

**UNITED  
NATIONS**



International Residual Mechanism  
for Criminal Tribunals

Case No.: MICT-14-82-ES

Date: 7 August 2020

Original: English

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**THE PRESIDENT OF THE MECHANISM**

**Before: Judge Carmel Agius, President**

**Registrar: Mr. Abubacarr Tambaou**

**Decision of: 7 August 2020**

**PROSECUTOR**

**v.**

**MILAN MARTIĆ**

***PUBLIC***

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**DECISION ON THE EARLY RELEASE  
OF MILAN MARTIĆ**

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**The Office of the Prosecutor:**

Mr. Serge Brammertz

**Counsel for Mr. Milan Martić:**

Mr. Predrag Milovančević

**Republic of Estonia**

**I, CARMEL AGIUS**, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively);

**BEING SEISED** of a notification from the Republic of Estonia (“Estonia”) regarding Mr. Milan Martić’s (“Martić”) eligibility under Estonian law to be considered for release on parole under electronic surveillance, received by the Registry of the Mechanism (“Registry”) on 23 September 2019, and conveyed to me on 26 September 2019;<sup>1</sup>

**BEING FURTHER SEISED** of a motion filed by Martić on 23 October 2019, wherein he requests early release, that his sentence be commuted with conditional early release, or that he be transferred to another enforcement State;<sup>2</sup>

**NOTING** that, on 15 May 2002, Martić surrendered and was transferred to the United Nations Detention Unit in The Hague, the Netherlands;<sup>3</sup>

**NOTING** that, on 12 June 2007, Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) convicted Martić and sentenced him to 35 years of imprisonment,<sup>4</sup> and, on 8 October 2008, the Appeals Chamber of the ICTY affirmed this sentence;<sup>5</sup>

**NOTING** that, on 26 June 2009, Martić was transferred to Estonia to serve the remainder of his sentence;<sup>6</sup>

**NOTING** that in the Notification, the Estonian authorities indicate that: (i) the Estonian Penal Code permits a court to release on parole under electronic surveillance certain categories of offenders

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<sup>1</sup> See Internal Memorandum from the Registrar of the Mechanism (“Registrar”) to the President, dated 26 September 2019 (confidential) *transmitting* the Notice, 17 September 2019. See also Registrar’s Submission of Notification Transmitted by the Republic of Estonia, 25 March 2020 (public, with public redacted Annex) (“Notification”).

<sup>2</sup> Application for Commutation of Sentence or Early Release or Transfer to Another Enforcement State, 23 October 2019 (confidential and *ex parte*) (“Direct Petition”), paras. 1-2, 28, 32. As all proceedings before the Mechanism shall be public unless exceptional reasons require keeping them confidential, and as no information that ought to remain to confidential and/or *ex parte* will be revealed in the present Decision, I consider that it is appropriate to issue this Decision publicly and *inter partes* despite the classification of Martić’s filing. See *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-ES, Order to Reclassify the Decision on Request for Review of Registrar’s Decision on Video Communications, 1 May 2020, p. 1, fn. 4 and references cited therein.

<sup>3</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007 (“Trial Judgement”), para. 522; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008 (“Appeal Judgement”), Annex A, para. 2.

<sup>4</sup> Trial Judgement, paras. 518-519.

<sup>5</sup> Appeal Judgement, paras. 354-355.

<sup>6</sup> See ICTY Press Release, Milan Martić Transferred to Estonia to Serve Sentence, 26 June 2009, <https://www.icty.org/en/sid/10173>. See also *Prosecutor v. Milan Martić*, Case No. IT-95-11-ES, Order Designating State in which Milan Martić is to Serve his Sentence, 18 February 2009 (confidential, made public pursuant to instructions contained therein).

who have served half of the imposed punishment and who agree to electronic surveillance;<sup>7</sup> (ii) on 15 November 2019 Martić will have served half of his sentence and, as of that date, an Estonian court would be entitled to consider whether or not to grant his release on parole;<sup>8</sup> (iii) Martić provided the requisite consent to electronic surveillance on 22 August 2019;<sup>9</sup> and (iv) if the Estonian court decides that release on parole is justified, upon release from prison, Martić would be subject to expulsion from Estonia as he does not have a place of residence in Estonia, a prerequisite for electronic surveillance;<sup>10</sup>

