

Opinion

TWO-THIRDS AND YOU'RE OUT? THE PRACTICE OF EARLY RELEASE AT THE ICTY AND ICC, IN LIGHT OF THE GOALS OF INTERNATIONAL CRIMINAL JUSTICE

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Introduction

On the 13th of November 2015, Germain Katanga, the second person to be convicted by the International Criminal Court (ICC), was granted early release.¹ In 2014, Mr. Katanga was found guilty of crimes against humanity and war crimes perpetrated through mass murders and pillaging in the Democratic Republic of Congo (DRC), and sentenced to 12 years imprisonment.² However, in its decision granting early release, the ICC decided to reduce his sentence by 3 years and 8 months.³ As of the 25th of January 2016⁴, he will

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¹ *Prosecutor v Germain Katanga*, Decision on the review concerning the reduction of sentence of Mr. Germain Katanga, ICC-01/04-01/07, 13 November 2015, para. 116.

² *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07, T.Ch., 7 March 2014, Part XII, pp.658-59.

³ ICC 2015, supra note 1, para. 116.

⁴ This was the date set by the Court on which Katanga was due to be released. However, the DRC have decided that they will not release Katanga, and as of April 2016 they have commenced proceedings against him because they wish to prosecute him for other crimes he committed in the DRC. At the time of writing, Mr. Katanga is still in custody. See: M. Kooren, "Congo looking into new charges against ICC convict Katanga", Reuters, 18 January 2016, at: <http://www.reuters.com/article/us-congodemocratic-justice-idUSKCN0UW19W> (accessed 28 January 2016); ICC, "ICC Presidency approves the prosecution of Mr. Germain Katanga by national authorities of the Democratic Republic of the Congo", ICC Press Release, 7 April 2016, at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1206.aspx (accessed 7 April 2016).

have spent less than 2 years in prison, following his conviction.⁵ At face value this seems rather unjust, regardless of the fact that his sentence for committing egregious international crimes was rather short⁶, the fact that his sentence was reduced seems a particular affront to notions of fairness and justice. In fact, partly in response to this, the DRC have commenced domestic proceedings against Katanga for offences committed by him in the DRC, which were not tried by the ICC.⁷ Early release is a controversial subject in international criminal law; in a discussion with ICTY Appeals Prosecutor Lada Soljan she noted that one of the biggest issues facing the prosecution is early release of perpetrators.⁸ Indeed, given that international criminal law seeks to condemn the most atrocious crimes witnessed by humanity⁹, one must question whether early release of these perpetrators corresponds with this goal.¹⁰ The following discussion seeks to trace some of the selected practice of early release in international criminal law, looking at the jurisprudence of the ICTY and ICC¹¹, and addressing the tension that arises between early release and some of the goals of international criminal justice.

I. Early Release at the ICTY - An Unsatisfactory Picture?

As of December 2015, almost half of the persons convicted by the ICTY have been released, the majority of them before serving their full sentence.¹² Early release at the ICTY is governed by Article 28 of the Statute and Rule 125 of the Rules of Procedure and Evidence (RPE). The Statute provides that the President of the Tribunal shall decide whether to grant early release on the basis of the interests of justice and the general principles of law.¹³ Rule 125 then enumerates several criteria that the President should consider when granting early release. These range from the gravity of the crime committed, the treatment of similarly situated prisoners, the prisoner's demonstration of

⁵ In international criminal law, judges will count the time spent in detention during trial as part of the sentence to be served by the convicted person. See: Rule 101(C) Rules of Procedure and Evidence ICTY; Article 78(2) Rome Statute of the International Criminal Court.

⁶ For example, if one considers domestic sentencing guidelines, an individual in the UK convicted for murder must, by law, serve at least 25 years in prison, Katanga received only 12, despite being held responsible for the deaths of over 200 people. See: Criminal Justice Act 2003, schedule 21, at: <http://www.legislation.gov.uk/ukpga/2003/44/contents> (accessed 28 January 2016); and *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07, T.Ch., 7 March 2014, para. 835, respectively.

⁷ ICC, "Press Release: ICC Presidency approves the prosecution of Mr. Germain Katanga by national authorities of the Democratic Republic of Congo", ICC Press Release, 7 April 2016, at: https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1206.aspx (accessed 7 April 2016).

