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Mechanism for International Criminal Tribunals

Case No.: MICT-15-85-ES.3

Date: 16 June 2017

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President
Registrar: Mr. Olufemi Elias
Decision of: 16 June 2017

PROSECUTOR

v.

LJUBIŠA BEARA

PUBLIC

**PUBLIC REDACTED VERSION OF 7 FEBRUARY 2017
DECISION OF THE PRESIDENT ON THE
EARLY RELEASE OF LJUBIŠA BEARA**

The Office of the Prosecutor

Mr. Serge Brammertz

Mr. Ljubiša Beara

The Federal Republic of Germany

The Republic of Serbia

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively), am seized of the notification from the Embassy of the Federal Republic of Germany (“Germany”) of the eligibility for early release of Mr. Ljubiša Beara (“Beara”), dated 20 January 2017, conveyed to me by the Registry of the Mechanism (“Registry”) on the same day.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. Beara surrendered to the International Criminal Tribunal for the former Yugoslavia (“ICTY”) on 9 October 2004 and was transferred to the United Nations Detention Unit (“UNDU”) on 10 October 2004.³ On 11 November 2004, Beara pleaded not guilty to all charges.⁴ After the indictment was amended, Beara entered new pleas of not guilty to the additional charges at a further appearance on 13 April 2005.⁵

3. On 10 June 2010, Trial Chamber II of the ICTY (“Trial Chamber”) found Beara guilty pursuant to Article 7(1) of the ICTY Statute for committing genocide, extermination and persecution as crimes against humanity, and murder as a violation of the laws or customs of war.⁶ He was sentenced to life imprisonment.⁷

4. On 30 January 2015, the Appeals Chamber of the ICTY (“Appeals Chamber”) reversed, in part, Beara’s “convictions for genocide (Count 1 in part), extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecutions as a crime against humanity (Count 6 in part) to the extent they concern[ed] the killing of six Bosnian Muslim men near Trnovo.”⁸ All other convictions were upheld and a new conviction

¹ Internal Memorandum from Ms. Åsa Rydberg van der Sluis, Legal Officer, Office of the Registrar, Hague Branch, to Judge Theodor Meron, President, dated 20 January 2017, *transmitting note verbale* from the Embassy of the Federal Republic of Germany, The Hague, dated 20 January 2017 (“Notification”). All references herein are to the English translation.

² MICT/3, 5 July 2012.

³ See *Prosecutor v. Ljubiša Beara*, Case No. IT-02-58-I, Scheduling Order for Initial Appearance, 11 October 2004. See also *Prosecutor v. Ljubiša Beara*, Case No. IT-02-58-I, T. 1–4, 12 October 2004; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Trial Judgement, 10 June 2010 (“Trial Judgement”), vol. 2, Annex 2, para. 6.

⁴ See *Prosecutor v. Ljubiša Beara*, Case No. IT-02-58-I, T. 11–12, 11 November 2004.

⁵ See *Prosecutor v. Ljubiša Beara*, Case No. IT-02-58-I, T. 19–20, 13 April 2005.

⁶ See Trial Judgement, vol. II, p. 833.

⁷ Trial Judgement, vol. II, p. 833.

⁸ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Judgement, 30 January 2015 (“Appeal Judgement”), Appeal Judgement, p. 713.

against Beara for conspiracy to commit genocide was entered.⁹ Beara's life sentence was affirmed by the Appeals Chamber.¹⁰

5. Beara was transferred to Germany on 8 October 2015 to serve the remainder of his sentence at the Tegel Correctional Facility.¹¹

6. In coming to my decision on whether it is appropriate to grant Beara early release, I have consulted the Judges of the sentencing Chamber, who are also Judges of the Mechanism, pursuant to paragraph 7 of the Practice Direction and Rule 150 of the Rules.