**NOTING** that in the Direct Petition, Martić submits that: (i) he is eligible for early release or commutation of sentence under Estonian Law;<sup>11</sup> (ii) he is willing to be released subject to restrictions;<sup>12</sup> and (iii) the conditions of his detention do not meet the international standards of detention foreseen by the Enforcement Agreement between the United Nations and the Government of Estonia, and in order to prevent further breaches he seeks the requested remedies;<sup>13</sup>

**NOTING** that, on 6 April 2020, Martić filed a supplement to his Direct Petition, wherein he contends that the COVID-19 pandemic has created a new circumstance that should be taken into account in the determination of the Direct Petition, in particular since his age and medical condition place him a high risk category;<sup>14</sup>

**RECALLING** that, pursuant to Rule 150 of the Rules, the President shall determine whether pardon, commutation of sentence, or early release is appropriate, in consultation with: (i) any Judges of the sentencing Chamber who are Judges of the Mechanism; or (ii) at least two other Judges, if none of the Judges who imposed the sentence are Judges of the Mechanism;

**CONSIDERING** that, as none of the Judges who imposed Martić’s sentence are Judges of the Mechanism, I have consulted with two Judges of the Mechanism, namely Judge Liu Daqun and Judge Claudia Hofer;<sup>15</sup>

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<sup>7</sup> Notification, Registry Pagination (“RP”) 520 *referring to* Penal Code of Estonia, clause 76(2)(1).

<sup>8</sup> Notification, RP 520-519.

<sup>9</sup> Notification, RP 520.

<sup>10</sup> Notification, RP 519.

<sup>11</sup> Direct Petition, paras. 1-2.

<sup>12</sup> Direct Petition, paras. 2, 28-31.

<sup>13</sup> Direct Petition, paras. 2-28, 32. *See also* Agreement between the Government of the Republic of Estonia and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, dated 11 February 2008 (“Enforcement Agreement”), Article 3(5).

<sup>14</sup> Supplement Submission to the Application for Commutation of Sentence or Early Release or Transfer to Another Enforcement State, 6 April 2020 (confidential and *ex parte*) (“Supplemental Submission”), paras. 1, 3-10. Martić also reiterates arguments raised in the Direct Petition. *See* Supplemental Submission, paras. 1-2, 8, 10. *See supra* fn. 2.

<sup>15</sup> *See* Rule 150 of the Rules; Practice Direction, para. 16.

**RECALLING** that pursuant to Article 25 of the Statute of the Mechanism (“Statute”), imprisonment in an enforcement State shall be in accordance with the applicable law of the State concerned, subject to the Mechanism’s supervision;

**RECALLING FURTHER** that pursuant to Article 26 of the Statute: (i) if a convicted person is becomes eligible for pardon or commutation of sentence pursuant to the law of the enforcement State, that State shall notify the Mechanism accordingly; and (ii) 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;<sup>16</sup>

**RECALLING** that Article 3(3) of the Enforcement Agreement, which applies *mutatis mutandis* to the Mechanism,<sup>17</sup> provides that the conditions of imprisonment shall be governed by Estonian law, subject to the Mechanism’s supervision;

**RECALLING FURTHER** that Article 8 of the Enforcement Agreement provides, *inter alia*, that if a convicted person has become eligible for early release under Estonian law, the President will provide his views as to whether such early release is appropriate, and Estonia will consider these views and respond to the President before taking any decision on the matter;<sup>18</sup>

**RECALLING** that all convicted persons serving a sentence under the Mechanism’s supervision are eligible to be considered for early release upon having served two-thirds of their sentences, irrespective of: (i) whether the person was convicted by the International Criminal Tribunal for Rwanda (“ICTR”), the ICTY, or the Mechanism; (ii) where the sentence is being served; and (iii) whether an early release matter is brought before the President through a direct petition by the convicted person or a notification from the relevant enforcement State;<sup>19</sup>

