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Mécanisme pour les  
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<b>Registrar/ <i>Greffier</i>:</b> Mr. J. Hocking			
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Mechanism for International Criminal Tribunals

Case No. MICT-15-85-ES.4

Date: 13 October 2015

Original: English

**THE PRESIDENT OF THE MECHANISM**

**Before:** Judge Theodor Meron, President  
**Registrar:** Mr. John Hocking  
**Decision of:** 13 October 2015

**PROSECUTOR**

v.

**DRAGO NIKOLIĆ**

***PUBLIC REDACTED***

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**PUBLIC REDACTED VERSION OF THE 20 JULY 2015  
DECISION OF THE PRESIDENT ON THE APPLICATION FOR  
EARLY RELEASE OR OTHER RELIEF OF DRAGO NIKOLIĆ**

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**The Office of the Prosecutor:**

Mr. Hassan B. Jallow

**Counsel for Mr. Drago Nikolić:**

Ms. Jelena Nikolić  
Mr. Stéphane Bourgon

**The Republic of Serbia**

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively), am seised of the confidential and *ex parte* application for early release with confidential and *ex parte* annexes filed by Mr. Drago Nikolić (“Nikolić”), dated 29 May 2015.<sup>1</sup> Alternatively, Nikolić asks that he be allowed to serve the remainder of his sentence at his place of residence in Serbia.<sup>2</sup> I consider the Application 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 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”).<sup>3</sup>

## I. BACKGROUND

2. Nikolić surrendered to the International Criminal Tribunal for the former Yugoslavia (“ICTY”) on 15 March 2005 and was transferred to the United Nations Detention Unit (“UNDU”) of the ICTY on 17 March 2005.<sup>4</sup> At the hearing on 20 April 2005 before Trial Chamber II of the ICTY (“Trial Chamber”) Nikolić pleaded not guilty to all charges in the Indictment.<sup>5</sup> On June 2010, the Trial Chamber found Nikolić guilty of aiding and abetting genocide, extermination and persecution as crimes against humanity, and murder as a violation of the laws or customs of war, and sentenced Nikolić to a single term of 35 years’ imprisonment.<sup>6</sup>

3. On 30 January 2015, the Appeals Chamber of the ICTY reversed Nikolić’s convictions, in part, in relation to certain convictions for genocide, extermination and persecution as crimes against humanity, and murder as a violation of the laws or customs of war, and affirmed the remainder of his convictions and his sentence of 35 years’ imprisonment.<sup>7</sup>

4. As of the date of this decision, Nikolić remains in custody at the UNDU pending designation of an enforcement State.

<sup>1</sup> [REDACTED] 29 May 2015 (confidential and *ex parte*) (“Application”).

<sup>2</sup> Application, paras. 59-70. Although Nikolić does not refer to a “commutation” of his sentence, I understand his alternative request that he be allowed to serve the remainder of his sentence at his residence in Serbia as such.

<sup>3</sup> MICT/3, 5 July 2012.

<sup>4</sup> See *Prosecutor v. Drago Nikolić*, Case No. IT-02-63-1, Order for Detention on Remand, 21 March 2005. See also Press Release “Drago Nikolic Transferred to ICTY Detention Unit”, dated 17 March 2005, available at <http://www.icty.org/sid/8622>.

<sup>5</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (“Trial Judgement”), Annex 2, para. 6.

<sup>6</sup> Trial Judgement, para. 2106, p. 834.

<sup>7</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Judgement, 30 January 2015 (“Appeal Judgement”), p. 714.