II. NOTICE OF ELIGIBILITY

7. On 20 January 2017, pursuant to Article 2(5) of the Agreement between the Mechanism for International Criminal Tribunals and the Government of the Federal Republic of Germany concerning the conditions under which Beara's prison sentence shall be enforced, dated 26 June 2015 ("Enforcement Agreement"), which requires the German authorities to "notify the Mechanism immediately if the health condition of the convicted person prevents a continuation of enforcement, and shall procure a decision from the Mechanism regarding the termination of enforcement", the Embassy of Germany to the Netherlands, via *note verbale*, requested the Mechanism "to render, as expeditiously as possible, a decision regarding the termination of enforcement of Mr Beara's sentence."¹² The Notification further stated that "Mr. Beara's precarious health condition [...] requires very quick action without any undue delay" and that "neither Tegel Correctional Facility, nor any other detention facility in Germany, is equipped with the means necessary to address the health needs of seriously-ill patients".¹³ The Notification also included: (i) a communication from the Berlin Senate Administration for Justice, Consumer Protection and Anti-Discrimination, dated 18 January 2017; and (ii) a report prepared by the Tegel Correctional Facility, dated 18 January 2017 ("Prison Report"). The Medical Officer of the Tegel Correctional Facility in the Prison Report indicated "[b]ased on an assessment of all of the circumstances, I am of the opinion that the

⁹ Appeal Judgement, p. 713.

¹⁰ Appeal Judgement, p. 714.

¹¹ See Press Release, Registry and Chambers, dated 22 October 2015, available at <http://www.icty.org/en/press/icty-press-briefing-0>. See also Order Designating State in which Ljubiša Beara is to Serve his Sentence, 28 May 2015; Internal Memorandum from Tatjana Dawson, Deputy Chief, Office of the Registrar to Judge Theodor Meron, President, dated 13 October 2016, attaching a medical report from Tegel Correctional Facility "Medical Opinion on the Current State of Health of the Prison Inmate Ljubiša Beara (as well as treatment options and actually applied treatment measures)", dated 2 September 2016 ("2 September 2016 Medical Report").

¹² Notification, p. 2. See also 2 September 2016 Medical Report.

¹³ Notification, p. 2.

situation now argues in favour of an early release from incarceration in Germany under the laws governing criminal procedure or as an act of clemency”.¹⁴

8. On 22 January 2017, considering, (i) that neither the Registry nor I had received Beara’s alleged application for early release mentioned in the Prison Report;¹⁵ (ii) Beara’s precarious health condition; and (iii) the notification from Germany that the health condition of Beara prevents the continuation of the enforcement of Beara’s sentence and the situation now argues in favour of an early release from incarceration, I informed the Registry that I would consider the Notification as notification of eligibility for early release pursuant to paragraph 2 of the Practice Direction.¹⁶ The Registry was instructed, as a matter of urgency, to engage the steps set out in paragraph 4 of the Practice Direction.¹⁷

9. On 23 January 2017, the Registry conveyed to me a memorandum from the Office of the Prosecutor of the Mechanism (“Prosecution Memorandum” and “Prosecution”, respectively).¹⁸ On the same day, the Registry stated that it would inform Beara, via letter, that the President was considering, in accordance with the Practice Direction, Beara’s eligibility for early release pursuant to the Notification.¹⁹

10. On 27 January 2017, the Registry conveyed to me Beara’s response to the documents provided to him by the Registry, in accordance with paragraph 5 of the Practice Direction, which it had received, in turn, on 26 January 2017.²⁰ Beara informed the Registry of his desire for release as soon as possible.²¹

11. I note, in issuing this decision, that the German authorities requested “very quick action without any undue delay”.²² In the circumstances, I have taken available steps to expedite the procedure required under the Practice Direction. Essential aspects of the process, notably the requisite consultation with the Judges of the sentencing Chamber, who are also Judges of the Mechanism, and additional independent medical reports being sought, while undertaken in the most time efficient manner possible, have impacted my expeditious rendering of this decision.

¹⁴ Prison Report, p. 3.

¹⁵ Prison Report, p. 2.

¹⁶ Internal Memorandum from Judge Theodor Meron, President, to Mr. Olufemi Elias, Registrar, URGENT: Mr. Beara, dated 22 January 2017 (“22 January 2017 Memorandum”).

¹⁷ 22 January 2017 Memorandum.

¹⁸ Internal Memorandum from Ms. Åsa Rydberg van der Sluis, Legal Officer, Office of the Registrar, Hague Branch, to Judge Theodor Meron, President, Mr. Ljubiša Beara – Health Status, dated 23 January 2017 (“23 January 2017 Registry Memorandum”).

