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Date Created/ Daté du :	02 February 2017	Date transmitted/ Transmis le :	02 February 2017
Original Language / Langue de l'original :	<input checked="" type="checkbox"/> English/ Anglais	<input type="checkbox"/> French/ Français	<input type="checkbox"/> Kinyarwanda
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Rev: April 2014/Rév. : Avril 2014



Mechanism for International Criminal Tribunals

Case No.: MICT-15-88-ES.1

Date: 2 February 2017

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President

Registrar: Mr. Olufemi Elias

Decision of: 2 February 2017

PROSECUTOR

v.

DRAGOLJUB KUNARAC

PUBLIC REDACTED

**DECISION OF THE PRESIDENT ON THE
EARLY RELEASE OF DRAGOLJUB KUNARAC**

The Office of the Prosecutor

Mr. Serge Brammertz

Counsel for Mr. Dragoljub Kunarac

Mr. Mihajlo Bakrač

The Federal Republic of Germany

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals ("Mechanism"), am seized of the notification of the Embassy of the Federal Republic of Germany ("Germany") of the eligibility for the early release of Mr. Dragoljub Kunarac ("Kunarac"), dated 7 March 2016 ("Notification") and conveyed to me by the Registry of the Mechanism ("Registry") on 15 March 2016.¹ 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 paragraph 2 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. Kunarac surrendered to the International Criminal Tribunal for the former Yugoslavia ("ICTY") on 4 March 1998 and was transferred to the United Nations Detention Unit ("UNDU") in the Hague on that same day.³ On 22 February 2001, Trial Chamber II of the ICTY ("Trial Chamber") found Kunarac guilty of torture, rape, and enslavement as crimes against humanity, and torture and rape as violations of the laws or customs of war, and sentenced him to 28 years of imprisonment.⁴ On 12 June 2002, the Appeals Chamber of the ICTY affirmed the convictions entered against Kunarac by the Trial Chamber, as well as the 28 year sentence it had imposed.⁵

3. Kunarac was transferred to Germany to serve the remainder of his sentence on 12 December 2002.⁶

II. NOTICE OF ELIGIBILITY

4. On 15 March 2016, the Registry conveyed the Notification, which in turn conveyed: (i) a communication from the Public Prosecutor's Office, Hamm, Germany ("German Prosecutor"),

¹ Internal Memorandum from Mr. Andrew Begg, Acting Officer in Charge, Registry, Hague Branch, to Judge Theodor Meron, President, dated 15 March 2016. All references herein are to the English translation of the Notification.

² MICT/3, 5 July 2012.

³ *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/I-T, Judgement, 22 February 2001 ("Trial Judgement"), p. 283. See also Press Release, "Dragoljub Kunarac Is the First Accused of Rape and Torture of Bosnian Muslim Women to Turn Himself In", 4 March 1998, available at <http://www.icty.org/en/sid/7687>.

⁴ Trial Judgement, paras. 883, 885.

⁵ *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/I-A, Judgement, 12 June 2002, p. 125.

⁶ See Press Release, "Dragoljub Kunarac Transferred to Germany to Serve Prison Sentence", 12 December 2002, available at <http://www.icty.org/en/press/dragoljub-kunarac-transferred-germany-serve-prison-sentence>.

dated 5 January 2016; and (ii) a report dated 29 December 2015 by the warden of Bochum prison ("Prison Report") regarding Kunarac behaviour and conditions of detention at Bochum prison.⁷

5. [REDACTED].⁸

6. On 13 May 2016, I received a memorandum from the Registry, conveying a memorandum from the Office of the Prosecutor of the Mechanism ("Prosecution"), dated 7 April 2016 ("Prosecution Memorandum").⁹

7. On 28 September 2016, I received a memorandum from the Registry,¹⁰ conveying, *inter alia*: (i) a personal data and enforcement sheet, dated 29 December 2015; and (ii) a declaration from the German Prosecutor, dated 14 July 2015 ("Declaration"). On 29 September 2016, I received a *note verbale* from the German authorities, dated 26 September 2016, conveying a psychiatric evaluation of Kunarac, dated 1 August 2016 ("Psychiatric Report").

8. On 28 October 2016, counsel for Kunarac filed the confidential "Defence Request Seeking Dragoljub Kunarac's Early Release" ("Request").¹¹ By letter of 31 October 2016, Kunarac conveyed his own request for early release.¹²

9. On 15 November 2016, I denied the Prosecution's request that I order Kunarac to provide myself "and the Prosecution with documentation or other information" in support of the Request.¹³

10. On 17 November 2016, counsel for Kunarac filed the confidential "Defence Response on Behalf of Dragoljub Kunarac with Regard to the Documents Relating to the Request for Early Release" ("Response").