## II. THE APPLICATION

5. On 1 June 2015, the Registry of the Mechanism (“Registry”) provided me with an update regarding the documents collected pursuant to the Practice Direction, and conveyed to me, in accordance with paragraphs 4 and 5 of the Practice Direction, a medical report and Nikolić’s consent to the disclosure of that report.<sup>8</sup>

6. On 3 June 2015, the Office of the Prosecutor of the Mechanism (“Prosecution”) filed a confidential and *ex parte* motion, submitting that the Prosecution has standing to do so “[g]iven the grave implications for the public confidence and on the administration of justice of a decision – for which there is no Mechanism or Tribunals precedent – to release from prison custody a person convicted of genocide who has served less than one third of his sentence”.<sup>9</sup> [REDACTED].<sup>10</sup> Lastly, the Prosecution requests that it be allowed to make submissions on the remedy sought by Nikolić once the “required information” is made available.<sup>11</sup>

7. On 5 June 2015, the Registry conveyed to me: (i) a memorandum from the Prosecution, dated 3 June 2015 (“Prosecution Memorandum”), regarding the cooperation provided by Nikolić to the Prosecution of the ICTY (“ICTY Prosecution”) and of the Mechanism;<sup>12</sup> (ii) a medical report by the Deputy Medical Officer (“Medical Report of 4 June 2015”) and Nikolić’s consent to the disclosure thereof; and (iii) a letter from Nikolić’s [REDACTED], dated 12 May 2015 (“[REDACTED] Letter”). On 8 June 2015, I responded to the Registry, requesting that they obtain Nikolić’s consent for the disclosure, to the Judges of the sentencing Chamber who are Judges of the Mechanism, of the medical reports provided to me as part of Nikolić’s request. On 9 June 2015, the Registry conveyed to me Nikolić’s consent in this regard.

8. On 12 June 2015, the Registry conveyed to me Nikolić’s response in accordance with paragraph 5 and 6 of the Practice Direction.<sup>13</sup> In his response, Nikolić notes that: (i) he has nothing to add; (ii) he agrees with all the medical reports; and (iii) [REDACTED].<sup>14</sup> On 18 June 2015, the Registry conveyed to me: (i) a medical report prepared by the Deputy Medical Officer of the

<sup>8</sup> Memorandum from Ms. Kate Mackintosh, Deputy Registrar, ICTY, to Judge Theodor Meron, President, dated 1 June 2015, *transmitting* Report from Mr. Aernout Tenhaeff, Reporting Medical Officer, to Mr. John Hocking, Registrar, dated 27 May 2015, *and* Letter of Consent from Mr. Drago Nikolić, dated 27 May 2015.

<sup>9</sup> Urgent Prosecution Motion for Leave, 3 June 2015 (confidential and *ex parte*), para. 1.

<sup>10</sup> Prosecution Response to Application for Early Release or to Serve Sentence under Custody at Place of Residence, 3 June 2015 (confidential and *ex parte*) (“Prosecution Response”), para. 1.

<sup>11</sup> Prosecution Response, para. 4.

<sup>12</sup> Memorandum from Ms. Kate Mackintosh, Deputy Registrar, ICTY, to Judge Theodor Meron, President, dated 5 June 2015, *transmitting* Memorandum from Mr. Matthias Marcussen, Officer in Charge, OTP, Hague Branch, to Ms. Tatjana Dawson, Deputy Chief, Immediate Office of the Registrar, ICTY, dated 3 June 2015 (“Prosecution Memorandum”).

<sup>13</sup> Memorandum from Mr. John Hocking, Registrar, to Judge Theodor Meron, President, dated 12 June 2015, *transmitting* Letter from Mr. Drago Nikolić, dated 12 June 2015 (“Nikolić Response”).

<sup>14</sup> Nikolić Response, p. 1.

UNDU, dated 17 June 2015, and Nikolić's consent to the release thereof; and (ii) additional comments submitted by Nikolić regarding his request for early release, dated 18 June 2015.<sup>15</sup>

### III. PRELIMINARY MATTERS

9. I note that pursuant to Rule 151 of the Rules, the Prosecution is consulted with respect to the substantial cooperation, if any, of the convicted person during pre-trial, trial or appeal of his or her case.<sup>16</sup> However, neither the Rules nor the Practice Direction provides the Prosecution standing to make submissions on whether or not early release should be granted.<sup>17</sup> While I may consider "any other information" I deem relevant in the context of an application for early release in accordance with paragraph 4(d) of the Practice Direction, I note that there exists clear precedent for considering requests for early release on the basis of humanitarian concerns, including medical reasons.<sup>18</sup> Accordingly, I do not consider that there exists a compelling reason, special circumstance, or possible prejudice in this particular context requiring consideration of the Prosecution Response in the present matter.