¹⁹ See 23 January 2017 Registry Memorandum.

²⁰ Internal Memorandum from Ms. Esther Halm, Legal Officer, Office of the Registrar, to Judge Theodor Meron, President, dated 27 January 2017, *transmitting* Beara’s comments (“Beara’s Response”).

III. DISCUSSION

A. 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. Article 26 of the Statute further provides that 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. 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.

14. Paragraph 2 of the Practice Direction provides that, upon a convicted person becoming eligible for pardon, commutation of sentence, or early release under the law of the enforcing State, the enforcing State shall, in accordance with its agreement with the United Nations on the enforcement of sentences and, where practicable, at least 45 days prior to the date of eligibility, notify the Mechanism accordingly. Paragraph 3 of the Practice Direction provides that a convicted person may directly petition the President for pardon, commutation of sentence, or early release, if he or she believes that he or she is eligible therefore.

15. Article 2(5) of the Enforcement Agreement, requires the German authorities to “notify the Mechanism immediately if the health condition of the convicted person prevents a continuation of enforcement, and shall procure a decision from the Mechanism regarding the termination of enforcement”. Article 8(1) of the Enforcement Agreement, provides, *inter alia*, that the enforcement of Beara’s sentence by Germany shall cease upon the early release, commutation, or

²¹ Beara’s Response, p. 1.

²² Notification, p. 2.

pardon of Beara having been determined by the President to be appropriate. The competent authorities of Germany shall terminate the enforcement of the sentence as soon as they are informed by the Registrar of the Mechanism (“Registrar”) of any decision or measure as a result of which the sentence ceases to be enforceable.²³

B. Eligibility for early release

16. Pursuant to Article 2(5) of the Enforcement Agreement, mentioned above, the German authorities informed the Mechanism that the health of Beara had seriously deteriorated, and they therefore requested the Mechanism “to render, as expeditiously as possible, a decision regarding the termination of enforcement of Mr. Beara’s sentence”.²⁴

17. While the Notification does not specifically state under which provision of German law Beara would be eligible for early release, I am satisfied, in these circumstances, that the contents of the Notification, including a request for a decision regarding the termination of enforcement of Beara’s sentence, combined with the Prison Report, which specifically states that “the situation now argues in favour of an early release from incarceration in Germany under the laws governing criminal procedure or as an act of clemency”,²⁵ are sufficient for the purposes of notification in accordance with paragraph 2 of the Practice Direction.

18. Given the urgency of the matter, and the humanitarian considerations set forth below, in the interests of judicial expediency, I have considered the above Notification as notification of Beara’s eligibility for early release within the meaning of paragraph 2 of the Practice Direction.

C. Gravity of Crimes

19. 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.

20. The crimes for which Beara was convicted are of very high gravity. In this regard, the Trial Chamber found that Beara was “a driving force behind the murder enterprise”,²⁶ and “a central figure in the organisation and execution of the genocide”.²⁷ It further found that Beara “had the clearest overall picture of the massive scale and scope of the killing operation”, and that “he had a

²³ Enforcement Agreement, Article 8(3).

²⁴ Notification, p. 2.

²⁵ Notification, p. 3.

²⁶ Trial Judgement, vol. 2, para. 1314. See Appeal Judgement, paras. 1967, 1972.

²⁷ Trial Judgement, vol. 2, para. 2164. See Appeal Judgement, paras. 1967, 1972.

very personal view of the staggering number of victims destined for execution”.²⁸ The Trial Chamber found “that Beara’s involvement in the murder operation was not characterised by a particular ‘zeal’, but his actions were cold and calculated. Even in the early stages of the murder operation, Beara’s approach is demonstrated by the conversation he had with Deronjić on the night of 13 July, when he announces his intent to ‘kill all’ the detained men, and without pause to consider or comment upon the horrific nature of his ‘orders’”.²⁹

21. In these circumstances, I am of the view that the high gravity of Beara’s offences weighs strongly against his early release.

D. Treatment of Similarly-Situated Prisoners

22. 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.