⁸ This meeting took place on the 5th November 2015 at the ICTY. The author would like to thank Ms. Soljan, the rest of the staff at the ICTY and Frederiek de Vlaming for organising this meeting.

⁹ A. Cassese, "The Rationale for International Criminal Justice" in A. Cassese (ed), *The Oxford Companion to International Criminal Justice*, Oxford University Press 2009, p.127.

¹⁰ J. Choi, "Early Release in International Criminal Law", *Yale Law Journal* 2014-123, pp.1784-1828(1808).

¹¹ The following discussion will be limited to these two institutions given that they were the courts that the author had the opportunity to visit.

¹² B. Holá & J. van Wijk, "Life after Conviction at International Criminal Tribunals", *Journal of International Criminal Justice* 2014-12, pp.109-32(122).

¹³ Article 28, Statute of the International Criminal Tribunal for the Former Yugoslavia, at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed 28 January 2016).

rehabilitation and any substantial cooperation of the prisoner with the Prosecutor.¹⁴ On analysis of the implementation of these rules it would appear that the ICTY have developed a presumption in favour of release when the prisoner has served two thirds of his sentence, giving substantial weight to the “treatment of similarly situated prisoners” criterion.¹⁵ It appears that in the entire history of the tribunal there has only been one case¹⁶ where the President has denied early release when the prisoner had served two thirds of his sentence, namely that of Mlado Radić¹⁷, and even in this case the President ordered him to be released 16 months later on 31st December 2012.¹⁸ Radić’s full sentence would have taken him through to 2018.¹⁹ This practice is rather concerning when one looks at this trend in light of the goals of international criminal justice. International criminal law seeks to bring an end to impunity and could be argued to act as some form of deterrence for future perpetrators.²⁰ These goals could be argued to be significantly undermined by the fact that the President effectively chops one third off the majority of sentences handed down by the tribunal.²¹ Any deterrent factor brought on by sentencing is arguably lost due to the leniency in this ICTY’s practice of early release.

In relation to the other factors listed in Rule 125 RPE, the President typically does discuss whether a prisoner has demonstrated rehabilitation by behaving well in prison or expressing remorse in relation to his/her crimes.²² It is important that offenders can reintegrate into society once their time in prison is completed, with rehabilitation arguably being an underlying goal of international criminal justice.²³ While expressions of remorse are to be welcomed and encouraged, in terms of granting early release such expressions should be taken with a “pinch of salt”. A prisoner making these statements obviously has an interest in making them, namely obtaining early release.²⁴ This issue has been demonstrated on more than one occasion, most notably in the cases of Biljana Plavšić and Veselin Šljivančanin. Plavšić initially pleaded guilty in 2002 to crimes against humanity²⁵,

¹⁴ Rule 125, Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf (accessed 28 January 2016).

¹⁵ Choi 2014, supra note 10, p. 1794.

¹⁶ B. Holá & J. van Wijk (2014), supra note 12, p. 125.

¹⁷ *Prosecutor v Mlado Radić*, Public Redacted Version of 13 February 2012 Decision of the President on Early Release of Mlado Radić, Case No. IT-98-30/1-ES, 9 January 2013, para. 30.

¹⁸ *Ibid.*

¹⁹ *Prosecutor v Kvočka et al*, Judgment, Case No. IT-98-30/1-T, T.Ch., 2 November 2001, para. 745.

²⁰ B. Swart, “Damaska and the Faces of International Criminal Justice”, *Journal of International Criminal Justice* 2008-6, pp. 97-114(103); M. Damaska, “What is the Point of International Criminal Justice?”, *Chicago Kent Law Review* 2008-83, pp. 329-65(339).

²¹ Choi 2014, supra note 10, p. 1798.

²² Holá & van Wijk 2014, supra note 12, p. 127.

²³ J. Kelder, B. Holá & J. van Wijk, “Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR”, *International Criminal Review* 2014-13, pp. 1177-1203(1178). See also *Prosecutor v Drazen Erdemović*, Sentencing Judgment, Case No. IT-96-22-T. T.Ch., 29 November 1996, paras. 60 & 66; *Prosecutor v Anto Furundžija*, Judgment, Case No. IT-95-17/1-T, T.Ch., 10 December 1998, para. 291.

