the uncertainty as to whether such action would be considered desirable and of benefit to the Victims.

104. Finally, the Panel also notes that the second clause of this factor provides that it should also consider "any impact on the victims and their families as a result of the early release". In this respect, the Panel considers the submissions regarding the potential traumatizing effect that Mr Katanga's early release could have on the Victims and on their families to be relevant to its evaluation of this factor.

105. Accordingly, on the basis of the information received, the Panel finds that there is a limited benefit to the Victims from several of the actions taken by Mr Katanga. However, in the circumstances of this case, including with regard to the timing of this Sentence Review and evaluating the actions undertaken collectively, the Panel considers that there has not been a significant action taken by Mr Katanga for the benefit of the Victims within the meaning of rule 223 (d) of the Rules of Procedure and Evidence. The Panel also finds that the early release of Mr Katanga could have a negative impact on the Victims and their families. The Panel therefore finds that the factor under rule 223 (d) of the Rules of Procedure and Evidence is not present for purposes of determining whether it is appropriate to reduce Mr Katanga'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**

106. The Registrar submits that he is unaware of any medical conditions facing Mr Katanga.<sup>195</sup>

107. Mr Katanga submits that following the recent deaths of his father and his oldest brother, he is the eldest in his family,<sup>196</sup> which means that he must assume the “responsibilities that fall on him within an African society” to support not only his immediate family, but his now deceased brother’s children as well.<sup>197</sup> Mr Katanga also submits that his mother and step-mother are in poor health.<sup>198</sup>

**(b) Determination of the Panel**

108. In order to determine the presence of this factor, the Panel recalls that, under article 110 (4) (c), it must find that there is a “clear and significant change of circumstances” in relation to Mr Katanga’s individual circumstances since the time that his sentence was imposed.<sup>199</sup> The Panel recalls that Mr Katanga’s family situation and his responsibility to care for his own three children and three adopted children were taken into consideration in the Sentencing Decision as a mitigating factor.<sup>200</sup> Specifically, the Trial Chamber gave limited weight to the fact that Mr Katanga’s family situation would “make rehabilitation and reintegration easier”.<sup>201</sup>

109. As a preliminary matter, the Panel does not consider that the death of a family member, on its own, is a personal circumstance that is relevant to whether to reduce a person’s sentence. Rather, this would more typically be relevant to the issue of interim release. However, the Panel notes that Mr Katanga does not argue that the deaths in his family are a changed circumstance in his personal situation, but rather that these deaths have caused a change in his responsibilities vis-à-vis his extended family. In this respect, the Panel concurs that, since the imposition of his sentence,

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<sup>195</sup> [Registrar’s Submissions](#), para. 13.

<sup>196</sup> [Mr Katanga’s Submissions](#), para. 61.

<sup>197</sup> [Transcript of Sentence Review Hearing](#), p.12, lines 20-23; [Mr Katanga’s Submissions](#), para. 61.

<sup>198</sup> [Mr Katanga’s Submissions](#), para. 61.

<sup>199</sup> *Supra* para. 19.

<sup>200</sup> [Sentencing Decision](#), paras 84-85, 144.

<sup>201</sup> [Sentencing Decision](#), para. 144.



Mr Katanga has gained the new role of primary provider for the families of both his deceased father and brother. The Panel understands this group of people to include Mr Katanga's mother, his step-mother, and his deceased brother's three children.<sup>202</sup> The Panel considers that the increase in the amount of people now dependent upon Mr Katanga for support is a measurably larger amount than that identified prior to the imposition of his sentence.<sup>203</sup> Thus, the Panel considers that this change in familial responsibilities is a "clear and significant" change in Mr Katanga's individual circumstances.<sup>204</sup>

110. Accordingly, on the basis of the information received, the Panel finds that the factor under rule 223 (e) of the Rules of Procedure and Evidence concerning a change of circumstances in Mr Katanga's individual circumstances is present. Directly below, this factor will be weighed with the other factors found to be present in order to determine whether it is appropriate to reduce Mr Katanga's sentence.