10. Nikolić requests that he be allowed to exceed the word limit for the Application by no more than 4250 words.<sup>19</sup> Nikolić submits that he was unable to request an extension of the word limit before filing the Application, given the urgency of his request for early release.<sup>20</sup> While the provisions to which Nikolić makes reference typically refer to motions filed before a Chamber, I

<sup>15</sup> Memorandum from Ms. Kate Mackintosh, Deputy Registrar, ICTY, to Judge Theodor Meron, President, dated 18 June 2015. The Registry thereafter continued to send regular updates regarding Nikolić's health.

<sup>16</sup> See also Practice Direction, para. 4(c).

<sup>17</sup> 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. 8; *Prosecutor v. Sreten Lukić*, Case No. MICT-14-67-ES.4, Decision on Sreten Lukić's Request for Determination by the President of Time Served, 29 May 2015, p. 2; *Prosecutor v. Zoran Žigić*, Case No. MICT-14-81-ES.1, Decision on Zoran Žigić's Request to Withhold Consent for the Execution of the Republic of Austria's Extradition Decision, 12 December 2014, para. 10.

<sup>18</sup> See *Prosecutor v. Omar Serushago*, Case No. MICT-12-28, Public Redacted Version of Decision of the President on the Early Release of Omar Serushago, 13 December 2012 ("*Serushago Decision*"), para. 31, citing *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010 ("*Gvero Decision*"), para. 10, fn. 25. See also *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) ("*Ruzindana Decision*"), para. 22; *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) ("*Bisengimana Decision*"), paras. 33, 35; *Prosecutor v. Mladen Naletilić*, Case No. IT-98-34-ES, Public Redacted Version of the 29 November 2012 Decision of the President on Early Release of Mladen Naletilić, 29 November 2012 (public redacted) ("*Naletilić Decision*"), paras. 32-35; *Prosecutor v. Dragoljub Ojdanić*, Case No. IT-05-87-ES.1, Public Redacted Version of the 10 July 2013 Decision of the President on Early Release of Dragoljub Ojdanić, 10 July 2013 (public redacted) ("*Ojdanić Decision*"), para. 24; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Pavle Strugar, 16 January 2009 (public redacted) ("*Strugar Decision*"), paras. 11-12; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-ES, Order Issuing A Public Redacted Version of the 9 July 2009 Decision of the President on the Application for Pardon or Commutation of the Sentence of Milorad Krnojelac, 23 July 2009 ("*Krnojelac Decision*"), para. 20.

<sup>19</sup> Application, paras. 11-12, 14. See also Practice Direction on Length of Briefs and Motions, MICT/11, 6 August 2013, para. 15.

<sup>20</sup> Application, para. 13.

consider that they apply, *mutatis mutandis*, to motions filed before the President.<sup>21</sup> I observe that the Application exceeds the prescribed word limit by 1223 words.<sup>22</sup> However, I find that it is in the interests of justice to address the merits of the Application and I consider that there are exceptional circumstances that justify the oversized filing of the Application, including the urgency of the Application and the nature of the humanitarian concerns raised by Nikolić.

#### IV. DISCUSSION

11. In coming to my decision on whether it is appropriate to grant early release, or, alternatively, commutation of sentence or other measures for Nikolić, I have consulted the Judges of the sentencing Chamber who are Judges of the Mechanism, pursuant to paragraph 7 of the Practice Direction and Rule 150 of the Rules.

##### A. Early Release and Commutation of Sentence

###### 1. Applicable Law

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

13. 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

<sup>21</sup> See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision Concerning Defence Motion to Exceed Word Count and Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Judge Christoph Flügel, 22 January 2014, p. 2; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Public Redacted Version of the 25 July 2013 Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means, 28 August 2013, para. 29. Cf. *Prosecutor v. Milan Lukić*, Case No. MICT-13-52-ES.1, Decision on Milan Lukić's Motion Pursuant to Rule 154 to Enlarge the Time Limit for Filing of the Reply Brief, 10 April 2015 ("*M. Lukić* Decision"), p. 1; *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25, Decision on Prosecutor's Request for Extension of Time to File Response to Uwinkindi's Additional Submissions, 23 December 2013 ("*Uwinkindi* Decision"), p. 2.