²⁴ *Idem*, Kelder, Holá & van Wijk, p. 1196.

²⁵ See *Statement of Guilt: Biljana Plavšić*, 17 December 2002, at: <http://www.icty.org/en/content/statement-guilt-biljana-plavšić> (accessed 28 January 2016). See also *Prosecutor v Biljana Plavšić*, Sentencing Judgment, Case No. IT-00-39&40/1-S, T.Ch., 27 February 2003, paras. 66-81.

and was sentenced to 11 years in prison.²⁶ However, in an interview in January 2009 Plavšić stated that she had pleaded guilty solely to reduce her sentence claiming that she had “done nothing wrong”.²⁷ These statements were seemingly not taken into account when the President of the Tribunal decided 8 months later to allow Plavšić’s early release, feeling that she had demonstrated “sufficient evidence of rehabilitation”.²⁸ This decision was met with particular affront by victims who expressed dismay that the decision had “nothing to do with justice”.²⁹ Similarly, to add insult to injury, Mrs. Plavšić received a ceremonial reception on arriving back in Belgrade, being escorted by the Bosnian Serb Prime Minister himself.³⁰ Upon Šljivančanin’s early release he published a book about his “unfair” treatment by the tribunal and publicly stated that he would do “everything the same again”.³¹ Apart from the fact that these actions could be argued to severely undermine notions of international criminal justice and are a particular insult to victims, they illustrate a fundamental issue with the handling of those convicted of international crimes. In other words, it is perhaps evident that there is a misunderstanding as to what constitutes “rehabilitation” amongst the judges at the ICTY.³² For example, in the case of Obrenović, the President noted in the decision granting Obrenović’s early release that he had reliably served as a kitchen assistant during imprisonment, which weighed heavily in support of the fact that he had become rehabilitated.³³ One might question how Obrenović’s kitchen duties actually assist his rehabilitation for persecuting hundreds of people.³⁴ Surely good behaviour is what should be expected from any convict in prison, and these are somewhat superficial indications of rehabilitation. These practices could be argued to severely undermine the principle of ending impunity for international crimes that international criminal justice seeks to ensure given that a prisoner only serves a few years of his or her sentence.³⁵ This is somewhat exacerbated by the fact that sentences for international crimes typically tend to be relatively short.³⁶ This is especially apparent when one compares the situation at the domestic level where an accused can receive a life sentence for murdering a single individual, yet at the international level an accused can receive only a few years for killing hundreds.³⁷

Given the apparent superficiality in terms of remorse amongst some perpetrators, the notion of early release can frustrate ideas of justice and accountability. How can there be

²⁶ *Prosecutor v Biljana Plavšić*, Sentencing Judgment, Case No. IT-00-39&40/1-S, T.Ch., 27 February 2003, para. 134.

²⁷ D. Goldberg, “Bosnian War Criminal: ‘I did nothing wrong’”, *The Local Sweden*, 26 January 2009, at: <http://www.thelocal.se/20090126/17162> (accessed 28 January 2016).

²⁸ *Prosecutor v Biljana Plavšić*, Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić, Case No. IT-00-39&40/1-ES, 14 September 2009, para. 13.

²⁹ D. Sito-Sucic, “Bosnian Muslims Protest Against UN Tribunal Ruling”, *Reuters*, 16 September 2009, at: <http://in.reuters.com/article/idINIndia-42504520090916> (accessed 28 January 2016).

³⁰ I. Traynor, “Leading Bosnian Serb War Criminal Released from Swedish Prison”, *The Guardian*, 27 October 2009, at: <http://www.theguardian.com/world/2009/oct/27/bosnian-serb-war-criminal-freed> (accessed 28 January 2016).

³¹ Holá & van Wijk 2014, *supra* note 12, p. 129-30.

³² Kelder, Holá & van Wijk 2014, *supra* note 23, pp. 1192-93.

³³ *Prosecutor v Dragan Obrenović*, Decision of President on Early Release of Dragan Obrenović, Case No. IT-02-60/2-ES, 21 September 2011, paras. 21 & 24.

³⁴ Kelder, Holá & van Wijk 2014, *supra* note 23, p. 1193.

