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Mechanism for International Criminal Tribunals

Case No. MICT-14-81-ES.1

Date: 23 December 2014

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

Decision of: 23 December 2014

PROSECUTOR

v.

ZORAN ŽIGIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF THE 10 NOVEMBER 2014
DECISION OF THE PRESIDENT ON THE
EARLY RELEASE OF ZORAN ŽIGIĆ**

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow

Counsel for Mr. Zoran Žigić

Mr. Slobodan Stojanović

The Republic of Austria

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals (“Mechanism”), am seised of the Republic of Austria’s notification of Zoran Žigić’s eligibility for early release under Austrian law.¹ I consider the Notification pursuant to Article 26 of the Statute of the Mechanism (“Statute”), Rules 150 and 151 of the Rules of Procedure and Evidence of the Mechanism (“Rules”), and paragraphs 2 and 3 of the Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism (“Practice Direction”).²

I. BACKGROUND

2. Žigić surrendered to the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in 1998, while he was serving a sentence imposed upon him by a Bosnian Serb Court and was transferred to the United Nations Detention Unit at The Hague on 16 April 1998.³ The Trial Chamber of the ICTY convicted Žigić pursuant to joint criminal enterprise liability of violations of the laws and customs of war and crimes against humanity for crimes committed in the Omarska camp generally, and for persecution as a crime against humanity and murder, torture and cruel treatment as violations of the laws or customs of war of a number of individuals at the Omarska camp, the Keraterm camp and Trnopolje camp.⁴

3. On 2 November 2001, the Trial Chamber sentenced Žigić to a single sentence of 25 years of imprisonment.⁵ The Appeals Chamber, while having reversed Žigić’s convictions related to crimes committed in the Omarska camp generally, affirmed the Trial Chamber’s findings in all other respects, as well as Žigić’s 25 years of imprisonment.⁶ On 8 June 2006, Žigić was transferred to the Republic of Austria (“Austria”) to serve the remainder of his sentence.⁷

4. On 7 September 2010, the Registry informed the President of the ICTY of a notification received from the Embassy of Austria stating that Žigić became eligible for conditional release under Austrian law as of 16 October 2010, after having served one-half of his prison sentence.⁸ On

¹ Internal Memorandum from Ms. Kate Mackintosh, ICTY Deputy Registrar, to Judge Theodor Meron, President, dated 20 August 2014 (“Memorandum”), transmitting a Note Verbale to the Registrar of the Mechanism (“Registrar”), dated 30 July 2014 (“Notification”).

² MICT/3, 5 July 2012.

³ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 (“Trial Judgement”), para. 746.

⁴ Trial Judgement, paras. 684-691, 764.

⁵ Trial Judgement, para. 750.

⁶ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“Appeal Judgement”), para. 716.

⁷ See Press Release, Dario Kordić and Zoran Žigić Transferred to Austria to Serve their Prison Sentences, dated 9 June 2006, available at <http://www.icty.org/sid/8736>.

⁸ See *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-ES, Decision of President on Early Release of Zoran Žigić, 8 November 2010 (“Decision of 8 November 2010”), para. 2.

8 November 2010, the President of the ICTY, taking into account the treatment of similarly-situated prisoners who have been considered eligible for early release, concluded that the amount of time that Žigić had served for his crimes did not militate in favour of his early release and denied early release.⁹

II. NOTICE OF ELIGIBILITY AND REQUEST

5. By Notification, dated 30 July 2014, the Embassy of the Republic of Austria informed the Registry that Žigić will be eligible for early release under its national laws.¹⁰ The Notification includes information regarding: (i) the Austrian law applicable to early release; (ii) a report on Žigić's behaviour, health and mental status, prepared by the Graz-Karlau Prison Warden, dated 4 June 2014; (iii) a psychological report, dated 30 May 2014; (iv) sentence enforcement plans; and (v) administrative decisions against Žigić.¹¹

6. On 16 September 2014, the Registry, in accordance with paragraphs 4 and 5 of the Practice Direction, provided me with a memorandum from the Office of the Prosecutor of the Mechanism ("Prosecution"), dated 16 September 2014 ("Prosecution Memorandum"), regarding the cooperation provided by Žigić to the Prosecution of the ICTY ("ICTY Prosecution").¹²