<sup>22</sup> Application, p. 12.

similarly-situated prisoners, the prisoner's demonstration of rehabilitation, and any substantial cooperation of the prisoner with the Prosecution.

14. The jurisprudence of the Mechanism recognizes that, in the situation where there is no appeal pending and a convicted person is still detained at either the United Nations Detention Facility in Arusha ("UNDF") or the UNDU in The Hague, a request for early release may be entertained by the President.<sup>23</sup> Following the approach taken by the ICTR and the ICTY, the President may consider such requests given that "the conditions for eligibility regarding the pardon or commutation of sentence should be applied equally to all individuals convicted and sentenced" by the ICTR, the ICTY, or the Mechanism and that the eligibility of individuals serving their sentences at the UNDF or the UNDU "must be determined by reference to the equivalent conditions for eligibility established by enforcement states".<sup>24</sup>

## 2. Gravity of Crimes

15. Rule 151 of the Rules provides that, in making a determination on early release, the President shall take into account the gravity of the crime or crimes for which the prisoner was convicted.

16. As Nikolić acknowledges,<sup>25</sup> the crimes for which he has been convicted are of very high gravity. In this regard, the Trial Chamber found that Nikolić "played an important role in the [joint criminal enterprise] to Murder in terms of planning and organizing detentions and executions".<sup>26</sup> The Trial Chamber characterized his contribution as "persistent and determined; he demonstrated a resolve to carry out his assigned tasks in this murderous operation".<sup>27</sup> It further determined that Nikolić "was actively involved in many facets"<sup>28</sup> of the executions committed and "participated in various aspects of the operation – planning, physical preparations, and securing personnel".<sup>29</sup>

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

<sup>23</sup> See *Prosecutor v. Vinko Pandurević*, Case No. MICT-15-85-ES.1, Public Redacted Version of the 9 April 2015 Decision of the President on the Early Release of Vinko Pandurević, 10 April 2015 ("*Pandurević Decision*"), para. 11; *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 ("*Sagahutu Decision*"), paras. 11-12.

<sup>24</sup> *Pandurević Decision*, para. 11; *Sagahutu Decision*, para. 11.

<sup>25</sup> Application, para. 41.

<sup>26</sup> Trial Judgement, para. 2171. See also Trial Judgement, paras. 1408-1409.

<sup>27</sup> Trial Judgement, para. 2171. See also Trial Judgement, paras. 1408-1409.

<sup>28</sup> Trial Judgement, para. 1409.

<sup>29</sup> Trial Judgement, paras. 1390-1391, 1409.



### 3. Treatment of Similarly-Situated Prisoners

18. Rule 151 of the Rules requires the President to consider, as a separate factor, the need for equal treatment for similarly-situated prisoners when deciding early release applications.

19. In this respect, I recall that persons sentenced by the ICTY, like Nikolić, 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.<sup>30</sup> 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.<sup>31</sup>

20. 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.<sup>32</sup>

21. 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.<sup>33</sup> Paragraph 3 of the Practice Direction<sup>34</sup> 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.<sup>34</sup> 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.<sup>35</sup>

<sup>30</sup> *Galić* Decision, para. 27, citing *Prosecutor v. Dario Kordić*, Case No. MICT-14-68-ES, Public Redacted Version of the 21 May 2014 Decision of the President on the Early Release of Dario Kordić, 6 June 2014, (“*Kordić* Decision”), para. 17, fn. 46; *Bisengimana* Decision, paras. 17, 20.

<sup>31</sup> See *Galić* Decision, para. 27; *Bisengimana* Decision, para. 20.

<sup>32</sup> See *Galić* Decision, para. 27; *Bisengimana* Decision, paras. 21, 35.

<sup>33</sup> See generally Practice Direction, para. 2.

<sup>34</sup> See Practice Direction, para. 3.

<sup>35</sup> 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

22. Based on my calculation, Nikolić has served a little over ten years' imprisonment as of the date of this decision, which is less than two-thirds of his sentence. Taking into account the treatment of similarly-situated prisoners, I am accordingly of the view that the amount of time that Nikolić has served for his crime does not weigh in favour of his early release.