⁷ Internal Memorandum from Mr. Andrew Begg, Acting Officer in Charge, Registry, Hague Branch, to Judge Theodor Meron, President, dated 15 March 2016, conveying a *note verbale* from the Federal Republic of Germany, dated 7 March 2016 ("Note Verbale"). All references herein are to the English translation of the *Note Verbale*.

⁸ [REDACTED].

⁹ Internal Memorandum from Mr. Gus de Witt, Head of Office, Registry, Hague Branch, to Judge Theodor Meron, President, dated 13 May 2016, conveying the Prosecution Memorandum.

¹⁰ Internal Memorandum from Ms. Kate Mackintosh, Deputy Registrar, ICTY, to Judge Theodor Meron, President, dated 28 September 2016.

¹¹ I note that while the Request is entitled "Defence Request Seeking Dragoljub Kunarac's Early Release", in view of the stage of the proceedings and the fact that I already received all the relevant information as provided for in paragraph 4 of the Practice Direction, I did not direct the Registry to obtain further information as a result of the Request.

¹² I received the English translation of Kunarac's letter on 18 November 2016. Where a submission is filed by both the convicted person and counsel on his or her behalf, the submission filed by counsel is generally taken into account for purposes of adjudicating a matter. Cf. *Eliézer Niyitegeka v. The Prosecutor*, Case No. MICT-12-16-R, Decision on Niyitegeka's Request for Review and Assignment of Counsel, 13 July 2015, paras. 13-14. [REDACTED] and counsel thereafter filed the Request on his behalf. Accordingly, I will take into account the Request alone for purposes of adjudicating the Notification.

¹³ Decision on Prosecution Request for Information Relating to Dragoljub Kunarac's Request for Early Release, 15 November 2016 (confidential), p. 2.

III. DISCUSSION

A. Applicable Law

11. Under Article 26 of the Statute, if, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. Article 26 of the Statute further provides that 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.

12. 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.¹⁴ Pursuant to Rule 151 of the Rules, 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.

13. 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 Article 26 of the Statute and with its agreement with the United Nations on the enforcement of sentences and, where practicable, at least 45 days prior to the date of eligibility, notify the Mechanism accordingly.

14. Article 2(2) of the agreement between the ICTY and the Government of Germany, dated 14 November 2002 ("Enforcement Agreement"), provides that the conditions of imprisonment shall be governed by the law of Germany, subject to the supervision of the ICTY (and now, the Mechanism).¹⁵ Article 7(2) of the Enforcement Agreement, applied *mutatis mutandis* to the

¹⁴ Other than myself, none of the Judges of the sentencing Chamber are Judges of the Mechanism. On that basis, no consultations with other Judges of the Mechanism pursuant to Rule 150 of the Rules are required in determining this Application.

¹⁵ 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, provides, *inter alia*, that the President shall determine whether pardon or commutation of sentence is appropriate.

B. Eligibility under German Law

15. Under section 57(1) of the German Criminal Code, a convicted person may be released on parole if two-thirds of the imposed sentence, but not less than two months, have been served.¹⁶

16. I note, however, that even if Kunarac is eligible for early release under the domestic law of Germany, 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

17. 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.

18. The crimes for which Kunarac has been convicted are of a high gravity. The Trial Chamber determined, *inter alia*, that Kunarac “continuously and constantly” raped FWS-191 while she was kept at the house.¹⁷ The Trial Chamber was satisfied that two young women, FWS-191 and FWS-186, “were denied any control over their lives” by, *inter alia*, Kunarac, during their stay at the house where they were kept, that they “had to obey all orders”, and “were subjected to other mistreatments, such as Kunarac inviting a soldier into the house so that he could rape FWS-191 for 100 Deutschmark if he so wished. On another occasion, Kunarac tried to rape FWS-191 while in his hospital bed, in front of other soldiers”.¹⁸ The Trial Chamber further found that Kunarac treated the two women at the house as though they were his personal property and concluded that Kunarac was “personally committed to the act of enslavement”.¹⁹

19. The Trial Chamber further held that Kunarac

acted intentionally and with the aim of discriminating between the members of his ethnic group and the Muslims, in particular its women and girls. The treatment reserved by Dragoljub Kunarac for his victims was motivated by their being Muslims, as is evidenced by 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”.

