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Counsel for Mr. Zelenovic: Mr. Marko Obradovic (1 cc)			

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Mechanism for International Criminal Tribunals

Case No. MICT-15-89-ES

Date: 15 September 2015

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

Decision of: 15 September 2015

PROSECUTOR

v.

DRAGAN ZELENović

PUBLIC REDACTED

**PUBLIC REDACTED VERSION OF THE 28 AUGUST 2015
DECISION OF THE PRESIDENT ON THE
EARLY RELEASE OF DRAGAN ZELENović**

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Mathias Marcussen

Counsel for Mr. Dragan Zelenović:

Mr. Marko Obradovic

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively), am seised of a letter I received from Mr. Dragan Zelenović (“Zelenović”), dated 9 May 2014 (“Application”), requesting, *inter alia*, that he be granted pardon, commutation of sentence, or early release.¹ 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 paragraphs 3, 4, and 5 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. Zelenović was arrested on 22 August 2005 and transferred to Bosnia and Herzegovina on 8 June 2006.³ On 10 June 2006, Zelenović was transferred to the custody of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and detained at the United Nations Detention Unit.⁴ On 14 December 2006, the Office of the Prosecutor of the ICTY (“ICTY Prosecution”) and Zelenović jointly filed a motion for consideration of a plea agreement pursuant to Rule 62*ter* of the ICTY Rules of Procedure and Evidence.⁵ Zelenović pleaded guilty to seven counts of rape and torture as crimes against humanity pursuant to Article 7(1) of the ICTY Statute on 17 January 2007.⁶

3. On 4 April 2007, Trial Chamber I of the ICTY (“Trial Chamber”) convicted Zelenović in accordance with his guilty plea and sentenced him to 15 years’ imprisonment, with credit given for the time he had already served from 22 August 2005.⁷ Zelenović appealed the Sentencing Judgement on 27 April 2007;⁸ an appeal which was denied in its entirety by the ICTY Appeals

¹ Application, para. 3.

² MICT/3, 5 July 2012.

³ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-S, Sentencing Judgement, 4 April 2007 (“Sentencing Judgement”), para. 4.

⁴ Sentencing Judgement, para. 4.

⁵ Sentencing Judgement, para. 10; *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-PT, Joint Motion for Consideration of Plea Agreement Between Dragan Zelenović and the Office of the Prosecutor Pursuant to Rule 62 *ter*, 14 December 2006 (“Plea Agreement”). On 16 January 2007, the parties filed an annex to the Plea Agreement, consisting of a redacted and revised copy of the indictment reflecting the charges and underlying incidents to which Zelenović agreed to plead guilty. *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-PT, Joint Submission of Annex to Plea Agreement, 16 January 2007. *See also* Sentencing Judgement, paras. 11-12.

⁶ Sentencing Judgement, para. 10; Plea Agreement, para. 2.

⁷ Sentencing Judgement, paras. 71-72.

⁸ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-A, Defence Notice for Leave to Appeal Sentencing Judgment, 27 April 2007.

Chamber on 31 October 2007.⁹ Zelenović was transferred to Belgium on 27 February 2008 to serve the remainder of his sentence.¹⁰

II. APPLICATION

4. Following receipt of the Application, I directed the Registry of the Mechanism (“Registry”) to request relevant reports and observations from the Office of the Prosecutor of the Mechanism (“Prosecution”) and the Belgian authorities, pursuant to paragraphs 3, 4, and 5 of the Practice Direction.¹¹ On 29 July 2014, the Registry transmitted to me: (i) a letter from the Belgian Ministry of Justice conveying reports regarding Zelenović’s custodial behaviour and psycho-social state, dated 4 July 2014 (“4 July 2014 Letter”); (ii) reports on Zelenović’s conduct and psycho-social state while in custody, dated 2 July 2014, 10 July 2012 and 2 July 2012 (“Custodial Report”, “Psycho-Social Report”, and “Anthropological Report”, respectively); and (iii) memoranda from the Prosecution regarding Zelenović’s cooperation with the ICTY Prosecution.¹² On 27 July 2015, the Registry transmitted to me, *inter alia*, a further psycho-social report, dated 2 July 2015 (“2 July 2015 Report”).¹³

5. On 5 August 2014, Zelenović requested that legal counsel be assigned to him to assist in reviewing the material sent to him by the Registry pursuant to paragraph 5 of the Practice Direction. Between October 2014 and May 2015, communications ensued between the Registry and myself to determine whether Zelenović as a convicted person is entitled to legal aid provided for by the Mechanism. On 27 May 2015, I received a letter from Mr. Marko Obradovic (“Obradovic”), counsel acting on behalf of Zelenović, stating that Zelenović will have served two-thirds of his sentence on 21 August 2015 and should therefore be granted early release.¹⁴ On 1 June 2015, I informed Zelenović that I was in receipt of the letter sent by his counsel on his behalf and that his

⁹ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-A, Judgement on Sentencing Appeal, 31 October 2007, p. 13.