### **C. The Panel's determination on whether it is appropriate to reduce Mr Katanga's sentence**

111. The Panel recalls that it has found that the following factors are present: (i) an early and continuing willingness by Mr Katanga to cooperate with the Court in its investigations and prosecutions (article 110 (4) (a) of the Statute); (ii) a genuine dissociation from his crimes demonstrated by Mr Katanga's conduct while in detention (rule 223 (a) of the Rules of Procedure and Evidence); (iii) the prospect of resocialisation and successful resettlement of Mr Katanga (rule 223 (b) of the Rules of Procedure and Evidence); (iv) the prospect that Mr Katanga's early release would give rise to some level of social instability in the DRC, though not to the level of "significant" (rule 223 (c) of the Rules of Procedure and Evidence); and (v) the individual circumstance of an increase in familial responsibilities due to recent deaths in Mr Katanga's family (rule 223 (e) of the Rules of Procedure and Evidence). The Panel has not found the factors under article 110 (4) (b) of the Statute or rule 223 (d) of the Rules of Procedure and Evidence to be present.

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<sup>202</sup> [Mr Katanga's Submissions](#), para. 61; [Transcript of Sentence Review Hearing](#), p. 12, lines 20-23.

<sup>203</sup> [Sentencing Decision](#), para. 84.

<sup>204</sup> *Supra* para. 47.

112. The Panel recalls that, while it found that the factor under rule 223 (c) of the Rules of Procedure and Evidence is present, it determined that this factor “ha[s] neutral value, weighing neither for nor against a reduction in Mr Katanga’s sentence”.<sup>205</sup> All the other factors found to be present weigh in favour of a reduction in sentence. With respect to the factor concerning Mr Katanga’s individual circumstances under rule 223 (e) of the Rules of Procedure and Evidence, the Panel does not consider that this factor, on its own, is sufficient to justify a reduction in sentence. However, taking into account all of the factors found to be present, the Panel considers that together they are “sufficient to justify a reduction of sentence”.<sup>206</sup> Therefore, on the basis of the above, the Panel decides that it is appropriate to reduce Mr Katanga’s sentence pursuant to article 110 (3) of the Statute.

### III. DISPOSITION

113. Having decided that it is appropriate to reduce Mr Katanga’s sentence, the Panel will now address the question of the extent of the reduction. In this respect, the Panel recalls that “[u]nder the Court’s legal framework, the two-third threshold serves as a trigger mechanism for the commencement of the [Sentence Review]”, as opposed to a trigger for automatic early release.<sup>207</sup> This means that any possible reduction can only be applied to the remaining one third of the sentence. The information presented in the context of each specific sentence review will determine the appropriate extent of any reduction.

114. In the present Sentence Review, the Panel considers that the information taken into account to establish the presence of these factors under article 110 (4) (a) of the Statute and rule 223 (a) of the Rules of Procedure and Evidence, i.e. Mr Katanga’s early and continuing cooperation with the Court in its investigations and prosecutions and his genuine dissociation from his crimes, weigh in favour of a substantial reduction of sentence. In this regard, the Panel recalls its above finding regarding Mr Katanga’s contribution to the efficient administration of justice, as well as its finding that he has “repeatedly and publically taken responsibility for the crimes for

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<sup>205</sup> *Supra* para. 79.

<sup>206</sup> *See* article 110 (4) (c) of the Statute.

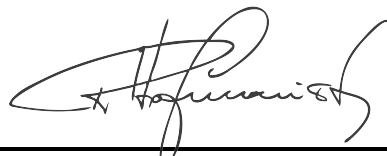
<sup>207</sup> [Lubanga Sentence Review Decision](#), para. 27.

which he was convicted, as well as expressed regret for the harm caused to the victims by his actions”<sup>208</sup>.

115. With respect to the prospect of resocialisation and successful resettlement and Mr Katanga’s individual circumstances, the Panel considers that in the circumstances of this case, the information taken into account under these factors support a further reduction of sentence when considered together with the factors already discussed above.

116. The Panel recalls that Mr Katanga was sentenced to a term of 12 years imprisonment and that 18 September 2015 marked the two thirds threshold of time served, i.e. 8 years served. Thus, Mr Katanga will complete his sentence on 18 September 2019, absent any reduction. Taking into account the specific circumstances of this Sentence Review, the number of factors favouring a reduction in sentence that were found to be present, as well as the extent of reduction in sentence that the Panel has found that these factors support, the Panel considers that a reduction of 3 years and 8 months is warranted. Accordingly, the Panel so reduces Mr Katanga’s sentence and sets the date for the completion of his sentence to 18 January 2016.

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



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**Judge Piotr Hofmański**  
**Presiding Judge**

Dated this thirteenth day of November 2015

At The Hague, The Netherlands

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<sup>208</sup> *Supra* para. 50.