¹⁶ See Declaration, p. 5.

¹⁷ Trial Judgement, para. 741.

¹⁸ Trial Judgement, para. 742.

¹⁹ Trial Judgement, para. 742.

occasions when the accused told women, that they would give birth to Serb babies, or that they should "enjoy being fucked by a Serb".²⁰

The Trial Chamber further found in this regard that Kunarac personally raped multiple Muslim women and brought women to a house with the knowledge that they would be raped by soldiers there.²¹ Indeed, the Trial Chamber found in relation to one of these women that while raping the woman, FWS-183, "Kunarac forced her to touch his penis and to look at him. He cursed her. The other two soldiers watched from the car, laughing. While she was raped by Dragoljub Kunarac, FWS-183 heard him tell the other soldiers to wait for their turn. Subsequently, she was raped vaginally and orally by the other soldiers".²²

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

D. Eligibility and Treatment of Similarly-Situated Prisoners

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

22. In this respect, I recall that ICTY convicts, like Kunarac, are considered "similarly-situated" to all other prisoners under the Mechanism's supervision and that all convicts supervised by the Mechanism are to be considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the tribunal that convicted them.²³ 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.²⁴

23. Based on my own calculation, Kunarac served two-thirds of his sentence of 28 years on 1 November 2016.

²⁰ Trial Judgement, para. 654.

²¹ See Trial Judgement, paras. 656, 670, 679-680, 685, 701, 711, 724-725, 727-729.

²² Trial Judgement, para. 711.

²³ See *Prosecutor v. Stanislav Galić*, Case No. MICT-14-83-ES, Decision of the President on the Early Release of Stanislav Galić, 18 January 2017 ("*Galić Decision*"), para. 20. See also *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.

²⁴ See *Galić Decision*, para. 22; *Bisengimana Decision*, paras. 21, 35.

E. Demonstration of Rehabilitation

24. Rule 151 of the Rules provides that the President shall take into account a “prisoner’s demonstration of rehabilitation” in determining whether early release is appropriate. In addressing the convicted person’s rehabilitation, paragraph 4(b) of the Practice Direction states that the Registrar shall

[r]equest reports and observations from the relevant authorities in the enforcing State as to the behavior of the convicted person during his or her period of incarceration and the general conditions under which he or she was imprisoned, and request from such authorities any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration[.]

1. Behaviour whilst in detention

25. The Prison Report states that Kunarac “has kept up an opaque network of contacts with the other inmates as well as with other detainees in European prisons”.²⁵ According to the Prison Report, Kunarac is a “very demanding prisoner”.²⁶ The Prison Report states that Kunarac “is not always able to react appropriately” when faced with a negative decision and he “becomes loud quickly, showing no signs of being an experienced prisoner”.²⁷ The Prison Report reflects that “numerous disciplinary proceedings were initiated against [Kunarac] for being in possession of drugs, a mobile telephone, cash, etc”.²⁸ The Prison Report notes that on the whole Kunarac’s conduct in prison “cannot be described as impeccable. However, over the years a decrease in documented irregularities can be noted”.²⁹ During an interview that was conducted with Kunarac on 21 August 2015, Kunarac explained that he dealt in mobile telephones and drugs whilst imprisoned at Bochum prison because he could not work for four and a half years and his pocket money was insufficient to cover the costs of the extra food he wanted to buy.³⁰

26. The Prison Report informs that Kunarac behaves properly towards the prison attendants, but that conflicts with other inmates are “not a rare occurrence”.³¹ The Prison Report reflects that Kunarac, who has been at Bochum prison since 2002, has a “very rudimentary” knowledge of German.³² The Prison Report notes in this regard that any attempt at providing Kunarac with

²⁵ Prison Report, p. 1. *See also* Prison Report, p. 11.

²⁶ Prison Report, p. 2.

²⁷ Prison Report, p. 2. *See also* Prison Report, p. 3.

²⁸ Prison Report, p. 2. *See also* Prison Report, pp. 8-9.

²⁹ Prison Report, p. 9.

³⁰ Prison Report, p. 11. *See also* Prison Report, p. 13; Psychiatric Report, pp. 23-24.

³¹ Prison Report, p. 2.

³² Prison Report, p. 2.