³⁵ B. Swart, *supra* note 20, p. 103.

³⁶ M. Harmon & F. Gaynor, “Ordinary Sentences for Extraordinary Crimes”, *Journal of International Criminal Justice* 2007-5, pp. 683-712(683).

³⁷ M. Harmon & F. Gaynor, *supra* note 36, p. 687.

true accountability for international crimes if sentences handed down at trial are not fully realised and carried out? There is something particularly inflammatory about releasing early an individual convicted for some of the most heinous crimes in human history, without any real remorse or changed circumstances.³⁸ One of the key goals of international criminal justice is reconciliation³⁹; many of these international crimes take place in countries ripped apart by mass conflict and deep-rooted ethnic tension.⁴⁰ The institutions of international criminal law were set up for, among other things, to reconcile some of these tensions fuelled by some of the most horrendous crimes by trying and bringing the perpetrators to justice.⁴¹ Early release could arguably significantly hamper and set back the reconciliation process amongst victims and communities, which in itself can take a long time, given the ease by which convicts can obtain early release at the ICTY.⁴² Indeed, early release of controversial convicts could trigger a new wave of conflict, which could lead to the perpetration of new international crimes.⁴³

II. Early Release at the ICC - A Step in the Right Direction?

The early release process at the ICC functions somewhat differently from that at the ICTY and is regulated by Article 110 of the Rome Statute and Rule 223 of the RPE. Article 110(3) provides that when a person has served two thirds of his/her sentence, then the Court *shall review* the sentence to determine whether it should be reduced.⁴⁴ Article 110(4) then lists several factors that should be borne in mind by the Court when determining whether to reduce a prisoner's sentence, these factors include: early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions⁴⁵; any voluntary assistance of the person in enabling the enforcement of judgments of the Court⁴⁶; and providing assistance in locating assets which may be used to benefit victims.⁴⁷ Rule 223 RPE further supplements more detailed criteria for the Court

³⁸ Choi 2014, *supra* note 10, p. 1789.

³⁹ The UN Security Council Resolution establishing the ICTR noted that creation of the tribunal would "contribute to the process of national reconciliation" - UN Security Council, *Resolution 955*, S/RES/955, 8 November 1994, at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement> (accessed 28 January 2016); See also M. Damaska (2014), *supra* note 20, p. 332.

⁴⁰ *Prosecutor v Dragan Nikolić*, Sentencing Judgment, Case No. IT-94-2-S, T.Ch., 18 December 2003, para. 233; *Prosecutor v Anto Furundžija*, Judgment, Case No. IT-95-17/1-T, T.Ch., 10 December 1998, para. 288.

⁴¹ UN Security Council, *Resolution 827*, S/RES/827, 25 May 1993, at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf (accessed 28 January 2016); UN Security Council, *Resolution 955*, S/RES/955, 8 November 1994, at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement> (accessed 28 January 2016).

⁴² Choi 2014, *supra* note 10, p. 1821.

⁴³ J. Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*, Routledge 2014, p. 65; Similarly note that the ICC now takes any potential social instability arising from the convict's early release into account when making its decision - See Rule 223(c) Rules of Procedure and Evidence ICC and discussion below.

⁴⁴ Article 110(3), Rome Statute of the International Criminal Court, at: https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 28 January 2016).

⁴⁵ Article 110(4)(a), Rome Statute of the International Criminal Court.

⁴⁶ Article 110(4)(b), Rome Statute of the International Criminal Court.

⁴⁷ Article 110(4)(b), Rome Statute of the International Criminal Court.

to consider. These range from whether the individual has shown a genuine dissociation from his crime⁴⁸; the prospect of re-socialisation⁴⁹; whether early release would give rise to significant social instability⁵⁰; whether the convict has taken any action for the benefit of victims⁵¹; and finally, the individual's personal circumstances.⁵² It is clear from the mere reading of these provisions that the system in place for early release at the ICC appears more structured and thorough than that at the ICTY, with more expanded criteria that the Court must consider. Furthermore, as opposed to the ICTY, where a decision on early release is granted solely by the President⁵³, the ICC requires that the decision is rendered by a panel of three judges⁵⁴, which could be argued to increase the possibility for broader discussion in the decision making process compared with the ICTY.⁵⁵

Given the ICC's young age, there have so far only been two decisions rendered by the Court in relation to early release. The two decisions in question relate to Thomas Lubanga, whose early release was rejected⁵⁶, and Germain Katanga, whose early release was granted.⁵⁷ Analysis of these decisions does shed some light on the early release practices of the ICC and does demonstrate some positive implications for the goals of international criminal justice.