23. In this respect, I recall that ICTY convicts, like Beara, 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.³⁰

24. I further recall that, in accordance with the principle of treating similarly-situated prisoners equally, a person sentenced to life imprisonment shall be considered eligible for early release by the Mechanism upon having served more than two-thirds of the highest fixed terms sentence imposed by the ICTR, the ICTY, or the Mechanism.³¹ I note that for purposes of applying the two-thirds practice of the Mechanism to those sentenced to life imprisonment and serving their sentences under the supervision of the Mechanism, a sentence of life imprisonment is to be treated as equivalent to more than a sentence of 45 years.³²

²⁸ Trial Judgement, vol. 2, para. 2164. See Appeal Judgement, paras. 1265.

²⁹ Trial Judgement, vol. 2, para. 2166.

³⁰ 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 (public redacted version) (“*Galić Decision 2017*”), para. 20; *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.

³¹ *Galić Decision 2017*, para. 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 version) (“*Galić Decision 2015*”), para. 36.

³² *Galić Decision 2017*, para. 21. I note in this regard that, following the issuance of the *Galić Decision 2015*, a fixed-term sentence higher than 45 years was handed down by the International Criminal Tribunal for Rwanda (“ICTR”). Specifically, the Appeals Chamber of the ICTR in the case of *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, reduced the life sentences of Messrs. Arsène Shalom Ntahobali and Élie Ndayambaje to respective sentences of 47 years of imprisonment. See *Prosecutor v. Pauline Nyiramasuhuko et al.* Case No. ICTR-98-42-A, Judgement, 14 December 2015, pp. 1210, 1213. I recall in this regard that the interests of justice and the principle of

25. 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.³³

26. Based on the foregoing, Beara shall be considered eligible for early release by the Mechanism upon having served more than two-thirds of 45 years, which amounts to more than 30 years of his sentence. As of the date of this decision, and based on my own calculation, Beara has thus far served approximately 13 years of his sentence.

27. I recognize that this is a particularly early point in a lengthy sentence and consider the fact that Beara has only served 13 years of his life sentence to be a factor that weighs strongly against his early release.

E. Demonstration of Rehabilitation

28. 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 [.]

legal certainty require that no change in the calculation of the eligibility threshold for those sentenced to life imprisonment take place, notwithstanding the fact that a sentence higher than 45 years was handed down. *See Galić Decision 2015*, para. 38. I further 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 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 ICTY Prosecution); *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 ICTY Prosecution and because the convicted person had effectively completed two-thirds of his sentence once sentence remissions under national law were recognized).

³³ *Galić Decision 2017*, para. 22; *Bisengimana Decision*, paras. 21, 35.

29. As of the date of this decision, I have not received information regarding Beara's rehabilitation, nor do the German authorities intend to submit further information.³⁴ Nevertheless, I am of the view that the absence of this information, in the present circumstances of this case, should not weigh either way in my consideration of his early release.³⁵

F. Substantial Cooperation with the Prosecution

30. 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".

31. The Prosecution Memorandum states that Beara did not cooperate with the Prosecution in the course of his trial, appeal, or at any point while serving his sentence.³⁶ The Prosecution does not indicate whether it sought Beara's cooperation at any point during his trial or after he was convicted.³⁷

32. 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.³⁸ I therefore consider that Beara's lack of cooperation with the Prosecution is a neutral factor in determining whether or not to grant him early release.

G. Humanitarian Considerations

33. 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 have determined that the state of the convicted person's health may be taken into account in the context of an application for early release,

³⁴ 23 January 2017 Registry Memorandum, para. 2. According to this memorandum, the German authorities confirmed via e-mail to the Registry that they are not intending to submit any additional documentation, unless so requested.

³⁵ Cf. *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* Decision"), para. 17.

³⁶ Prosecution Memorandum, para. 2.

³⁷ See generally Prosecution Memorandum.