German refresher courses “is dropped after a short while” and the Prison Report further observes that Kunarac “obviously seems to show no real interest in learning the language properly”.³³

27. According to the Prison Report, Bochum prison’s Social Work Unit states that Kunarac has a “striking history in detention of a variety of breaches and offences”, that he has in the past “always proven to be demanding, occasionally insolent, brash and intransigent in his behaviour”, and that Kunarac projects his difficulties “onto the nearest prison attendants and his bad mood is acted out on them accordingly”.³⁴ According to the Social Work Unit, Kunarac calmed down to a certain extent since mid-2014, at least insofar as it relates to his interactions with this Unit.³⁵

28. The Prison Report concludes by stating that Kunarac “has not used his time in prison in a fully positive way” and reflects that even “under the corseted conditions of a closed prison Mr. Kunarac finds compliance with rules and application of behavioural values and standards difficult, however over the years a certain calming down is noticeable”.³⁶

29. [REDACTED].³⁷ [REDACTED].³⁸ [REDACTED].³⁹

30. Kunarac submits generally that his conduct whilst in detention “has been in line with the rules and circumstances under which he served his sentence”.⁴⁰ According to Kunarac, “[t]he achieved level of rehabilitation is optimal and in line with his educational, intellectual and psychological profile”.⁴¹ Kunarac asserts that he has been working in the prison library since 2008 to the best of his physical abilities, “bearing in mind that [he] suffered a severe injury to his right arm, with permanent consequences”.⁴² Kunarac further contends that he has “successfully attended German language courses”⁴³ and that he has treated the prison authorities, guards, and other convicted persons with respect and consideration.⁴⁴

31. Kunarac concedes that there were “some disciplinary issues” between 2002 and 2007, but he submits that this was the consequence of, on the one hand, “his inability to adjust right away to a

³³ Prison Report, p. 2.

³⁴ Prison Report, p. 3.

³⁵ Prison Report, p. 3.

³⁶ Prison Report, p. 14.

³⁷ Psychiatric Report, p. 14.

³⁸ Psychiatric Report, p. 24.

³⁹ Psychiatric Report, p. 24.

⁴⁰ Request, para. 16. *See also* Request, para. 20.

⁴¹ Request, para. 17.

⁴² Request, para. 17. *See also* Request, para. 20.

⁴³ Request, para. 19.

⁴⁴ Request, para. 21.

new environment and a new language” and, on the other hand, the time “required for the prison authorities to acquaint themselves with all of [Kunarac’s] health and family issues”.⁴⁵

32. [REDACTED].⁴⁶ [REDACTED].⁴⁷ Kunarac submits that he has not committed any disciplinary offences and he has not been the subject of any disciplinary proceedings since the beginning of 2008.⁴⁸

2. General conditions under which Kunarac is detained

33. The Prison Report reflects that Kunarac has had extended family visits with his new “life companion”.⁴⁹ The Prison Report states that Kunarac has been accommodated in a single cell and regularly needs to be encouraged to do more when it comes to the cleanliness and orderliness of his cell.⁵⁰ The Prison Report states that Kunarac has been assigned a job in the library since 1 August 2012 and that he goes there regularly and punctually.⁵¹ On 16 July 2016, Bochum prison’s Occupational Unit noted that during his time working in the library, Kunarac has been “friendly and courteous towards prison attendants”.⁵² According to the Prison Report, Kunarac mainly uses the kitchen in his spare time and he takes part in activities such as chess groups, backgammon groups, and various events in connection with the church.⁵³

34. [REDACTED].⁵⁴

35. Kunarac submits that he has never been granted permission to leave the prison grounds, even though “this right is granted to all convicts who have served ten years of their sentence”.⁵⁵ Kunarac asserts that the prison authorities justified their decision not to grant him permission to leave the prison grounds on the basis of his disability, as well as the fact that his 28-year sentence “is unknown to German law”.⁵⁶ Kunarac contends that the fact that he was not permitted to leave the prison grounds for reasons beyond his control should be counted as a factor in favour of his early release.⁵⁷ Kunarac further asserts that “a year ago, the warden personally recommended that [he] be on a regime which would permit him to be out of the prison in the daytime and return to the

⁴⁵ Request, para. 18.

⁴⁶ Request, para. 19.

⁴⁷ Request, para. 19.

⁴⁸ Request, para. 20. *See also* Request, para. 22.

⁴⁹ Prison Report, p. 3.

⁵⁰ Prison Report, p. 1.

⁵¹ Prison Report, p. 2.

⁵² Prison Report, p. 2.

⁵³ Prison Report, p. 2.

⁵⁴ Psychiatric Report, p. 14.