If one looks firstly at the decision rejecting Lubanga's early release the Court are very quick to highlight that there is no presumption in favour of early release based on the fact that two thirds of a sentence have been served.⁵⁸ This is positive because it moves away from the presumption established by the ICTY and makes early release at the ICC more dependent on substantive factors. The Court noted specifically that Lubanga had not identified any cooperation or voluntary assistance by him that had continued beyond his conviction, and therefore these were not factors that could be held in favour of early release.⁵⁹ This is somewhat significant because any potential for superficiality is somewhat reduced here because the Court in essence requires the accused to do something positive for the Court in the pursuit of its goals to bring those to justice and end impunity for these factors to weigh in the prisoner's favour. The Court further recognises that good conduct is insufficient on its own establish the necessary dissociation from the crimes committed.⁶⁰ The Court also notes that there is a difference between a person expressing opposition to a particular crime and that person accepting responsibility and expressing remorse from having himself committed those acts.⁶¹ It is clear here that the Court requires the prisoner to actually demonstrate some form of rehabilitation, and that they have actually done

⁴⁸ Rule 223(a), Rules of Procedure and Evidence of the International Criminal Court, at: <https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf> (accessed 28 January 2016).

⁴⁹ Rule 223(b), Rules of Procedure and Evidence of the International Criminal Court.

⁵⁰ Rule 223(c), Rules of Procedure and Evidence of the International Criminal Court.

⁵¹ Rule 223(d), Rules of Procedure and Evidence of the International Criminal Court.

⁵² Rule 223(e), Rules of Procedure and Evidence of the International Criminal Court.

⁵³ See Article 28 Statute of the International Criminal Tribunal for the Former Yugoslavia.

⁵⁴ Rule 224(1), Rules of Procedure and Evidence of the International Criminal Court.

⁵⁵ Choi 2014, *supra* note 10, p. 1806.

⁵⁶ *Prosecutor v Thomas Lubanga Dyilo*, Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, ICC-01/04/01/06, 22 September 2015, para. 77.

⁵⁷ *Prosecutor v Germain Katanga*, Decision on the review concerning the reduction of sentence of Mr Germain Katanga, ICC-01/04-01/07, 13 November 2015, para. 116.

⁵⁸ ICC 2015, *supra* note 53, para. 27.

⁵⁹ *Idem*, paras. 37 & 40.

⁶⁰ *Idem*, para. 45.

⁶¹ *Idem*, para. 46.

something to warrant early release. This is important because basing early release solely on the fact that two thirds of the sentence have been fulfilled, absent any other criteria, seems illogical and at odds with ending impunity for international crimes as it effectively undermines sentences handed down at trial.⁶²

However, one point of criticism that could be levelled at the ICC in its decision here is the apparent insufficient weight that is given to the potential for social instability if the prisoner is released. Rule 233 requires that the social instability be “significant”, which arguably is quite a high and somewhat vague threshold.⁶³ On analysis of the Lubanga decision several of the parties, including the DRC, where Lubanga perpetrated his crimes, put forward information that early release could re-traumatise victims and increase tensions between communities.⁶⁴ However, the Court held in relation to these submissions that the instability that would arise would not be “significant” as required by the RPE and thus these submissions could not be taken into account when determining whether or not to reduce a sentence.⁶⁵ This is somewhat concerning; logically, the state where the crimes took place and where the prisoner will be released is the best placed to provide evidence on the social situation in the country, and the potential ramifications of early release. One would advocate that more weight should be given to these parties to ensure that the goal of reconciliation is not undermined by early release. However, ultimately the Court found that there were insufficient factors in favour of Lubanga’s release.⁶⁶