#### 4. Demonstration of Rehabilitation

23. The latest behavioural report from the Commanding Officer of the UNDU on 19 May 2015 confirms that Nikolić has always shown respect for management and staff during his incarceration at the UNDU.<sup>36</sup> The Commanding Officer further reports that Nikolić has "complied well with both the Rules of Detention and the instructions of the guards".<sup>37</sup> Lastly, the Commanding Officer reports that Nikolić "maintains cordial relations with his fellow detainees and has integrated well into the routine pattern of life in custody whilst participating fully in the regime of the Unit".<sup>38</sup>

24. Moreover, Nikolić notes that, at the end of the appeal hearing in his case on 6 December 2013, he expressed "deep regret and remorse for not having done more to prevent the killing of prisoners and said that he was truly sorry for all the people who were killed".<sup>39</sup>

25. Having carefully reviewed the information before me, I am of the opinion that Nikolić has demonstrated signs of rehabilitation and, thus, count this factor as weighing in favour of his early release.

#### 5. Substantial Cooperation with the Prosecution

26. Rule 151 of the Rules states that the President shall take into account any "substantial cooperation" of the prisoner with the Prosecution. Paragraph 4(c) of the Practice Direction states that the Registrar of the Mechanism ("Registrar") shall request the Prosecution "to submit a detailed report of any co-operation that the convicted person has provided to the Office of the Prosecutor and the significance thereof".

27. The Prosecution states that Nikolić did not cooperate with the ICTY Prosecution nor with the Prosecution in the course of his trial or appeal, or at any point during the serving of his sentence.<sup>40</sup> Nikolić submits that while he did not plead guilty or cooperate substantially with the ICTY Prosecution, he was respectful of the judicial process at all times.<sup>41</sup>

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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).

<sup>36</sup> Application, Annex C.

<sup>37</sup> Application, Annex C.

<sup>38</sup> Application, Annex C.

<sup>39</sup> Application, para. 47, citing *Prosecutor v. Vujadin Popović et al.*, IT-05-88-A, T. 6 December 2013, pp. 592-593.

<sup>40</sup> Prosecution Memorandum, para. 2.

<sup>41</sup> Application, para. 51.

28. 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.<sup>42</sup> I therefore consider that Nikolić's lack of cooperation with the Prosecution is a neutral factor in my determination of whether or not to grant him early release.

#### 6. Humanitarian Considerations

29. Paragraph 9 of the Practice Direction provides that the President may consider "any other information" that the President believes to be relevant in addition to the criteria specified in Rule 151 of the Rules. Previous decisions on early release reflect that the condition of a convicted person's health may be taken into account in the context of an application for early release, [REDACTED].<sup>43</sup>

30. Nikolić requests that he be granted early release based on humanitarian grounds, [REDACTED].<sup>44</sup> Nikolić notes that he is detained far away from his family, [REDACTED].<sup>45</sup> [REDACTED].<sup>46</sup> [REDACTED].<sup>47</sup> [REDACTED].<sup>48</sup> [REDACTED].<sup>49</sup>

31. I note that while a convicted person's medical condition has been taken into account when granting requests for early release, almost all instances involved grants of early release effective at or after two-thirds of a sentence were served. In one case, the convicted person was granted early release on the basis of humanitarian considerations a little over a year before having served two-thirds of his sentence.<sup>50</sup> In addition, consideration of Nikolić's [REDACTED] medical circumstances raises a number of questions. [REDACTED]. [REDACTED]. [REDACTED].

32. I believe that these types of situations can only be assessed on a case-by-case basis. [REDACTED].<sup>51</sup> [REDACTED].

33. Accordingly, I am satisfied that humanitarian considerations support a grant of early release.

#### 7. Conclusion

34. Before discussing the particulars of the request, [REDACTED], it is essential that the Mechanism show compassion and deference to the highest humanitarian principles. At the same

<sup>42</sup> See *Galić Decision*, para. 47; *Ruzindana Decision*, para. 21.

