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Mécanisme pour les Tribunaux Pénaux Internationaux

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APPROVED FOR DISTRIBUTION APPROUVE POUR DISTRIBUTION PAR	Stefanie GEISS

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Prosecutor Team MICT:

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Public redacted version of 10 July 2015 decision of the President on the early release of Nikola Sainovic, submitted by President on 27 August 2015

COMMENTS

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Mechanism for International Criminal Tribunals

Case No.: MICT-14-67-ES.1
Date: 27 August 2015
Original: English

THE PRESIDENT OF THE MECHANISM

Before: **Judge Theodor Meron, President**

Registrar: **Mr. John Hocking**

Decision of: **27 August 2015**

PROSECUTOR

v.

NIKOLA ŠAINOVIĆ

PUBLIC REDACTED

PUBLIC REDACTED VERSION OF THE 10 JULY 2015 DECISION OF THE PRESIDENT ON THE EARLY RELEASE OF NIKOLA ŠAINOVIĆ

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow

Counsel for Mr. Nikola Šainović:

Mr. Toma Fila
Mr. Vladimir Petrović

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals ("Mechanism"), am seised of Mr. Nikola Šainović's ("Šainović") Request for Early Release, dated 8 June 2015.[1] I consider Šainović's Request 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 paragraph 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. Šainović surrendered voluntarily to the International Criminal Tribunal for the former Yugoslavia ("ICTY") and was transferred to the United Nations Detention Unit at The Hague ("UNDU") on 2 May 2002.[3] At his initial appearance on 3 May 2002, before Trial Chamber III of the ICTY ("Trial Chamber"), Šainović entered a plea of not guilty.[4]

3. On 26 February 2009, the Trial Chamber convicted Šainović of committing, through participation in a Joint Criminal Enterprise, deportation, other inhumane acts (forcible transfer), murder, and persecution as crimes against humanity and murder as a violation of the laws or customs of war, pursuant to Articles 3, 5(a), 5(d), 5(h)-(i), and 7(1) of the ICTY Statute.[5] Šainović was sentenced to a single term of 22 years of imprisonment.[6]

4. On 23 January 2014, the Appeals Chamber of the ICTY ("Appeals Chamber") overturned a number of Šainović's convictions in part, including "his convictions for committing through his participation in a JCE murder as a violation of the laws or customs of war and murder and persecution, through murder, as crimes against humanity" and his "convictions as a participant in a JCE for deportation and inhumane acts (forcible transfer) as crimes against humanity".[7] The Appeals Chamber set aside his sentence and imposed a new sentence of 18 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he had already spent in detention.[8]

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[1] *Prosecutor v. Nikola Šainović*, Case No. MICT-14-67-ES.1, Nikola Šainović's Request for Early Release, 8 June 2015 ("Request").
[2] MICT/3, 5 July 2012.
[3] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 ("Trial Judgement"), vol. 1, para. 2.
[4] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, 3 May 2002, pp. 392-395.
[5] Trial Judgement, vol. 3, paras. 475-477, 1208.
[6] Trial Judgement, vol. 3, para. 1208.
[7] *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014 ("Appeal Judgement"), para. 1847.
[8] Appeal Judgement, para. 1847.

5. Šainović was transferred to Sweden to serve the remainder of his sentence on 18 September 2014.[9] As of the date of this decision, he remains in custody in Sweden.

II. THE REQUEST

6. By letter dated 10 April 2015, the Swedish Ministry of Justice informed the Registry that Šainović would soon be eligible for early release under its national laws, in view of the fact that he will have served two-thirds of his sentence as of August 2015.[10] On 8 June 2015, Šainović filed his Request.

7. On 9 June 2015, the Registry, in accordance with paragraphs 4 and 5 of the Practice Direction, provided me with: (i) a memorandum from the Office of the Prosecutor of the Mechanism ("Prosecution"), dated 6 May 2015 ("Prosecution Memorandum"), regarding the cooperation provided by Šainović to the Prosecution of the ICTY ("ICTY Prosecution");[11] and (ii) a letter from the Swedish Prison Administration regarding Šainović's behaviour during incarceration and his health condition, dated 15 May 2015 ("Prison Recommendation").[12]

8. On 9 June 2015, the Registry forwarded the documentation related to the Request to Šainović pursuant to paragraph 5 of the Practice Direction.[13] On 12 June 2015 Šainović made submissions pursuant to paragraph 6 of the Practice Direction.[14]

III. DISCUSSION

9. In coming to my decision on whether it is appropriate to grant early release for Šainović, I have consulted a Judge of the sentencing Chamber, who is also a Judge of the Mechanism, pursuant to Rule 150 of the Rules.