¹⁰ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-ES, Order Designating the State in which Dragan Zelenović is to Serve his Prison Sentence, 7 December 2007. *See also* Press Release, “Dragan Zelenović Transferred to Belgium to Serve Sentence”, available at <http://www.icty.org/sid/8921>.

¹¹ Memorandum from Judge Theodor Meron, President, to Mr. Gus de Witt, Officer in Charge, Office of the Registrar, Hague Branch, dated 21 May 2014.

¹² Memorandum from MR. Gus de Witt, Officer in Charge, Office of the Registrar, Hague Branch, to Judge Theodor Meron, President, dated 29 July 2014, *transmitting* Letter, dated 4 July 2014, Custodial Report, Psycho-Social Report, Anthropological Report, dated 2 July 2014, 10 July 2012 and 2 July 2012, respectively, and memoranda from Mr. Mathias Marcussen, Officer in Charge, Office of the Prosecutor, The Hague Branch, to Mr. Gus de Witt, Officer in Charge, Office of the Registrar, dated 10 April 2014 (“Prosecution Memorandum”) and 26 May 2014.

¹³ Memorandum from Mr. John Hocking, Registrar, to Judge Theodor Meron, President, dated 27 July 2015, transmitting, *inter alia*, the 2 July 2015 Report. I note that it is unclear on the face of the 2 July 2015 Report whether it dates back to 2 July 2012 (the French version refers to “my report of 2 July 2012”) or reflects a more recent meeting with Zelenović in July 2015. However, given that the original, French version of the 2 July 2015 Report has a time stamp from 7 July 2015, refers to Lantin prison, where Zelenović has been detained since July 2013, and is referenced in the preamble as dating from 2 July 2015, I am of the view that the reference to 2 July 2012 may be a typographical error.

request for assignment of counsel by the Mechanism was therefore considered moot.¹⁵ I further informed Zelenović that, as legal counsel acting on his behalf, Obradovic could respond to the documentation sent to Zelenović by the Registry within 10 days of receipt of the 1 June 2015 Letter.¹⁶ On 5 June 2015, Obradovic, on behalf of Zelenović, responded to the documentation conveyed to Zelenović, reiterating that Zelenović requests release from 21 August 2015.¹⁷

III. DISCUSSION

6. In coming to my decision on whether it is appropriate to grant early release for Zelenović, I have consulted the Judges of the sentencing Chamber who are Judges of the Mechanism, pursuant to Rule 150 of the Rules.

A. Applicable Law

7. 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, and 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.

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

9. 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,

¹⁴ Letter from Mr. Marko Obradovic, Counsel for Zelenović, to Judge Theodor Meron, President, dated 27 May 2015 (“27 May 2015 Letter”).

¹⁵ Letter from Judge Theodor Meron, President, to Zelenović, dated 1 June 2015 (“1 June 2015 Letter”).

¹⁶ 1 June 2015 Letter.

¹⁷ Letter from Mr. Marko Obradovic, Counsel for Zelenović, to Judge Theodor Meron, President, dated 5 June 2015.

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.

10. Article 3(2) of the Agreement between the United Nations and the Government of the Kingdom of Belgium on Enforcement of Sentences Handed Down by the International Criminal Tribunal for the former Yugoslavia, dated 2 May 2007 (“Enforcement Agreement”), provides that the conditions of imprisonment shall be governed by the laws of Belgium, subject to the supervision of the ICTY (and now the Mechanism).¹⁸ Article 8(2) of the Enforcement Agreement, applied *mutatis mutandis* to the Mechanism, provides, *inter alia*, that the President shall determine whether pardon or commutation of sentence is appropriate, and the Registrar shall inform Belgium of the President’s determination accordingly.