³⁸ See *Galić* Decision 2015, para. 34; *Prosecutor v. Dominique Ntawukulilyayo*, Case No. MICT-13-34-ES, Decision of the President on the Early Release of Dominique Ntawukulilyayo, 8 July 2016 (public redacted version), para. 31; *Ntakirutimana* Decision, para. 20.

especially when the seriousness of the condition makes it inappropriate for the convicted person to remain in prison any longer.³⁹

34. Beara was diagnosed with [REDACTED].⁴⁰ [REDACTED].⁴¹ [REDACTED].⁴² [REDACTED].⁴³ [REDACTED].⁴⁴

35. Subsequently, the German authorities supplied further information to the effect that, [REDACTED].⁴⁵ According to the Head Prison Doctor, [REDACTED].⁴⁶ [REDACTED].⁴⁷ The German authorities have advised the Mechanism that [REDACTED].⁴⁸

36. On 23 January 2017, the Medical Officer at the UNDU, Dr. Paulus Falke, gave a preliminary assessment, having reviewed the Prison Report. He reported that the medical situation, as described in the Prison Report, was accurate and consistent with the expected progression of the diagnosed illness.⁴⁹ On 24 January 2017, I requested that the Registry arrange for Dr. Paulus Falke, or another UNDU doctor should he not be available, to visit Beara and report back on his own view of the current medical situation.⁵⁰ A visit of Dr. Ernst-Jan van Gellicum, Deputy Medical Officer at the UNDU, with Beara was accordingly fixed for 2 February 2017.⁵¹

³⁹ See, e.g., *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, para. 31; *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.

⁴⁰ See 2 September 2016 Medical Report, p. 5, [REDACTED]. See, e.g., Internal Memorandum from Mr. Gus de Witt, Officer in Charge, Registry, Hague Branch; to Judge Theodor Meron, President, Mr. Ljubiša Beara – Health Status, dated 2 June 2016, conveying a letter from Tegel Correctional Facility, dated 18 April 2016.

⁴¹ 2 September 2016 Medical Report, p. 7.

⁴² 2 September 2016 Medical Report, p. 7.

⁴³ 2 September 2016 Medical Report, p. 7.

⁴⁴ Internal Memorandum from Judge Theodor Meron, President, to Ms. Tatjana Dawson, Deputy Chief, Office of the Registrar, ICTY, Mr. Ljubiša Beara – Health Status, dated 18 October 2016.

⁴⁵ Prison Report, p. 2.

⁴⁶ Prison Report, p. 3.

⁴⁷ Prison Report, p. 3 (emphasis in original).

⁴⁸ Notification, p. 2.

⁴⁹ 23 January 2017 Registry Memorandum, para. 6.

⁵⁰ Internal Memorandum from Judge Theodor Meron, President, to Mr. Olufemi Elias, Registrar, URGENT: Ljubiša Beara, dated 24 January 2017, para. 2. Specifically, at paragraph 3, I requested Dr. Falke to report on: [REDACTED].

⁵¹ See Internal Memorandum from Ms. Åsa Rydberg van der Sluis, Legal Officer, Office of the Registrar, Hague Branch, to Judge Theodor Meron, President, Mr. Ljubiša Beara – Report by Dr. Ernst-Jan van Gellicum, dated 6 February 2017, transmitting the formal report of Dr. Ernst-Jan van Gellicum, Deputy Medical Officer of the UNDU, following his visit to Beara on 2 February 2017, dated 6 February 2017 (“6 February 2017 Registry Memorandum” and “Dr. van Gellicum’s Medical Report”, respectively), and Beara’s consent for the release of his medical information, dated 2 February 2017.

37. Beara did not have substantive comments on the materials provided to him by the Registry under the Practice Direction, but stated his desire for release as soon as possible in view of his condition.⁵²

38. On 27 January 2017, the German authorities further informed the Mechanism that [REDACTED].⁵³ [REDACTED].⁵⁴

39. On 6 February 2017, I received Dr. van Gellicum's Medical Report on Beara's current medical situation, following his visit to the convicted person at the prison hospital [REDACTED], on 2 February 2017.⁵⁵ Dr. van Gellicum reported that [REDACTED].⁵⁶ [REDACTED].⁵⁷ [REDACTED].⁵⁸ [REDACTED].⁵⁹

40. Dr. van Gellicum cited the German physicians' estimation that Beara's life expectancy ranged [REDACTED].⁶⁰ [REDACTED].⁶¹ It was recorded that, following consultation between Beara and his treating physician, [REDACTED].⁶²

41. It was further confirmed by Dr. van Gellicum that [REDACTED].⁶³ [REDACTED].⁶⁴

42. Dr. van Gellicum reported that Beara, from a medical point of view, was receiving excellent care in the Prison Hospital, however, [REDACTED].⁶⁵ [REDACTED].⁶⁶ [REDACTED].⁶⁷

43. Following the visit on Dr. van Gellicum, on 6 February 2017, the Head of the Social-Therapeutic Section of Tegel Correctional Facility additionally reported that [REDACTED].⁶⁸ According to the treating physicians, [REDACTED].⁶⁹

⁵² Beara's Response, p. 1.