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[9] Request, para. 4.
[10] Internal Memorandum from Ms. Kate Mackintosh, Deputy Registrar ICTY, to Judge Theodor Meron, President, dated 22 April 2015 ("Memorandum"), *transmitting* Letter from the Ministry of Justice Sweden, Division for Criminal Cases and International Judicial Co-operation, to the Office of the Registrar of the Mechanism ("Registrar"), dated 10 April 2015 ("Notification").
[11] Internal memorandum from Ms. Tatjana Dawson, Deputy Chief, Immediate Office of the Registrar, ICTY, to Judge Theodor Meron, President, dated 9 June 2015 ("9 June 2015 Memorandum"), *transmitting* Internal Memorandum from Mr. Matthias Marcussen, Officer in Charge, Office of the Prosecutor Mechanism, to Ms. Esther Halm, Legal Officer, Office of the Registrar, dated 6 May 2015.
[12] 9 June 2015 Memorandum, *transmitting* Letter from Lisa Gezelius, Head of Section of the Swedish Prison and Probation Service to the Mechanism, dated 15 May 2015.
[13] Internal Memorandum from Ms. Tatjana Dawson, Deputy Chief, Immediate Office of the Registrar, ICTY, to Judge Theodor Meron, President, dated 18 June 2015, *transmitting* Letter from Mr. Nikola Šainović to Judge Theodor Meron, President, dated 12 June 2015 ("Šainović Response").
[14] Šainović Response.

A. Applicable Law

10. 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, or the Mechanism is imprisoned ("Enforcing State"), he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. Pursuant to Article 26 of the Statute, there shall only be pardon or commutation of sentence if the President of the Mechanism so decides based on the interests of justice and the general principles of law.

11. 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, under the Enforcing State's laws, "for pardon, commutation of sentence, or early release". Rule 150 of the Rules provides that the President of the Mechanism 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 of the Mechanism 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.[15]

12. Article 3(2) of the Agreement between the United Nations and the Government of Sweden on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, dated 23 February 1999 ("Enforcement Agreement") provides that the conditions of imprisonment shall be governed by the law of Sweden, subject to the supervision of the ICTY (and now, the Mechanism). Article 8 of the Enforcement Agreement, applied *mutatis mutandis* to the Mechanism, provides, *inter alia*, that, following notification of eligibility for early release under Swedish law, the Mechanism shall give its views whether early release is appropriate, and Sweden shall take these views into consideration and respond to the Mechanism prior to taking any decision in the matter. I note that the Mechanism is bound by the Enforcement Agreement, even though it was concluded between Sweden and the ICTY, in accordance with Article 25, paragraph 2 of the Statute, and the Mechanism's founding document, Security Council Resolution 1966 of 22 December 2010.[16]

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[15] While Rule 151 of the Rules refers to cooperation with the "Prosecutor", which is defined in Rule 2(A) of the Rules as the Prosecutor of the Mechanism, I consider that it is in the interests of justice to interpret Rule 151 of the Rules to allow me to consider an early release applicant's cooperation with the Prosecution of the ICTY or the ICTR as well.

[16] 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

B. Eligibility under Swedish Law

13. According to the Swedish Ministry of Justice, Šainović will be eligible for early release under its domestic laws, in view of the fact that he will have served two-thirds of his sentence as of 26 August 2015.[17] I note, however, that even if Šainović is eligible for early release under the domestic law of Sweden, 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

14. The crimes for which Šainović has been convicted are of very high gravity. In this regard, Šainović was found responsible for the murder of hundreds, several sexual assaults and the forcible transfer and deportation of hundreds of thousands of people.[18] These crimes were particularly grave as they were not committed in isolation but part of a widespread and systematic campaign of terror and violence.[19]

15. In assessing the gravity of the crimes, it is important to note, that while new convictions were not entered on appeal, the Appeals Chamber did find "that the Trial Chamber incorrectly found Šainović not guilty for committing through his participation in a JCE persecution, through sexual assaults, as a crime against humanity".[20]

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

D. Eligibility and Treatment of Similarly-Situated Prisoners

17. In this respect, I recall that persons sentenced by the ICTY, like Šainović, 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

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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 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".

[17] Notification, p. 2.