⁵⁵ Request, para. 23.

⁵⁶ Request, para. 23.

⁵⁷ Request, para. 23.

prison overnight”.⁵⁸ Kunarac contends that the prison’s failure to “implement this regime” cannot be considered as “grounds for dismissing” his request for early release.⁵⁹

36. Kunarac contends that he has “harmonious relations with his children and is in regular contact with them”.⁶⁰ Kunarac submits that he has two daughters who are employed and financially independent.⁶¹ He further asserts that he has a son who is a full-time student completing his final year at university and whom Kunarac is supporting financially.⁶² According to Kunarac, his release would motivate his son and enable his son to successfully graduate and find employment.⁶³

3. Denial of responsibility for crimes

37. In an interview that took place at Bochum prison on 21 August 2015, Kunarac stated that he did not commit the crimes of which he was convicted and that he was “shocked” at the allegations of rape that were made against him, “since that was not true”.⁶⁴ During this interview, Kunarac is to have stated that a “woman climbed on top of [him], overpowered him and had vaginal intercourse with him. He just lay there and didn’t move. [...]. Actually, he was the one who was raped”.⁶⁵

38. [REDACTED].⁶⁶ [REDACTED].⁶⁷ [REDACTED].⁶⁸

39. [REDACTED].⁶⁹ [REDACTED].⁷⁰ [REDACTED].⁷¹ [REDACTED].⁷² [REDACTED].⁷³

40. [REDACTED].⁷⁴ [REDACTED].⁷⁵ [REDACTED].⁷⁶ [REDACTED].⁷⁷ [REDACTED].⁷⁸
[REDACTED].⁷⁹

41. [REDACTED].⁸⁰ [REDACTED].⁸¹

⁵⁸ Response, para. 7.

⁵⁹ Response, para. 8.

⁶⁰ Request, para. 27.

⁶¹ Request, para. 27.

⁶² Request, para. 27.

⁶³ Request, para. 27.

⁶⁴ Prison Report, p. 10. *See also* Prison Report, p. 13.

⁶⁵ Prison Report, p. 11. *See also* Prison Report, p. 13; Psychiatric Report, p. 28.

⁶⁶ Psychiatric Report, p. 20. *See also* Psychiatric Report, p. 29.

⁶⁷ Psychiatric Report, p. 20. *See also* Psychiatric Report, p. 28.

⁶⁸ Psychiatric Report, p. 20. *See also* Psychiatric Report, p. 21.

⁶⁹ Psychiatric Report, p. 21. *See also* Psychiatric Report, p. 22.

⁷⁰ Psychiatric Report, p. 23.

⁷¹ Psychiatric Report, p. 23.

⁷² Psychiatric Report, p. 23.

⁷³ Psychiatric Report, p. 23.

⁷⁴ Psychiatric Report, p. 29.

⁷⁵ Psychiatric Report, p. 33. *See also* Psychiatric Report, p. 37.

⁷⁶ Psychiatric Report, p. 33.

⁷⁷ Psychiatric Report, p. 33.

⁷⁸ Psychiatric Report, p. 33.

⁷⁹ Psychiatric Report, p. 33. *See also* Psychiatric Report, p. 34.

4. Preparedness for reinsertion into society

42. The Prison Report states that “in view of the attitude of denial concerning the crimes [Kunarac] is charged with, his irregular detention history, with only recent signs of calming down, and the unresolved situation regarding his early release, an early release at this stage cannot be advocated by a social worker”.⁸²

43. [REDACTED].⁸³ [REDACTED].⁸⁴

44. [REDACTED].⁸⁵ [REDACTED].⁸⁶ [REDACTED].⁸⁷ [REDACTED].⁸⁸

45. During the interview of 21 August 2015, Kunarac reportedly stated that he has applied for asylum in Germany and that he has “recently received a residence permit”.⁸⁹ He further is to have stated that he cannot return to the former Yugoslavia, in view of threats directed against him.⁹⁰

46. [REDACTED].⁹¹ [REDACTED].⁹² [REDACTED].⁹³

47. [REDACTED].⁹⁴ [REDACTED].⁹⁵

48. Kunarac contends that, since his arrival at the prison, he has frequently requested permission to take part in “the resocialization programme”.⁹⁶ According to Kunarac, however, he was told on several occasions that the prison does not have a special programme for war criminals.⁹⁷ Kunarac contends that, despite the fact that he did not partake in this programme, he has “managed to achieve a satisfactory level of resocialization, through regular working assignments and activities, as well as in his contacts with the prison authorities”.⁹⁸ According to Kunarac, the Psychiatric

⁸⁰ Psychiatric Report, p. 28. *See also* Psychiatric Report, p. 35.