<sup>43</sup> *Galić Decision*, para. 48. See also *Serushago Decision*, para. 31, citing *Gvero Decision*, para. 10, fn. 25; *Ruzindana Decision*, para. 22; *Bisengimana Decision*, paras. 33-35; *Naletilić Decision*, paras. 32-35; *Ojđanić Decision*, para. 24; *Strugar Decision*, paras. 11-12; *Krnjelac Decision*, para. 20.

<sup>44</sup> Application, para. 39. See also Application, paras. 54-57.

<sup>45</sup> Application, para. 55.

<sup>46</sup> Application, Annex B, para. 2.

<sup>47</sup> Application, Annex B, para. 1. See also Medical Report of 4 June 2015.

<sup>48</sup> Application, Annex A, para. 1.

<sup>49</sup> [REDACTED] Letter, p. 5.

<sup>50</sup> In that case, which is confidential, consideration was also given to the substantial cooperation provided to the ICTY Prosecution.

time, I cannot set aside other important principles, such as the need to ensure equal treatment of all convicted persons, or to respect the sentences imposed by trial chambers and by appeals chambers. My approach to the issues Nikolić raises is guided by these twin sets of considerations.

(a) Early Release

35. Having considered the factors identified in Rule 151 of the Rules, as well as the relevant information on the record, I am not convinced that Nikolić merits early release. Specifically, while Nikolić has shown signs of rehabilitation and there exist compelling humanitarian considerations, the crimes for which Nikolić was convicted are very grave and he has not yet completed two-thirds of his sentence. Accordingly, I reject the request that I grant Nikolić early release. The view that Nikolić should not be granted early release is shared by the Judges of the sentencing Chamber who are Judges of the Mechanism.

(b) Commutation of Sentence

36. Turning to Nikolić's alternative request that he be allowed to serve the remainder of his sentence under custody at his residence in Serbia, I recall that in his report to the United Nations Security Council ("UN" and "Security Council", respectively) concerning the establishment of the ICTY, the UN Secretary-General indicated that he was of the view that the enforcement of sentences should take place outside the territory of the former Yugoslavia.<sup>52</sup> The UN Secretary-General's Report was approved by the Security Council in resolution 827 (1993).<sup>53</sup> No individual convicted by the ICTY has served his or her sentence in the former Yugoslavia, and neither the ICTY nor the Mechanism has an enforcement agreement with Serbia or any other State of the former Yugoslavia. Accordingly, I cannot grant Nikolić's alternative request to vary the conditions of his imprisonment to allow him to serve the remainder of his sentence under custody at his residence in Serbia, as doing so would be contrary to the position adopted by the Security Council. The view that Nikolić should not be granted commutation of his sentence is shared by the Judges of the sentencing Chamber who are Judges of the Mechanism.

**B. Provisional Release**

**1. Applicable law**

37. Rule 68 of the Rules provides that a chamber may grant an accused or convicted person pending appeal provisional release, subject to such conditions as it may determine appropriate.

<sup>51</sup> See Application, Annex B, para. 1. See also Medical Report of 4 June 2015.

<sup>52</sup> Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993 ("Secretary-General's Report"), para. 121.

<sup>53</sup> UN Security Council resolution 827 (1993), UN Doc. S/RES/827, 25 May 1993, para. 1.

## 2. Analysis

38. While Nikolić has not requested provisional release, I am of the view that it would be appropriate to consider this as an alternative to his request for early release and/or commutation of sentence given the particular circumstances of this case. I note that in 2005, in my capacity as President of the ICTY, I rejected a request for provisional release by a convicted person, on the basis that the ICTY Rules of Procedure and Evidence did not grant this power to the President of that court.<sup>54</sup> The Mechanism's Rules similarly do not explicitly provide for the possibility of provisional release for a convicted person awaiting transfer to an enforcement State. However, other Rules and procedures applicable to proceedings before the trial and/or appeal chamber have also been adopted in the context of proceedings related to enforcement of sentences.<sup>55</sup> Further, I note that neither the Statute nor the Rules explicitly prohibit the President from granting provisional release. In these circumstances, I believe there are cogent reasons to depart from the *Radić* Decision, and consider the provision of provisional release even after final sentencing in the context of particularly compelling circumstances and acting *sua sponte*, [REDACTED]