[18] Trial Judgement, paras. vol. 3, paras. 1172, 1174; Appeal Judgement, paras. 1575-1582, 1847.

[19] Trial Judgement, paras. vol. 3, paras. 20, 1173-1174.

[20] Appeal Judgement, para. 1847.

convicted them.[21] Although the two-thirds practice originates from the ICTY, it applies to all 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]

18. 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]

19. Based on my own calculation, Šainović will have served two-thirds of his sentence as of 24 August 2015. In these circumstances, I am of the view that this factor weighs in favour of Šainović's early release.

E. Demonstration of Rehabilitation

20. The information supplied by the Swedish Prison and Probation Service provides a positive account of Šainović's time in detention. In particular, according to the Prison Recommendation, during his incarceration Šainović has "behaved immaculately", understood his conditions of detention and behaved respectfully toward all staff.[24] [REDACTED].[25]

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[21] *See Prosecutor v. Stanislav Galić*, Case No. MICT-14-83-ES, Reasons for the President's Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion, 23 June 2015 (public redacted) ("*Galić* Decision"), para. 27; *Prosecutor v. Paul Bisengimana*, Case No. MICT-12-07, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012 (public redacted version) ("*Bisengimana* Decision"), paras. 17, 20.

[22] *See Galić* Decision, para. 27; *Bisengimana* Decision, para. 20.

[23] *See Galić* Decision, paras. 27, 52; *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] Prison Recommendation, p. 2. *See also* Request, para. 9.

[25] Prison Recommendation, p. 2.

21. Šainović submits that he is a pensioner and plans to live with his wife and two sons when he returns to Serbia.[26] He also states that he will try to work as a consultant in the copper metal works.[27] Šainović acknowledges that following the completion of his sentence he "will carry the burden of the sentence in its psychological, sociological and historical senses".[28]

22. Šainović's submissions and the description of his behaviour while detained in Sweden suggest that he is capable of reintegrating into society if he is released. Having carefully reviewed the information before me, I am of the opinion that Šainović has demonstrated signs of rehabilitation, and I am therefore inclined to count this factor as weighing in favour of his early release.

F. Cooperation with the Prosecution

23. The Prosecution Memorandum acknowledges that Šainović agreed to be interviewed by the ICTY Prosecution, though it notes that he did not reveal significant information. The Trial Chamber took into account the fact that he gave the interview when discussing his sentence.[29] According to the Prosecution, Šainović has not provided additional co-operation to date.[30]

24. Šainović states that he did not plead guilty but that the judicial process and his acquittal of his responsibility for some crimes provide him with "satisfaction with regard to the effort invested in the trial because the Defence was successful" with regard to some parts of the Indictment.[31]

25. I note that an accused person is under no obligation to plead guilty or, in the absence of a plea agreement, to co-operate with the Prosecution.[32] While Šainović's cooperation with the Prosecution was taken into account by the Trial Chamber, I note that other factors influencing sentencing, such as the gravity of crimes, nonetheless play a role in review of applications for early release. Accordingly, I therefore consider Šainović's cooperation with the Prosecution as weighing, up to a point, in favour of early release.

G. Conclusion

26. 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 Šainović early release, effective

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[26] Request, para. 10; Šainović Response, p. 5.
[27] Šainović Response, p. 5.
[28] Šainović Response, p. 5.
[29] Trial Judgement, vol. 3, para. 1183; Prosecution Memorandum, para. 3.
[30] Prosecution Memorandum, para. 3.
[31] Šainović Response, pp. 4-5.
[32] *See Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-ES, Public Redacted Version of the 26 March 2014 Decision of the President on the Early Release of Gérard Ntakirutimana, 24 April 2014, para. 20; *Prosecutor v. Obed Ruzindana*, Case No. MICT-12-10-ES, Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014 (public redacted version).

24 August 2015, or as soon as practicable thereafter. Although the crimes for which Šainović was convicted are very grave, his completion of two-thirds of his sentence and his demonstrated signs of rehabilitation counsel in favour of his early release. I note that the remaining Judge of the sentencing Chamber, who is also a Judge of the Mechanism, agrees that Šainović should be granted early release.

IV. DISPOSITION

27. 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, I hereby **GRANT** the Request effective 24 August 2015, or as soon as practicable thereafter.

28. The Registrar is hereby **DIRECTED** to inform the authorities of Sweden 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 27th day of August 2015,
At The Hague,
The Netherlands.

Judge Theodor Meron
President

[Seal of the Mechanism]