B. Eligibility under Belgian Law

11. According to a prior submission from the Belgian Ministry of Justice, Belgian legislation provides that a convicted person who has served one-third of his sentence is eligible for provisional release.¹⁹ Zelenović, having served ten years, or two-thirds of his sentence, is therefore eligible for provisional release pursuant to Belgian law. I note, however, that even if Zelenović is eligible for early release under the domestic law of Belgium, 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.

¹⁸ Security Council Resolution 1966 (2010) provides that all existing agreements still in force as of the commencement date of the Mechanism shall apply *mutatis mutandis* to the Mechanism. Accordingly, the Enforcement Agreement applies to the Mechanism. See U.N. Security Council Resolution 1966, U.N. Doc. S/RES/1966 (2010), 22 December 2010, para. 4 (“[T]he Mechanism shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR, respectively, subject to the provisions of this resolution and the Statute of the Mechanism, and all contracts and international agreements concluded by the United Nations in relation to the ICTY and the ICTR, and still in force as of the relevant commencement date, shall continue in force *mutatis mutandis* in relation to the Mechanism[.]”). According to Article 25(2) of the Statute, “[t]he Mechanism shall have the power to supervise the 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”.

¹⁹ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-ES, Decision of President on Early Release of Dragan Zelenović, 30 November 2012, para. 10, citing Letter from Mr. Willy de Buck, Permanent Representative of Belgium to the International Institutions in The Hague, to Judge Theodor Meron, President, dated 31 August 2012, transmitting Notification from Ms. Pauline Warnotte, Attaché of the Belgian International Humanitarian Law Division, dated 24 August 2012. See also Custodial Report, p. 1.

C. Gravity of Crimes

12. The crimes to which Zelenović pleaded guilty are of a very high gravity. The Trial Chamber found in this regard that in addition to having co-perpetrated or aided and abetted a number of instances of sexual abuse, Zelenović “personally committ[ed] nine rapes, eight of which were qualified as both torture and rape.”²⁰ The Trial Chamber observed that “the scale of the crimes committed was large and [...] Zelenović’s participation in the crimes was substantial.”²¹ The Trial Chamber also considered that the victims in this case were “in a particularly vulnerable situation at the time of the commission of the crime”, and that Zelenović “was aware, and took advantage of, this vulnerability”.²² The Trial Chamber noted that the victims “suffered the unspeakable pain, indignity, and humiliation of being repeatedly violated, without knowing whether they would survive the ordeal”, and that “[t]he scars left from the crimes committed against them were deep and might never heal.”²³

13. Based on the foregoing, I am of the view that the very high gravity of Zelenović’s crimes is a factor that weighs against his early release.

D. Eligibility and Treatment of Similarly-Situated Prisoners

14. I recall that persons sentenced by the ICTY, like Zelenović, are “similarly-situated” to all other prisoners under the Mechanism’s supervision and thus are to be considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the tribunal that convicted them.²⁴ 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.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

²⁰ Sentencing Judgement, para. 38.

²¹ Sentencing Judgement, para. 38.

²² Sentencing Judgement, para. 39.

²³ Sentencing Judgement, para. 40.

²⁴ See *Prosecutor v. Youssouf Muniyaka*, Case No. MICT-12-18-ES.1, Public Redacted Version of the 22 July 2015 Decision of the President on the Early Release of Youssouf Muniyaka, 22 July 2015 (“*Muniyaka* Decision”), para. 14. 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.

²⁵ See *Prosecutor v. Stanislav Galic*, Case No. MICT-14-83-ES, Reasons for the President’s Decision to Deny the Early Release of Stanislav Galic and Decision on Prosecution Motion, 23 June 2015, para. 27 (public redacted version); *Bisengimana* Decision, para. 20.

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.²⁶

15. According to the 27 May 2015 Letter, and based on my own calculations, Zelenović will have served two-thirds of his sentence as of 21 August 2015.

E. Demonstration of Rehabilitation

16. Both the Custodial Report and the 4 July 2014 Letter note that Zelenović has not been the subject of any disciplinary reports.²⁷ Zelenović “regularly goes to the exercise yard and attends activities on his floor”,²⁸ and received occasional visits from the Ittre Prison’s Orthodox chaplain and representatives of the International Committee of the Red Cross.²⁹ [REDACTED].³⁰ The Custodial Report indicates that Zelenović hopes to return to the town of Foča in Bosnia and Herzegovina, where his wife and children live.³¹