39. Accordingly, I am of the view that Rule 68 of the Rules can be applied, *mutatis mutandis*, in the particular circumstances of Nikolić's case.<sup>56</sup>

40. In this regard, I note that Nikolić will not be provisionally released to the country in which the crimes were committed and that there is no information before me that suggests that he will pose a danger to any victim, witness, or other person. I am further not aware of any instance of Nikolić's non-compliance with the conditions imposed upon him during his previous period of provisional release, and I am satisfied that Nikolić will surrender into detention at the conclusion of the fixed period for which he is provisionally released, provided that the Government of the Republic of Serbia provides additional guarantees as stipulated below. I note that Nikolić undertakes to abide with any conditions imposed upon him.<sup>57</sup>

41. I further underscore that Nikolić shall not be provisionally released unless the Government of the Republic of Serbia provides, no later than 20 July 2015, additional guarantees that it will respect and ensure compliance with the specific conditions set out below. [REDACTED]

<sup>54</sup> See *The Prosecutor v. Mlado Radić*, Case No. IT-98-30/1-A, Decision on Request for Provisional Release, 13 July 2005 ("Radić Decision"), para. 3.

<sup>55</sup> Cf. *M. Lukić* Decision, p. 1; *Uwinkindi* Decision, p. 2.

<sup>56</sup> I note that under Rule 68 of the Rules, the Prosecution is provided the opportunity to make submissions in the context of provisional release at the trial and appellate stages of the proceedings. However, as indicated above, the Mechanism's Rules and the Practice Direction do not provide the Prosecution with standing to make submissions in the context of enforcement of sentences. Accordingly, and as explained above, I do not consider it necessary to solicit the Prosecution's views in this context.

<sup>57</sup> Application, para. 65.

42. Assuming the above requirements are met, I am of the view that the requirements of Rule 68 of the Rules are satisfied.

### 3. Conclusion

43. In light of the above, and having considered the factors identified in Rule 68 of the Rules, as well as the relevant information on the record, I hereby grant Nikolić provisional release, [REDACTED] State guarantees as usually requested in granting applications for provisional release.<sup>58</sup> The view that Nikolić should be granted provisional release is shared by the Judges of the sentencing Chamber who are Judges of the Mechanism.

## V. DISPOSITION

44. For the foregoing reasons and pursuant to Rules 68, 150, and 151 of the Rules and paragraph 9 of the Practice Direction, I hereby **DENY** Nikolić's request for early release and his alternative request that he be allowed to serve the remainder of his sentence under custody in Serbia; and **GRANT** Nikolić provisional release from 24 July 2015, or as soon as practicable thereafter, to 25 January 2016, subject to the conditions below; and **ORDER** as follows:

- i. Subject to the Registry filing a report confirming his fitness to travel and the availability of necessary medical care at the local hospital [REDACTED], Nikolić shall be transported to Schiphol airport in The Netherlands by the Dutch authorities on 24 July 2015 or as soon as practicable thereafter;
- ii. At Schiphol airport, Nikolić shall be provisionally delivered into the custody of the authorized official(s) of the Ministry of the Interior of the Republic of Serbia and shall be under the supervision and surveillance of such official(s) of the Ministry of the Interior of the Republic of Serbia who shall accompany him for the remainder of his travel to and from [REDACTED];
- iii. The period of the provisional release shall commence when Nikolić is delivered into the custody of the authorized official(s) of the Ministry of Interior of the Republic of Serbia at Schiphol airport on 24 July 2015 or as soon as practicable thereafter and shall be reassessed before the end of his provisional release on 25 January 2016;
- iv. During the period of his provisional release, Nikolić shall abide by the following conditions:

<sup>58</sup> See, e.g., *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Drago Nikolić's Motion for Provisional Release on Medical and Humanitarian Grounds, 7 November 2014 (confidential and *ex parte*).