7. I was informed on 7 October 2014 that, following receipt of the Bosnian/Croatian/Serbian translations of the materials from Austria and the Prosecution, the collected information was forwarded to Žigić by the Registry on 23 September 2014 pursuant to paragraph 5 of the Practice Direction, and Žigić confirmed receipt of this information by written response, dated 23 September 2014.¹³

III. DISCUSSION

A. Applicable Law

8. Under Article 26 of the Statute, if, pursuant to the applicable law of the State in which the person convicted by the ICTY, the International Criminal Tribunal for Rwanda ("ICTR"), or the Mechanism is imprisoned, he or she is eligible for pardon or commutation of sentence, the State

⁹ Decision of 8 November 2010, paras. 12, 22, 24.

¹⁰ See Notification, p. 1.

¹¹ See Notification.

¹² Internal memorandum from Mr. Gus de Witt, Officer in Charge, Office of the Registrar, to Judge Theodor Meron, President, dated 16 September 2014, *transmitting* Internal memorandum from Mr. Matthias Marcussen, Senior Legal Officer, OTP MICT, to Mr. Gus de Witt, Officer in Charge, Office of the Registrar, dated 16 September 2014 ("Prosecution Memorandum").

concerned shall notify the Mechanism accordingly. Pursuant to Article 26, there shall only be pardon or commutation of sentence if the President of the Mechanism ("President") so decides on the basis of the interests of justice and the general principles of law.

9. Rule 149 of the Rules echoes Article 26 of the Statute and provides that the enforcing State shall notify the Mechanism of a convicted person's eligibility for pardon, commutation of sentence, or early release under the enforcing State's laws. Rule 150 of the Rules provides that the President shall, upon such notice, determine, in consultation with any Judges of the sentencing Chamber who are Judges of the Mechanism, whether pardon, commutation of sentence, or early release is appropriate. Rule 151 of the Rules provides that, in making a determination on pardon, commutation of sentence, or early release, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, and any substantial cooperation of the prisoner with the Prosecution.

10. Paragraph 2 of the Practice Direction provides that, upon a convicted person becoming eligible for pardon, commutation of sentence, or early release under the law of the enforcing State, the enforcing State shall, in accordance with its agreement with the United Nations on the enforcement of sentences and, where practicable, at least forty-five days prior to the date of eligibility, notify the Mechanism accordingly. Paragraph 3 of the Practice Direction provides that a convicted person may directly petition the President for pardon, commutation of sentence, or early release, if he or she believes that he or she is eligible therefore.

11. Article 3(2) of the Agreement between the United Nations and the Federal Government of Austria on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, dated 23 July 1999 ("Enforcement Agreement") provides that the conditions of imprisonment shall be governed by the law of Austria, subject to the supervision of the ICTY (and now, the Mechanism).¹⁴ Article 8 of the Enforcement Agreement, applied *mutatis mutandis* to the Mechanism, provides, *inter alia*, that, following notification of eligibility for early release under Austrian law, the President shall determine, in consultation with the Judges of the Mechanism,

¹³ Internal memorandum from Mr. Gus de Witt, Officer in Charge, Office of the Registrar, Hague Branch to Judge Theodor Meron, President, dated 7 October 2014, transmitting Letter from Mr. Zoran Žigić to the Registrar, dated 23 September 2014.

¹⁴ Security Council Resolution 1966 (2010) provides that all existing agreements still in force as of the commencement date of the Mechanism shall apply *mutatis mutandis* to the Mechanism. Accordingly, the Enforcement Agreement applies to the Mechanism. See U.N. Security Council Resolution 1966, U.N. Doc. S/RES/1966 (2010), 22 December 2010, para. 4 ("[T]he Mechanism shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR, respectively, subject to the provisions of this resolution and the Statute of the Mechanism, and all contracts and international agreements concluded by the United Nations in relation to the ICTY and the ICTR, and still in force as of the relevant commencement date, shall continue in force *mutatis mutandis* in relation to the Mechanism[.]"). According to Article 25(2) of the Statute, "[t]he Mechanism shall have the power to supervise the

whether early release is appropriate, and the Registrar shall inform the Austrian authorities of the President's determination accordingly.

