Article 110(4)

[814] ***4. 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.
In para. 4, the Statute lists relevant factors to be taken into account when deciding on a reduction of sentence. While the first two factors are explicitly phrased in the Article, the "other factors" mentioned under sub-paragraph c) are further explained under Rule 223 RPE. Reduction of sentence is already permissible if only one of these factors is present. At the *ad hoc* tribunals, these factors were not part of the Statute (cf. Article 28 ICTY Statute / Article 27 ICTR Statute) but only regulated in the RPE (Rule 125 RPE ICTY / Rule 126 RPE ICTR). The ICTY and ICTR Statutes only very generally refer to the "interests of justice" and the "general principles of law" (Articles 27 and 28, respectively). At the SCSL, Article 2 of the Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone of 1 October 2013 provided further criteria for eligibility for conditional early release, including some requirements that leave worrisome discretion to the authorities, such as "respect for the fairness of the process by which he was convicted" and "positive contribution to peace and reconciliation in Sierra Leone and the region". Most of these requirements relate to the specific situation of Sierra Leone. It is therefore doubtful in how far they may be applied analogously to cases of the ICC. Some of them may be considered for the interpretation of Rule 223(c) or (d) RPE.

The factors listed under Article 110 (early and continuing willingness to cooperate with the court, voluntary assistance in enabling the enforcement, as well as other factors "establishing a clear and significant change of circumstances") are all focused on the present and future, not on the past. They give regard to special preventative considerations rather than retaliation. This understanding is in line with the general principle that the execution of sentences should be mainly oriented towards rehabilitation and reinsertion, while criteria of retaliation and atonement have already been taken account when determining the length of the sentence. Domestic constitutional law confirms this approach *). Moreover, the first two factors are both linked directly to and support the work of the Court. It is likely that their predominant role in the Statute (as opposed to the RPE) is a result of the practical difficulties the ICC faces when investigating in other countries, and thus reflects the ICC's strong need for cooperation of convicts in order to satisfactorily fulfill its tasks.

It is unclear whether factors that already played a role for the sentencing decision may again be taken into account when deciding on a reduction of sentence (e.g. gravity of the crime) **). The wording of Article 110(4)(c) referring to changes of the situation suggests that these factors should be considered only to the extent that they continued to exist and thus influenced the enforcement of sentence, also in the period after the sentencing decision.

*) Under German constitutional law, e.g., the decision on reduction of sentence should be limited to special preventive considerations, while matters relevant for the determination of guilt (e.g. gravity of the crime) may not be considered (with regard to section 57 of the German Criminal Code, cf. Bundesverfassungsgericht, Neue Juristische Wochenschrift (NJW) 1994, 378).

**) The ICTR ruled on this matter in a contradictory manner: On the one hand, a request for early release was denied where mitigating factors were already taken into account when determining the length of the sentence (*Prosecutor v Rutaganira*, No. ICTR -95-IC-T, Decision on Request for Early Release (2 June 2006)). On the other, in a different case, the request was also denied, after serving 10 of a 12-year sentence, where gravity of crimes were greater than mitigating factors, although gravity had also been decisive for the sentencing decision (cf. *Prosecutor v Imanishimwe*, No. ICTR-99-46-S, Decision on Samuel Imanishimwe's Application for Early Release (30 August 2007). Similarly, at the ICTY, in the Case of *Prosecutor v Radic*, No. 98-30/1-ES, due to lack of integration in prison and high gravity of crimes, the convict from Omarska camp would only be released after serving ¾, rather than 2/3 of his sentence (Decision of the President on Early Release of Mlado Radic (13 February 2012) at para. 30. A low gravity of the crimes played, on the other hand, in favor of the early release

decision in the case of Kubura, cf. *Prosecutor v Hadzihasanovic and Kubura*, No. IT-01-47-T, Decision of the President on Amir Kubura's Request for Early Release, 11 April 2006, para. 8).

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Article 110(4)(a)

[815] ***(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;***

The first factor to take into account is the degree of cooperation shown by the prisoner with the court, the investigations and prosecutions. This prominent position within the provision indicates the importance the ICC attaches to this factor, and reflects the ICC's problematic need to rely on the cooperation of its own convicts.