- a. Before leaving the UNDU, Nikolić shall provide details of his itinerary to the Ministry of Justice of The Netherlands and to the Registrar;
- b. Nikolić shall remain within the confines of his place of residence in Banja Koviljača, Republic of Serbia, and – if strictly necessary for the purpose of medical treatment – the local hospital [REDACTED], apart from his travel to and from these locations and as specifically authorized by me;
- c. Nikolić shall remain under 24-hour armed surveillance by authorized officials of the Ministry of Interior of the Republic of Serbia throughout his presence in [REDACTED];
- d. Nikolić shall surrender all his travel documents to the Public Security Station [REDACTED] for the entire duration of his provisional release;
- e. Nikolić shall have no contact whatsoever or in any way interfere with victims or (potential) witnesses, or otherwise interfere in any way with the proceedings of the Mechanism, the ICTY, or the administration of justice;
- f. Nikolić shall not discuss his case with anyone, including the media, other than his Counsel;
- g. Nikolić shall strictly comply with any requirements of the authorities of Republic of Serbia necessary to enable them to comply with their obligations under the present decision; and
- h. Nikolić shall comply with any order I issue varying the terms of or terminating his provisional release;

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**REQUIRE** the Government of the Republic of Serbia to inform me and the Registrar as soon as practicable, that it will assume responsibility for:

- i. Designating the authorized official(s) of the Ministry of Interior of the Republic of Serbia into whose custody Nikolić shall be delivered and who shall accompany Nikolić from Schiphol airport in The Netherlands to [REDACTED], if needed to and from Belgrade, Republic of Serbia, and back to Schiphol airport;
- ii. Notifying, as soon as practicable myself and the Registrar of the name(s) of these designated official(s);

- iii. Ensuring Nikolić's personal security and safety while on provisional release in the Republic of Serbia;
  - iv. Providing 24-hour armed surveillance of Nikolić throughout his stay in the Republic of Serbia, including the transfer from the airport designated by the Registry to [REDACTED], and back;
  - v. Covering all expenses in connection with Nikolić's provisional release including, but not limited to, the transport from Schiphol airport to [REDACTED];
  - vi. Facilitating, at the Mechanism's request, all means of co-operation and communication and ensuring the confidentiality of any such communications;
  - vii. Reporting immediately to the Registrar as to the substance of any threats to Nikolić's security, including full reports of investigations related to such threats;
  - viii. Detaining Nikolić immediately should he attempt to escape from the territory of the Republic of Serbia or the custody of the authorized official(s) of the Ministry of Interior of the Republic of Serbia, or should he in any other way breach the terms and conditions of his provisional release as set out in the present decision and reporting immediately any such breach to the Registry and myself;
  - ix. Respecting the primacy of the Mechanism in relation to any existing or future proceedings in the Republic of Serbia concerning Nikolić;
  - x. Submitting a daily written report to the Mechanism confirming the presence of Nikolić in the Republic of Serbia and his adherence to the conditions of his provisional release and containing information [REDACTED]; and
- 
- xi. Complying strictly with any other or further requirements concerning this provisional release;

**INSTRUCT** the Registrar to:

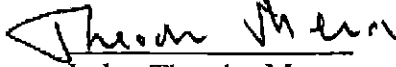
- i. Consult with the medical officer of the UNDU with regard to Nikolić's fitness to travel as well as the availability of necessary medical care at the local hospital in [REDACTED] and to file a report on these matters on 23 July 2015 or as soon as practicable thereafter;
- ii. Consult with the Dutch authorities and the authorities of the Republic of Serbia as to the practical arrangements for Nikolić's provisional release;



- iii. Request the authorities of the State(s) through whose territory Nikolić may travel to:
- a. hold him in custody for any time he will spend in transit at the airport of the State in question; and
  - b. arrest and detain Nikolić should he attempt to escape during travel; and
- iv. Continue to detain Nikolić at the UNDU in The Hague until such time as the Mechanism has been notified of the name(s) of the designated official(s) of the Ministry of Interior of the Republic of Serbia into whose custody Nikolić will be provisionally released, as well as the additional guarantees of the Republic of Serbia as set out above.

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

Done this 13th day of October 2015,  
At The Hague,  
The Netherlands.

  
Judge Theodor Meron  
President

[Seal of the Mechanism]