17. According to the Psycho-Social Report, Zelenović’s “behaviour in prison has been very positive”.³² Zelenović is described as “a calm detainee who respects the rules, the prison staff and his peers”.³³ The Psycho-Social Report further notes that there was only one disciplinary report about Zelenović between February 2008, when he arrived at the Ittre Prison, and July 2012. This report, which was not followed up on, concerned his refusal to work in the dustiest of workshops due to his respiratory problems.³⁴

²⁶ See *Munyakazi* Decision, para. 14; *Bisengimana* Decision, paras. 21, 35. I note, for clarification purposes, that the two-thirds threshold does not prohibit enforcement States from notifying the Mechanism whenever convicted persons become eligible for pardon, commutation of sentence, or early release under national law, even before the completion of two-thirds of their sentence. See generally Practice Direction, para. 2. Paragraph 3 of the Practice Direction also allows a convicted person to directly petition the President 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).

²⁷ 4 July 2014 Letter, p. 1; Custodial Report, p. 2.

²⁸ 4 July 2014 Letter, p. 2.

²⁹ Custodial Report, p. 2.

³⁰ Custodial Report, p. 3.

³¹ Custodial Report, p. 3.

³² Psycho-Social Report, p. 9.

³³ Psycho-Social Report, p. 9.

³⁴ Psycho-Social Report, p. 9.

18. The Psycho-Social Report observes that Zelenović's attitude towards the crimes for which he was convicted "is somewhat ambivalent".³⁵ According to the Psycho-Social Report, Zelenović claims to have assumed partial responsibility for acts committed by his subordinates, whose actions he regrets.³⁶ In regards to facts and evidence that directly implicate him, Zelenović generally admits that "he had various sexual relations", but regrets his inability "to recall the specific facts".³⁷

19. With respect to the prospect of reintegrating into society, the Psycho-Social Report notes that "[t]he risk of committing new and serious offences seems reduced considering that the events occurred in a special socio-political context, which no longer affects the country following a territorial compromise".³⁸ The Psycho-Social Report goes on to note that "the specific framework of various military and paramilitary functions of which [Zelenović] was part no longer appears to exist".³⁹

20. Based on the foregoing, I consider that Zelenović has demonstrated some signs of rehabilitation and I am therefore inclined to weigh this factor in favour of his early release.

F. Cooperation with the Prosecution

21. According to the Prosecution, Zelenović "cooperated in accordance with his plea agreement [...]. No additional cooperation has been given".⁴⁰ I note that the entry of a guilty plea by an accused person constitutes cooperation with the Prosecution.⁴¹ I further note that the Prosecution does not indicate whether it in fact sought additional cooperation from Zelenović in addition to his guilty plea. While accepting that the entry of a guilty plea was a factor taken into account by the Trial Chamber, I am of the view that this factor weighs in favour of Zelenović's early release, primarily due to the impact such a plea has on the efficient administration of justice.

G. Conclusion

22. In light of the above, and having considered the factors delineated in Rule 151 of the Rules, I hereby grant Zelenović early release, effective 4 September 2015, or as soon as practicable thereafter. Although the crimes for which Zelenović was convicted are very grave, Zelenović's completion of two-thirds of his sentence, his demonstration of some rehabilitation, and his

³⁵ Psycho-Social Report, p. 7. *See also* Anthropological Report, p. 4.

³⁶ Psycho-Social Report, p. 7.

³⁷ Psycho-Social Report, p. 8.

³⁸ Psycho-Social Report, p. 11. *See also* 2 July 2015 Report, p. 7.

³⁹ Psycho-Social Report, p. 11.

⁴⁰ Prosecution Memorandum, para. 2.

⁴¹ *See Prosecutor v. Ranko Čević*, Case No. MICT-14-66-ES, Public Redacted Version of the 30 April 2014 Decision of the President on the Early Release of Ranko Čević, 28 May 2014, para. 24, fn. 38, *citing Bisengimana* Decision, para. 20.

cooperation with the ICTY Prosecution counsel in favour of his early release. The view that Zelenović should be granted early release is shared by the Judges of the sentencing Chamber who are Judges of the Mechanism.

IV. DISPOSITION

23. For the foregoing reasons and pursuant to Article 26 of the Statute, Rules 150 and 151 of the Rules, and paragraph 9 of the Practice Direction, I hereby **GRANT** Zelenović early release effective 4 September 2015, or as soon as practicable thereafter.

24. The Registrar is hereby **DIRECTED** to inform the Belgian authorities 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 15th day of September 2015,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Mechanism]



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