⁵³ Internal Memorandum from Ms. Esther Halm, Legal Officer, Office of the Registrar, to Judge Theodor Meron, President, dated 27 January 2017 ("27 January 2017 Memorandum"), para. 2, *transmitting* an email from the Head of the Social-Therapeutic Section, JVA Tegel ("Email Communication"), p. 2, and an advance copy of a *note verbale* from the Embassy of the Federal Republic of Germany to the Mechanism.

⁵⁴ Email Communication, p. 2. *See also* 27 January 2017 Memorandum, para. 2.

⁵⁵ *See* 6 February 2017 Registry Memorandum; Dr. van Gellicum's Medical Report, p. 1.

⁵⁶ Dr. van Gellicum's Medical Report, p. 1.

⁵⁷ Dr. van Gellicum's Medical Report, p. 1.

⁵⁸ Dr. van Gellicum's Medical Report, p. 1.

⁵⁹ Dr. van Gellicum's Medical Report, pp. 1-2.

⁶⁰ Dr. van Gellicum's Medical Report, p. 2.

⁶¹ Dr. van Gellicum's Medical Report, p. 2.

⁶² Dr. van Gellicum's Medical Report, p. 2.

⁶³ Dr. van Gellicum's Medical Report, p. 2.

⁶⁴ Dr. van Gellicum's Medical Report, p. 2.

⁶⁵ Dr. van Gellicum's Medical Report, p. 3.

⁶⁶ Dr. van Gellicum's Medical Report, p. 3.

⁶⁷ Dr. van Gellicum's Medical Report, p. 3.

⁶⁸ Internal Memorandum from Ms. Åsa Rydberg van der Sluis, Legal Officer, Office of the Registrar, Hague Branch, to Judge Theodor Meron, President, Mr. Ljubiša Beara – Medical condition, dated 6 February 2017 ("Medical Update"), para. 1.

44. On 7 February 2017, the Head of the Social-Therapeutic Section of Tegel Correctional Facility informed the Registry that [REDACTED].⁷⁰ [REDACTED].

45. I am of the opinion that the ongoing enforcement of Beara's sentence, in such present conditions that (i) [REDACTED]; (ii) [REDACTED]; (iii) curative medical care is no longer medically-indicated and [REDACTED]; (iv) Beara is socially isolated; and (v) his life expectancy is estimated at a few weeks at the most, would be tantamount to violation of Beara's internationally-guaranteed human right not to be subjected to inhuman or degrading treatment or punishment.⁷¹ I adopt the view of the German authorities, consistent with all medical reports received to date, that the severity of Beara's health condition, and the rapid deterioration of his health, have presently become irreconcilable with having his prison sentence executed at a correctional facility.⁷²

46. Accordingly, I am satisfied that the clear and compelling humanitarian considerations discussed above weigh strongly in favour of a grant of release from imprisonment.

H. Conclusion

47. While I have given due consideration to the particular gravity of the crimes for which Beara was convicted, as well as the early stage of Beara's sentence, it is apparent, given the severe and rapid deterioration of Beara's health condition successively advised by the German authorities and confirmed by United Nations medical personnel, that his present life expectancy has now become highly abbreviated. I further recall that, as confirmed by the German authorities, neither Tegel Correctional Facility, in which Beara has been serving his sentence, nor any other detention facility in Germany, is equipped with the means necessary to address the health needs of seriously-ill patients.⁷³ Nor does it appear a viable option for him to be returned to The Netherlands. Accordingly, on the basis of the above-mentioned specific medical circumstances, I am of the view on humanitarian grounds, and in accordance with human rights principles, that clear and compelling reasons exist that make it no longer appropriate, at this time, for Beara to remain in prison, notwithstanding the significant factors which weigh against release.

⁶⁹ Medical Update, para. 1.