⁸¹ Psychiatric Report, p. 28. *See also* Psychiatric Report, p. 29.

⁸² Prison Report, p. 5. *See also* Prison Report, p. 14.

⁸³ Psychiatric Report, p. 34. *See also* Psychiatric Report, p. 37.

⁸⁴ Psychiatric Report, p. 34.

⁸⁵ Psychiatric Report, p. 34. *See also* Psychiatric Report, p. 35.

⁸⁶ Psychiatric Report, p. 35.

⁸⁷ Psychiatric Report, p. 35. *See also* Psychiatric Report, p. 37.

⁸⁸ Psychiatric Report, p. 36. *See also* Psychiatric Report, p. 37.

⁸⁹ Prison Report, p. 12. On 9 December 2016, the Registry conveyed to me a *note verbale* from Germany, whereby the German authorities inform that Kunarac’s application for asylum in Germany was rejected. *See* Internal Memorandum from Ms. Kate Mackintosh, Deputy Registrar, ICTY, to Judge Theodor Meron, President, dated 9 December 2016.

⁹⁰ Prison Report, p. 12. *See also* Psychiatric Report, pp. 25-26, 36.

⁹¹ Psychiatric Report, p. 24. *See also* Psychiatric Report, p. 32.

⁹² Psychiatric Report, p. 25. *See also* Prison Report, p. 12.

⁹³ Psychiatric Report, pp. 26-27. *See also* Psychiatric Report, pp. 35-36; Prison Report, p. 12.

⁹⁴ Psychiatric Report, p. 36. *See also* Psychiatric Report, p. 38.

⁹⁵ Psychiatric Report, p. 37.

⁹⁶ Request, para. 22.

⁹⁷ Request, para. 22.

⁹⁸ Request, para. 22.

Report demonstrates that it is “very unlikely” that he would commit “similar crimes to the ones he was convicted for” if he were to be released.⁹⁹

49. [REDACTED].¹⁰⁰ [REDACTED].¹⁰¹

50. Kunarac submits that he would have a regular income if he were to be released, in the form of a pension and disability benefits, which would enable him to be self-sufficient.¹⁰² In this regard, Kunarac contends that he has sufficient knowledge of the German language, “which puts him in a much better position than the hundreds of thousands of refugees residing in Germany without property, income or even basic knowledge of the German language”.¹⁰³ In addition, Kunarac asserts that he has “long had a life companion who lives in Denmark, which is why he is in a significantly more favourable position than the prison authorities are trying to make it seem”.¹⁰⁴

51. Kunarac contends that not granting him early release “on purely economic grounds, would be in violation of the interests of justice, and would unjustifiably put Kunarac in a more unfavourable position” when compared to other similarly-situated prisoners.¹⁰⁵ Moreover, Kunarac submits that “without valid reason” he would “also be placed in a more unfavourable position than hundreds of thousands of persons residing in Germany without any financial support”.¹⁰⁶

52. Lastly, Kunarac asserts that his “overwhelming impression” is that “the negative statements [contained in the documentation collected] are conditioned by the current social and political situation caused by the ‘migrant crisis’ in Europe, and in particular in Germany, and not by any personal characteristics of Mr. Kunarac or his inadequate resocialization”.¹⁰⁷

5. Discussion

53. I note that factors such as, for example, the prisoner’s behaviour whilst in detention, his or her willingness to assume responsibility for the crimes of which he or she was convicted, his or her mental state, as well as his/her maintenance of meaningful ties with the outside world are taken into account in determining whether a prisoner has shown sufficient signs of rehabilitation.¹⁰⁸

⁹⁹ Response, para. 9.

¹⁰⁰ Response, para. 10. *See also* Response, paras. 11-13, 17.

¹⁰¹ Response, para. 14.

¹⁰² Request, para. 28. *See also* response, para. 18.

¹⁰³ Response, para. 18.

¹⁰⁴ Response, para. 19.

¹⁰⁵ Response, para. 20.

¹⁰⁶ Response, para. 21.

¹⁰⁷ Response, para. 16.