When one compares this decision with the ICC’s decision in Katanga granting early release, it is apparent that the Court takes a similarly thorough approach to addressing the respective factors laid down in the Statute and the rules in relation to the offender as they did in Lubanga. The Court found several factors in favour of Katanga’s early release, ranging from the fact that he had withdrawn his appeal⁶⁷ and publicly apologised, accepting responsibility and expressing genuine remorse for the crimes for which he was convicted.⁶⁸ Similarly, the Court took note of the fact that given recent deaths in his family Mr. Katanga was now the sole provider for his family.⁶⁹ The Court therefore found that there were sufficient factors in Katanga’s favour to warrant early release.⁷⁰ However, there are several aspects of the decision that do seem at tension with goals of international justice. For example, one feels that the Court did not attach sufficient weight to the fact that Mr. Katanga wishes to return to the army on his return to the DRC⁷¹ and there would be a real risk of social instability in the region.⁷² Similarly, in terms of reconciliation it seems somewhat unjust that Mr. Katanga is being released before the victims’ reparations proceedings have been concluded for the crimes he committed.⁷³ One must question whether this will add to the sense of impunity amongst victims given that the man who perpetrated heinous crimes against humanity against them may walk free before they see any reparations aimed to repair their harm.

⁶² Choi 2014, *supra* note 10, p. 1789.

⁶³ See Rule 223(c) Rules of Procedure and Evidence of the International Criminal Court.

⁶⁴ ICC 2015, *supra* note 53, paras. 55, 57, 58, 62.

⁶⁵ *Idem*, para. 64.

⁶⁶ *Idem*, para. 77.

⁶⁷ ICC 2015, *supra* note 54, para. 34.

⁶⁸ *Idem*, para. 50.

⁶⁹ *Idem*, para. 109.

⁷⁰ *Idem*, paras. 111-12.

⁷¹ *Idem*, para. 54.

⁷² *Idem*, paras. 63, 71, 72.

⁷³ *Idem*, paras. 83-5.

III. Conclusion – Possibilities of Reconciliation considering the Goals of International Criminal Justice and the Notion of Early Release

Early release will undoubtedly be a bitter pill to swallow for victims, as at face value early release could be argued to go against the fundamental goals of international criminal justice. It can undermine the deterrent factor because it illustrates to future perpetrators that the actual execution of sentences can be quite lenient.⁷⁴ Similarly, it can threaten reconciliation of communities harrowed by atrocity crimes as well as general aims of retribution for wrongdoing and genuine rehabilitation of offenders.⁷⁵ However, international criminal law also seeks to propagate human rights values and ensuring fairness to offenders during the whole international criminal process, including post-conviction.⁷⁶ This demonstrates a fundamental problem with the goals of international criminal justice; they are in abundance.⁷⁷ It is impossible for them all to be realised at the same time for they pull in different directions.⁷⁸ All that those deciding on early release can do is bear in mind this overarching tension and ensure that decisions are based on substantive criteria and not presumptions. If it is therefore so easy to obtain early release, and the fact that there appears to be a presumption for early release after serving two thirds of a sentence at the ICTY, the logical answer could be for Trial Chambers to lengthen sentences in their initial judgment. This is what precisely the Trial Chamber did in *Nikolić*, recognising that the actual sentence that an international convict serves is considerably lower than the sentence initially imposed, and thus they sentenced the accused accordingly.⁷⁹ However, this was overturned on appeal, with the Appeals Chamber noting that the Trial Chamber had attached too much weight to the possibility of early release.⁸⁰ Given that there seems to be relatively little that a Trial Chamber can do to alleviate the negative implications of early release, the practice is likely to remain a contentious issue. Although it appears that the ICC is moving away from the “unwritten rule” at the ICTY of “two thirds and you’re out”, despite best intentions, ultimately, with every early release order someone will be against the decision.

⁷⁴ Choi 2014, supra note 10, p. 1824.

⁷⁵ Damaska 2008, supra note 20, p. 332; Swart 2008, supra note 20, pp. 100-101.

⁷⁶ *Idem*, Damaska 2008, supra note 20, p. 331.

⁷⁷ *Ibid.*

⁷⁸ Damaska 2008, supra note 20, p. 331.

⁷⁹ *Prosecutor v Nikolić*, Judgment on Sentencing Appeal, Case No. IT-94-2-A, A.Ch, 4 February 2005, para. 97.

⁸⁰ *Ibid.*