B. Eligibility under Austrian Law

12. Under Section 46(1) of the Austrian Criminal Code in conjunction with Section 152(1) and (2) of the Penal Enforcement Act, a convicted person may be eligible for conditional release at the completion of one-half of the sentence.¹⁵ I note, however, that even if Žigić is eligible for early release under the domestic law of Austria, the early release of persons convicted by the ICTY falls exclusively within the discretion of the President, pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules.

C. Gravity of Crimes

13. The crimes for which Žigić has been convicted are of very high gravity. The Trial Chamber found that Žigić personally participated in the murdering, beating and torturing of detainees.¹⁶ The Trial Chamber found that Žigić "regularly entered the Keraterm camp in order to beat the detainees,"¹⁷ and considered that his contribution to the crimes committed at the Omarska and Keraterm camps was "intentional and substantial".¹⁸ Similarly, the Appeals Chamber noted that Žigić "of all the Appellants, was the one who physically committed the highest number of crimes",¹⁹ and placed particular emphasis on the "seriousness and gravity of the crimes committed by Žigić".²⁰

14. In these circumstances, I am of the view that the high gravity of Žigić's offences weighs against his early release.

D. Eligibility and Treatment of Similarly-Situated Prisoners

15. In this respect, I recall that persons sentenced by the ICTY, like Žigić, are "similarly-situated" to all other prisoners under the Mechanism's supervision and thus, are to be considered eligible for early release upon two-thirds of their sentences, irrespective of the tribunal that convicted them.²¹ Although the two-thirds practice originates from the ICTY, it applies to all

enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States".

¹⁵ See Notification, p. 1.

¹⁶ See Trial Judgement, paras. 597-598, 609, 623, 625, 633, 640, 645, 649, 651, 672, 681, 691, 747.

¹⁷ See Trial Judgement, para. 614. See also Trial Judgement, para. 747.

¹⁸ Trial Judgement, para. 682.

¹⁹ Appeal Judgement, para. 716.

²⁰ Appeal Judgement, para. 716.

²¹ See *Prosecutor v. Omar Serushago*, Case No. MICT-12-28-ES, Public Redacted Version of Decision of the President on the Early Release of Omar Serushago, 13 December 2012 ("*Serushago* Decision"), paras. 16-17; *Prosecutor v. Paul Bisengimana*, Case No. MICT-12-07, Decision of the President on Early Release of Paul Bisengimana and on Motion to

prisoners within the jurisdiction of the Mechanism, given the need for equal treatment of all convicted persons supervised by the Mechanism and the need for a uniform eligibility threshold applicable to both of the Mechanism's branches.²²

16. However, I note that a convicted person having served two-thirds of his or her sentence shall be merely eligible to apply for early release and not entitled to such release, which may only be granted by the President as a matter of discretion, after considering the totality of the circumstances in each case.²³

17. According to the *Note Verbale*, and based on my own calculation, Žigić will have served two-thirds of his sentence as of 16 December 2014.²⁴

E. Demonstration of Rehabilitation

18. The information supplied by the Graz-Karlau Prison Warden ("Prison Warden") provides a generally positive account of Žigić's time in detention. The prison authorities indicate that Žigić's overall conduct at the facility has been good.²⁵ The Prison Warden states that Žigić has worked at the prison's farm and thereafter at the form processing unit since August 2006 and "has demonstrated good working habits in both units".²⁶ [REDACTED].²⁷ [REDACTED].²⁸ [REDACTED].²⁹

File a Public Redacted Application, 11 December 2012 (public redacted version) ("*Bisengimana* Decision"), paras. 17, 20.

²² See *Serushago* Decision, para. 17; *Bisengimana* Decision, para. 20.