¹⁰⁸ *See, e.g., Galic* Decision, para. 108; *Prosecutor v. Emmanuel Rukundo*, Case No. MICT-13-35-ES, Public Redacted Version of the 19 July 2016 Decision of the President on the Early Release of Emmanuel Rukundo, 5 December 2016,

54. While the Prison Report reflects that there has been some improvement in Kunarac's behaviour since his arrival at the prison, particularly with respect to his breaches of the prison rules,¹⁰⁹ the warden's account of Kunarac's behaviour in prison [REDACTED] reflect that Kunarac continues to deny responsibility for the crimes of which he was convicted,¹¹⁰ that he has been a demanding prisoner,¹¹¹ and that, as a general matter, Kunarac has not used his time in prison in a fully positive manner.¹¹² In view hereof, [REDACTED] the Prison Report [REDACTED] suggest that granting Kunarac early release would be premature at this stage.¹¹³

55. Based on the above, I am of the view that while Kunarac's behaviour may have shown some improvement, he has not demonstrated sufficient signs of rehabilitation at this stage. Accordingly, I am of the view that this factor weighs against his early release.

F. Substantial Cooperation with the Prosecution

56. 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 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".

57. The Prosecution submits that, as a general matter, "the cooperation of a convicted person prior to sentencing is not relevant at the early release stage, since any such factor will be taken into account already, if relevant, at the sentencing stage".¹¹⁴ According to the Prosecution, Kunarac cooperated with the Prosecution and has been given credit in mitigation of his sentence for this factor.¹¹⁵ The Prosecution contends that no additional cooperation was provided by Kunarac.¹¹⁶

paras. 24, 27; *Prosecutor v. Ferdinand Nahimana*, Case No. MICT-13-37-ES.1, Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana, 5 December 2016, paras. 24-26; *Prosecutor v. Ljubomir Borovčanin*, Case No. MICT-15-85-ES.6, Public Redacted Version of the 14 July 2016 Decision of the President on the Early Release of Ljubomir Borovčanin, 2 August 2016 ("*Borovčanin* Decision"), paras. 21-25; *Prosecutor v. Aloys Simba*, Case No. MICT-14-62-ES.1, Decision of the President on the Early Release of Aloys Simba, 2 February 2016 (public redacted version), paras. 21-23.

¹⁰⁹ See *supra*, para. 25.

¹¹⁰ See *supra*, paras. 37-40.

¹¹¹ See *supra*, paras. 25, 27.

¹¹² See *supra*, para. 28.

¹¹³ See *supra*, paras. 42, 47.

¹¹⁴ Prosecution Memorandum, para. 2, citing *Prosecutor v. Duško Tadić*, Case No. IT-94-1-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Duško Tadić, 17 July 2008 (public redacted version), paras. 10, 18.

¹¹⁵ Prosecution Memorandum, para. 3. I note that the Prosecution Memorandum does not make clear whether the cooperation was provided with the Prosecution or the Office of the Prosecutor of the ICTY ("ICTY Prosecution"). See Prosecution Memorandum, paras. 1, 3. However, it is apparent from the context described in the Prosecution Memorandum that the cooperation provided by Kunarac was with the ICTY Prosecution. See Prosecution Memorandum, para. 3.

¹¹⁶ Prosecution Memorandum, para. 3.

58. Kunarac responds that the fact that his cooperation with the Prosecution was taken into account by the Trial Chamber at the time of his sentencing does not preclude his cooperation from being taken into account when his early release is being considered.¹¹⁷ Kunarac submits that he cooperated with the Prosecution by “willingly submitting himself to an interview with the Prosecution, lasting several hours, immediately upon his voluntary arrival in The Hague, and once again a year after his arrival, before the beginning of the trial”.¹¹⁸ Kunarac notes in this regard that following his interviews with the Prosecution, the initial indictment against him was expanded from four to 21 counts.¹¹⁹ Kunarac asserts that he testified in his own trial as the first witness, before all other defence witnesses.¹²⁰ Lastly, Kunarac asserts that the Prosecution did not “seek any additional cooperation after the verdict, which is why none was provided”.¹²¹

59. 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.¹²² While accepting that Kunarac's cooperation with the Prosecution was a factor taken into account by the Trial Chamber, I place some weight upon it in favour of Kunarac's release, due to the impact that such cooperation has on the efficient administration of justice.¹²³

G. Other Factors: Humanitarian Concerns

60. Paragraph 9 of the Practice Direction provides that the President may consider “any other information” that the President believes to be “relevant” to supplement the criteria specified in Rule 151 of the Rules. Previous decisions on early release have determined that the condition of a convicted person's health may be taken into account in the context of an application for early release, especially when the seriousness of the condition makes it inappropriate for the person to remain in prison any longer.¹²⁴

61. [REDACTED].¹²⁵ [REDACTED].¹²⁶ [REDACTED].¹²⁷ [REDACTED].¹²⁸
[REDACTED].¹²⁹

¹¹⁷ Response, para. 4.