It is important that it is the (demonstrated) willingness to cooperate that may weigh in favor of release, not actually effected cooperation; whether cooperation will actually be possible would be a question out of reach for the detainee, and it would be unfair if a lack of cooperation would weigh against him while no authority wanted the latter from him.

"Substantial cooperation with the Prosecutor" (thus not willingness) was already a relevant factor at the ad hoc tribunals (cf. Rule 125 RPE ICTY / Rule 126 RPE ICTR). The ICTY case law shows, on the one hand, that cooperation with the OTP did come into play in many cases (cf. e.g. *Prosecutor v Banovic*, No. IT-02-65/1-ES, Decision of the President on Commutation of Sentence, 3 September 2008, para. 14, *Prosecutor v Drazen Erdemovic*, No. IT-96-22-ES, Order issuing a public redacted version of decision of the President on early release, 15 July 2008; *Prosecutor v Ivica Rajic*, No. IT-95-12-ES. Decision of the President on Early Release of Ivaca Rajic, 22 August 2011, para. 23; *Prosecutor v Damir Dosen*, No. IT-95-8-S, Order of the President on the early release of Damir Došen, 28 February 2003, p. 3; *Prosecutor v. Tadic*, No. IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadic, 3 November 2004). In the case of Obrenovic, release was even granted 8 months before two thirds had been passed thanks to the exceptionally substantial cooperation with the prosecution (*Prosecutor v Obrenovic*, No. IT-02-60/2-ES, Decision of President on Early Release of Dragan Obrenovic, 21 September 2011, para. 28). On the other, there were also cases were early release was granted although such a cooperation could not be established. E.g. in the case of Jokic, the defendant had even been found in contempt of the Tribunal for refusing to testify at an ICTY trial (*Prosecutor v Dragan Jokic*, No. IT-02-60-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Drajan Jokic, 13 January 2010). Moreover, in several cases the cooperation with the authorities was considered as a neutral factor, as cooperation had not been sought by part of the OTP (e.g. *Prosecutor v Kayishemana et al.*, No. MICT-12-10, MICT, Decision of the President on the Early Release of Obed Ruzindana, para. 21; *Prosecutor v Momcilo Krajisnik*, No. IT-00-39-ES, ICTY, Decision of the President on Early Release of Momcilo Krajisnik, 2 July 2013, para. 29; *Prosecutor v Vidoje Blagojevic,* No. IT-02-60-ES, ICTY, Decision of the President on Early Release of Vidoje Blagojevic, 3 February 2012, para. 24; *Prosecutor v Milomir Stakic*, No. IT-97-24-ES, ICTY, Decision of President on Early Release of Milomir Stakic, 15 July 2011, para. 37; *Prosecutor v Johan Tarculovski*, No. IT-04-82-ES, ICTY, Decision of President on Early Release of Johan Tarculovski, 23 June 2011, para. 26; *Prosecutor v Pavle Strugar*, No. IT-01-42-ES, ICTY, Decision of the President on the Application for Pardon or Commutation of Sentence of Pavle Strugar, 16 January 2009, para. 13; *Prosecutor v Krnojelac*, No. IT-97-25-ES, ICTY, Decision on the Application for Pardon or Commutation of Sentence, 09 July 2009, para. 21; *Prosecutor v. Bala*, No. IT-03-66-ES, ICTY, Decision of President on Application of Haradin Bala for Sentence Remission, 15.10.2010, para. 27). Also in the *Tadic* case, the ICTY ruled that the ICTY prosecution was in no position to comment on the convicted person's behavior while in prison (*Prosecutor v Dusko Tadic*, No. IT-97-24-ES, ICTY, Decision of the President on the Application for Pardon or Commutation of Sentence of Dusko Tadic of 17.7.2008, para. 10), in particular, as it had not sought any such cooperation after the conviction (*ibid.* para. 18). At the ICTR it seems that cooperation with the prosecution was generally an important factor for early release after serving three quarters of sentence (*Prosecutor v Bargaragaza*, No. ICTR-05-86-S, Decision on the Early Release of Michel Bagaragaza, 24 October 2011, para. 13; *Prosecutor v Rugambarara*, No. ICTR-00-59, Decision on the Early Release Request of Juvenal Rugambarara (P), 8 February 2012).