²³ See *Serushago* Decision, paras. 18, 34; *Bisengimana* Decision, paras. 21, 35. I note, for clarification purposes, that the two-thirds threshold does not prohibit enforcement States from notifying the Mechanism whenever convicted persons become eligible for pardon, commutation of sentence, or early release under national law, even before the completion of two-thirds of their sentence. See generally Practice Direction, para. 2. Paragraph 3 of the Practice Direction also allows a convicted person to directly petition the President of the Mechanism for pardon, commutation of sentence, or early release, if the convicted person believes that he or she is eligible, even before the completion of the two-thirds of his or her sentence. According to the Practice Direction, in such circumstances, the President will still consider a convicted person's application or eligibility for pardon, commutation of sentence, or early release. See Practice Direction, para. 3. However, it is only in exceptional circumstances, such as cases involving extraordinary cooperation with the Prosecution or humanitarian emergencies, that early release prior to the serving of two-thirds of the sentence may be granted, provided that other factors also weigh in favour of early release. See, e.g., *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-ES, Decision of President on Early Release of Dragan Obrenović, 29 February 2012 (public redacted version), paras. 15, 25-28, 30 (granting early release in a case involving exceptional cooperation with the Office of the Prosecutor of the ICTY); *Prosecutor v. Vladimir Šantić*, Case No. IT-95-16-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Vladimir Šantić, 16 February 2009 (public redacted version), paras. 8, 13-15 (granting early release because of substantial cooperation with the Office of the Prosecutor of the ICTY and because the convicted person had effectively completed two-thirds of his sentence once sentence remissions under national law were recognized).

²⁴ See Notification.

²⁵ Notification, pp. 1, 3, 11, 18 (Registry pagination).

²⁶ Notification, p. 2 (Registry pagination). See also Notification, p. 11 (Registry pagination).

²⁷ Notification, pp. 2, 18 (Registry pagination).

²⁸ Notification, p. 2 (Registry pagination). See also Notification, pp. 3, 11 (Registry pagination).

²⁹ See Notification, pp. 2, 13 (Registry pagination).

19. Žigić did commit four administrative offences while imprisoned at Graz-Karlau prison, including possession of contraband items and abuse of a privilege, but the prison authorities did not consider that these offences “would warrant denial of parole”.³⁰

20. The description of Žigić’s behaviour while detained at the Graz-Karlau prison in Austria suggest that Žigić is capable of reintegrating into society if he is released. Having carefully reviewed the information before me, I am of the opinion that Žigić has demonstrated some signs of rehabilitation, and I am therefore inclined to count this factor as weighing in favour of his early release.

F. Substantial Cooperation with the Prosecution

21. The Prosecution Memorandum states that Žigić did not cooperate with the ICTY Prosecution in the course of his trial or appeal, or at any point during the serving of his sentence.³¹ The Prosecution does not indicate whether the ICTY Prosecution sought Žigić’s cooperation at any point during his trial or after he was convicted.

22. I note that an accused person is under no obligation to plead guilty or, in the absence of a plea agreement, to cooperate with the Prosecution.³² I therefore consider that Žigić’s lack of cooperation with the ICTY Prosecution is a neutral factor in determining whether or not to grant him early release.

G. Conclusion

23. In light of the above, and having considered the factors identified in Rule 151 of the Rules, as well as all the relevant information on the record, I hereby grant Žigić early release, effective 16 December 2014, or as soon as practicable thereafter. Although the crimes for which Žigić was convicted are very grave, Žigić has completed two-thirds of his sentence and has demonstrated signs of rehabilitation.

³⁰ Notification, p. 3 (Registry pagination). See also Notification, pp. 1, 3-9, 11 (Registry pagination).

³¹ Prosecution Memorandum, para 2, referring to internal memorandum from Mr. Serge Brammertz, ICTY Prosecutor, to Mr. Ken Roberts, then-ICTY Deputy Registrar, dated 23 September 2010.

³² See *Prosecutor v. Innocent Sagahutu*, Case No. MICT-13-43-ES, Public Redacted Version of the 9 May 2014 Decision of the President on the Early Release of Innocent Sagahutu, 13 May 2014, para. 22.

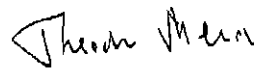
IV. DISPOSITION

24. For the foregoing reasons, and pursuant to Article 26 of the Statute, Rules 150 and 151 of the Rules, paragraph 9 of the Practice Direction, and Article 8 of the Enforcement Agreement, I hereby **GRANT** Žigić early release effective 16 December 2014.

25. The Registrar is hereby **DIRECTED** to inform the authorities of Austria of this decision as soon as practicable, as prescribed in paragraph 13 of the Practice Direction.

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

Done this 23rd day of December 2014,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Mechanism]