⁷⁰ Internal Memorandum from Ms. Åsa Rydberg van der Sluis, Legal Officer, Office of the Registrar, Hague Branch, to Judge Theodor Meron, President, Mr. Ljubiša Beara – Medical condition, dated 7 February 2017 ("7 February 2017 Update"), para. 1.

⁷¹ Article 7 of International Covenant on Civil and Political Rights; Article 3 of European Convention on Human Rights. See also *Paposhvili v. Belgium*, no. 41738/10, European Court of Human Rights ("ECHR") Judgement of 13 December 2016, para. 175; *Rozhkov v. Russia*, no. 64140/00, ECHR Judgement of 19 July 2007, para. 104; *Hüseyn Yildirim v. Turkey*, no. 2778/02, ECHR Judgement of 3 May 2007, paras. 73-74; *Farbtuhs v. Latvia*, no. 4672/02, ECHR Judgement of 2 December 2004, paras. 51-53, 61; *Papon v. France* (no. 1), no. 64666/01, Decision on Admissibility of 7 June 2001, pp. 7-8.

⁷² Prison Report, p. 3 (emphasis in original). See also *Rozhkov v. Russia*, ECHR Judgement of 19 July 2007, para. 104.

⁷³ Notification, p. 2.

48. My fellow Judges of the Mechanism, who were also Judges of the sentencing Chamber, have agreed that sufficient humanitarian considerations exist to warrant release but have expressed concerns with respect to granting Beara early release. [REDACTED]. Accordingly, it was recommended by the Judges of the sentencing Chamber, who are also Judges of the Mechanism, that Beara be granted a conditional release and that reporting obligations be placed on the State of release to keep the Mechanism informed of Beara's health condition in the event that revocation should become necessary.⁷⁴ While such an approach constitutes a novelty in terms of approaches that have been taken to applications for early release, I am satisfied that the clear and compelling circumstances in this case warrant Beara's discharge from detention but that the gravity of the crimes for which Beara was convicted, coupled with the limited amount of time he has served of his life sentence, warrant the taking of such an approach.

49. Accordingly, having considered the factors identified in Rule 151 of the Rules as well as all the relevant information on the record, given the specific, clear, and compelling humanitarian circumstances that exist at this time, I hereby grant Beara's conditional release effective on this specific humanitarian basis immediately, or as soon as practicable thereafter. I note in that regard that, should Beara's condition evolve in a non-terminal fashion, notwithstanding the consistent views of the German authorities which underlie this decision, I have competence, and reserve the possibility, to issue such corrective orders as may be necessary, including, *inter alia*, ordering the enforcement of the remainder of Beara's sentence and his return to the UNDU.⁷⁵ In that respect, I

⁷⁴ I note that in the past provisional release was granted to a convicted person who was still in the custody of the UNDU, awaiting transfer to an enforcement state. See *Prosecutor v. Drago Nikolić*, Case No. MICT-15-85-ES.4, Public Redacted Version of the 20 July 2015 Decision of the President on the Application for Early Release or Other Relief of Drago Nikolić, 13 October 2015 ("Nikolić Decision"). In the current matter, there are legal as well as practical issues that constrain my ability to consider provisional release. Beara is currently in the custody of Germany, and the regime of provisional release that applies to persons in the custody of the Mechanism is not applicable to individuals serving their sentences in an enforcement State. I also note that the Prosecution appealed the *Nikolić* Decision, arguing, *inter alia*, that, according to Rule 68 of the Rules, the power to grant provisional release lay explicitly with Trial and Appeals Chambers and that, in considering provisional release, the Prosecution should be heard prior to a convicted person's provisional release. See *Prosecutor v. Drago Nikolić*, Case No. MICT-15-85-ES.4, Prosecution Appeal of the Decision Granting Provisional Release to Drago Nikolić, 27 July 2015 (confidential). While an Appeals Chamber was constituted to deal with this appeal, Drago Nikolić died and therefore the Chamber held that it lacked the jurisdiction to continue the proceedings. See *Prosecutor v. Drago Nikolić*, Case No. MICT-15-85-ES.4, Decision on Prosecution Appeal of the Decision Granting Provisional Release, 22 October 2015. As such, whether as President I have the competence to issue a decision on provisional release, even should the individual remain in the custody of the UNDU, has yet to be resolved by the Appeals Chamber. See also *Prosecutor v. Zdravko Tolimir*, Case No. MICT-15-95-ES, Order Assigning Judges of the Appeals Chamber to Decide a Motion for Provisional Release, 18 November 2015.