The cooperation with the authorities is a factor that will necessarily be considered already at the level of sentencing. Therefore, it is questionable in how far this factor should play such a prominent role again when it comes to the reduction of sentences, in particular in the case of plea agreements where substantial cooperation with the prosecution is a prerequisite for the agreed sentence. In the

case of *Jelisic*, the ICTY qualified the entering into a plea agreement as a factor weighing in favor of a decision on remission of sentence, although the OTP's report denied any cooperation with the Prosecution both during and after trial (*Prosecutor v. Goran Jelisic*, IT-95-10-ES, Decision of the President on Sentence Remission for Goran Jelisic, 28 May 2013, para. 32, 33). On the other hand, under the SCSL's Practice Direction on the Conditional Early Release of Persons convicted by the Special Court for Sierra Leone of 1 October 2013, which gives very detailed regulations on early release requirements and conditions, the Registrar shall request from the Prosecutor a report, "outlining (…) any information relevant (…) of any co-operation the Convicted Person has provided to the Prosecutor that was not a consideration in sentencing" (Article 5(g)). Moreover, the ICC's phrasing "early and continuing willingness to cooperate" suggests that cooperation before the conviction is not sufficient; further cooperation during the time serving one's sentence is required. In any event, the demonstrated will to cooperate during detention, e.g. the will to testify before the Court in another case, will be taken into account (cf. e.g. *Prosecutor v Banovic*, No. IT-02-65/1-ES, ICTY, Decision of the President on Commutation of Sentence, 3 September 2008, para. 14). Similarly, it is likely that a refusal to testify will not play in favour of the decision (however, cf. *Prosecutor v Dragan Jokic* , No. IT-02-60-ES, ICTY, Decision of the President on the Application for Pardon or Commutation of Sentence of Drajan Jokic, 13 January 2010, where early release was granted notwithstanding contempt proceedings following the refusal to testify at an ICTY trial).

The "continuing willingness to cooperate with the Court and its investigations and prosecutions" requires some kind of demonstration of this will. On the other hand, convicts who do not have the opportunity to show such willingness, e.g. since their role was of such minor nature that they will not have any significant knowledge they could share, will have little or no chance to profit from this factor. It is likely that in such cases, as at the ICTY, this factor will be considered as a neutral one.

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Article 110(4)(b)

[816] ***(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***

It is new to explicitly regulate this criterion in international criminal law. Voluntary assistance can consist in voluntary surrender as well as in locating assets. At the ICTY, voluntary assistance in enabling enforcement was taken into account in a case where the prisoner surrendered voluntarily to the ICTY (*Prosecutor v. Simic*, No. IT-95-9/2). Neither the *ad hoc* tribunals nor the Special Courts for Sierra Leone and Lebanon foresee explicitly this criterion in their respective provisions governing early release. Moreover, cases may fall under this provision where people, prior to their own indictment, act as headhunters or informants or otherwise collaborate with the justice authorities in catching fugitive suspects. However, if applied in this sense one should bear in mind the risk that people turn in their political opponents, motivated not so much by the interests of justice as one might wish.

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Article 110(4)(c)

[817] ***(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.***

This rather vague criterion gives the court a considerable degree of discretion and flexibility. While the first two factors concern exclusively the individual behavior of the detainee, these other "factors" may also include aspects outside of the sphere of the detainee, e.g. the impact of his release on society.

As sub-paragraph c) makes reference to the Rules of Procedure and Evidence, the "other factors" referred to here are those listed under Rule 223 RPE (conduct during detention, prospect of resocialization, consequences of release for social stability, positive conduct towards victims and impact of release on them, as well as individual circumstances such age, sickness etc.). The wording "other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence" is formulated in such an open manner that it could also comprise additional factors not mentioned in Rule 223 (e.g. political circumstances, or the fact that the prisoner agrees to

his deportation to his home country, cf. *Prosecutor v Tadic*, No. IT-94-1-ES, Decision of the President on the Application for Pardon and Commutation of Sentence of Dusko Tadic, 17 July 2008; *Prosecutor v Vasilijevic*, No. IT-98-32-ES, Decision of President on Application for Pardon and Commutation of Sentence of Mitar Vasiljevic, 12 March 2010). However, the explicit reference to the RPE as well as the clear guidance of Rule 223 RPE that "one or more of the following factors must be present" clarifies that the list of Article 110(4), read in conjunction with Rule 223, is – unlike Rule 125 ICTY Statute/Rule 126 ICTR statute – exhaustive.

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