¹¹⁸ Request, para. 30. *See also* Response, para. 5.

¹¹⁹ Request, para. 30.

¹²⁰ Request, para. 30.

¹²¹ Response, para. 6.

¹²² *Galić* Decision, para. 34; *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 (“*Ntakirutimana*”), para. 20.

¹²³ *See Borovčanin* Decision, para. 29; *Bisengimana* Decision, para. 30.

¹²⁴ *See, e.g., Galić* Decision, para. 35; *Ntakirutimana* Decision, para. 21; *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), para. 22.

¹²⁵ Psychiatric Report, p. 11. *See also* Psychiatric Report, p. 30.

¹²⁶ Psychiatric Report, p. 11.

62. [REDACTED].¹³⁰ [REDACTED].¹³¹ [REDACTED].¹³² [REDACTED].¹³³

63. [REDACTED].¹³⁴

64. [REDACTED].¹³⁵ [REDACTED].¹³⁶ [REDACTED].¹³⁷

65. Kunarac submits that in addition to his uncontested disability, he is “also a man of poor health”.¹³⁸ [REDACTED].¹³⁹ [REDACTED].¹⁴⁰ [REDACTED].¹⁴¹ [REDACTED].¹⁴² [REDACTED].¹⁴³

66. [REDACTED].¹⁴⁴ [REDACTED].¹⁴⁵

67. I am satisfied based on the information before me that Kunarac suffers from an injury to his [REDACTED] and that he is coping with various [REDACTED] problems. However, contrary to the views expressed by Kunarac, the various reports provided suggest that he has been receiving the necessary treatment and that his medical condition has been stable. Accordingly, I am not convinced, based on the information before me, that Kunarac’s health condition is so serious as to weigh in favour of his early release.

H. Conclusion

68. In light of the above, and having carefully considered the factors identified in Rule 151 of the Rules, as well as all the relevant information on record, I am not in favour of granting Kunarac early release at this time. Although Kunarac has served two-thirds of his sentence as of 1 November 2016, the particular circumstances of this case, including the high gravity of the crimes, and the fact that Kunarac has not demonstrated sufficient signs of rehabilitation, weigh against his early release at this stage.

¹²⁷ Psychiatric Report, pp. 12-13. *See also* Request, para. 26.

¹²⁸ Psychiatric Report, p. 12. *See also* Psychiatric Report, p. 13; Request, para. 25.

¹²⁹ Psychiatric Report, p. 12.

¹³⁰ Psychiatric Report, p. 13.

¹³¹ Psychiatric Report, p. 13.

¹³² Psychiatric Report, p. 13.

¹³³ Psychiatric Report, p. 13. *See also* Psychiatric Report, p. 30.

¹³⁴ Psychiatric Report, p. 9.

¹³⁵ Psychiatric Report, p. 30.

¹³⁶ Psychiatric Report, pp. 30-31.

¹³⁷ Psychiatric Report, p. 31.

¹³⁸ Request, para. 24.

¹³⁹ Request, para. 24.

¹⁴⁰ Request, para. 24.

¹⁴¹ Request, para. 24.

¹⁴² Request, para. 24.

¹⁴³ Request, para. 24.

69. I note, however, that while Kunarac currently has not demonstrated sufficient signs of rehabilitation, [REDACTED],¹⁴⁶ and that other rehabilitation measures may also benefit Kunarac. [REDACTED].

70. Lastly, the fact that I am not granting Kunarac early release at this time does not preclude him from applying for early release in the future in accordance with paragraph 3 of the Practice Direction, in particular should Kunarac consider that changed circumstances suggest that he has demonstrated sufficient signs of rehabilitation.


IV. DISPOSITION

71. 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 **DENY** Kunarac early release at the present time, and respectfully **REQUEST** [REDACTED].

72. The Registrar is hereby **DIRECTED** to inform the authorities of Germany 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 2nd day of February 2017,
At The Hague,
The Netherlands.


Judge Theodor Meron
President

[Seal of the Mechanism]

¹⁴⁴ Request, para. 26.

¹⁴⁵ Request, para. 26.

¹⁴⁶ See *supra*, para. 47.