⁷⁵ The Mechanism, in this regard, received guarantees from the Government of the Republic of Serbia, stating that "it will comply with all orders by the Mechanism so that the convicted person will be accessible to the Mechanism at any time". See Internal Memorandum from Ms. Åsa Rydberg van der Sluis, Legal Officer, Office of the Registrar, Hague Branch, to Judge Theodor Meron, President, Mr. Ljubiša Beara – Guarantees from the Government of Serbia, dated 6 February 2017, transmitting guarantees issued by the Government of the Republic of Serbia in the event Beara is released by the Mechanism, dated 24 January 2017 (transmitted to the Registry on 4 February 2017, translation received 6 February 2017).

require the State to which Beara is released to report to me within one week of the rendering of this decision on the status of Beara's health and every week thereafter.

IV. DISPOSITION

50. For the foregoing reasons and pursuant to Article 26 of the Statute, Rules 150 and 151 of the Rules, paragraph 9 of the Practice Direction, and Article 8 of the Enforcement Agreement, I hereby **GRANT** the Notification, effective immediately, or as soon as practicable thereafter.

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

52. I further,

REQUEST the German authorities to report to the Mechanism on the status of Beara's health, on a weekly basis, pending the implementation of his conditional release to the Republic of Serbia; and

ORDER as follows:

- i. During the period of his conditional release, Beara shall abide by the following conditions:
 - a. Beara shall remain within the confines of his place of residence in the Republic of Serbia, and – if strictly necessary for the purpose of medical treatment – the local hospital in Belgrade, Republic of Serbia, apart from his travel to and from these locations and as specifically authorized by me;
 - b. Beara shall remain under 24-hour armed surveillance by authorized officials of the Ministry of Interior of the Republic of Serbia throughout his presence in the Republic of Serbia;
 - c. Beara shall surrender all his travel documents to the Public Security Station in the Republic of Serbia for the entire duration of his conditional release;
 - d. Beara 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;

- e. Beara 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
- f. Beara shall comply with any order I issue varying the terms of or terminating his conditional release, including any order that he return to the custody of the Mechanism; and

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 Beara shall be delivered and who shall accompany Beara from Germany to the Republic of Serbia, and, if needed, from the Republic of Serbia back to the custody of the Mechanism;
- ii. Notifying, as soon as practicable, myself and the Registrar of the name(s) of these designated official(s);
- iii. Ensuring Beara's personal security and safety while on conditional release in the Republic of Serbia;
- iv. Providing 24-hour armed surveillance of Beara throughout his stay in the Republic of Serbia;
- v. Covering all expenses in connection with Beara's conditional release including, but not limited to, the transport from Germany to the Republic of Serbia;
- 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 Beara's security, including full reports of investigations related to such threats;
- viii. Detaining Beara 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 conditional release as set out in the present decision, and reporting immediately any such breach to the Registry and myself;

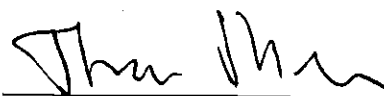
- ix. Respecting the primacy of the Mechanism in relation to any existing or future proceedings in the Republic of Serbia concerning Beara;
- x. Submitting a weekly written report to the Mechanism confirming the presence of Beara in the Republic of Serbia and his adherence to the conditions of his conditional release and containing information about any change in his health, whether a deterioration or an improvement;
- xi. Complying strictly with any other or further requirements concerning this conditional release; and
- xii. Complying with any order issued by the President, including any order to return Beara to the custody of the Mechanism; and

INSTRUCT the Registrar to:

- i. Consult with the German authorities and the authorities of the Republic of Serbia as to the practical arrangements for Beara's conditional release;
- ii. Request the authorities of the State(s) through whose territory Beara 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 Beara should he attempt to escape during travel.

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

Done this 16th day of June 2017,
At The Hague,
The Netherlands.


Judge Theodor Meron
President

[Seal of the Mechanism]