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<sup>16</sup> While Article 26 of the Statute does not specifically mention requests for early release of convicted persons, the President’s power to deal with such requests is reflected in the Rules of Procedure and Evidence of the Mechanism (“Rules”). See Rules 149-151 of the Rules; *Prosecutor v. Radoslav Brđanin*, Case No. MICT-13-48-ES, Decision on the Application of Radoslav Brđanin for Early Release, 28 February 2020 (public redacted version) (“*Brđanin Decision*”), paras. 24-25; *Prosecutor v. Miroslav Bralo*, Case No. MICT-14-78-ES, Decision on the Early Release of Miroslav Bralo, 31 December 2019 (public redacted version) (“*Bralo Decision*”), paras. 17-18.

<sup>17</sup> See U.N. Security Council Resolution 1966, U.N. Doc. S/RES/1966 (2010), 22 December 2010, para. 4. See also Rule 128 of the Rules.

<sup>18</sup> Enforcement Agreement, Articles 8(1), 8(2).

<sup>19</sup> See *Brđanin Decision*, para. 29; *Bralo Decision*, para. 22; *Prosecutor v. Radislav Krstić*, Case No. MICT-13-46-ES.1, Decision on the Early Release of Radislav Krstić, 10 September 2019 (public redacted version) (“*Krstić Decision*”), paras. 16, 18. See also Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, or Early Release of Persons Convicted by the ICTR, the ICTY, or the Mechanism, MICT/3/Rev.3, 15 May 2020 (“*Practice Direction*”), para. 8.

**RECALLING FURTHER** that the two-thirds mark has been described as being “in essence, an admissibility threshold”;<sup>20</sup>

**CONSIDERING** that even if an Estonian court decides that releasing Martić on parole is justified, the early release of persons convicted by the ICTY falls exclusively within the President’s discretion, pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules;<sup>21</sup>

**CONSIDERING** that, as Martić will not have served two-thirds of his sentence of 35 years’ imprisonment until September 2025,<sup>22</sup> he is not yet eligible to be considered for early release by the Mechanism;

**RECALLING** that in compelling or exceptional circumstances, early release may be granted prior to the serving of two-thirds of the sentence;<sup>23</sup>

**CONSIDERING** that, on 19 March 2020, I directed the Registrar to obtain information from all enforcement States, including Estonia, regarding any measures being taken to prevent the introduction and spread of COVID-19 in prisons and have since been receiving updated information on a regular basis;<sup>24</sup>

**NOTING** that Estonia has since provided regular updates with comprehensive information on COVID-19 related measures;<sup>25</sup>

**CONSIDERING** that, in light of the information received to date, I am assured that the Estonian prison authorities are taking appropriate measures in relation to the COVID-19 pandemic and that such measures are applied to all prisoners equally;

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<sup>20</sup> *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), para. 19.

<sup>21</sup> See e.g. *Krstić* Decision, para. 24; *Prosecutor v. Sreten Lukić*, Case No. MICT-14-67-ES.4, Decision of the President on the Early Release of Sreten Lukić, 17 September 2018 (public redacted) (“*Lukić* Decision”), para. 14; *Prosecutor v. Dragoljub Kunarac*, Case No. MICT-15-88-ES.1, Decision of the President on the Early Release of Dragoljub Kunarac, 2 February 2017 (public redacted), para. 16.

<sup>22</sup> Internal Memorandum from the Registrar to the President, dated 6 February 2019 (confidential), p. 23.

<sup>23</sup> See e.g. *Krstić* Decision, para. 17; *Prosecutor v. Alfred Musema*, Case No. MICT-12-15-ES.1, Decision on the Application of Alfred Musema Related to Early Release, 7 August 2019, p. 4, fn. 17; *Lukić* Decision, para. 16, fn. 15 and references cited therein.

<sup>24</sup> See Order for COVID-19 Updates from Enforcement States, 24 April 2020 (public redacted version) (“Order of 24 April 2020”); Second Order for COVID-19 Updates from Enforcement States, 26 June 2020 (public redacted version) (“Order of 26 June 2020”).

<sup>25</sup> See e.g. Order of 24 April 2020, fn. 5; Order of 26 June 2020, fn. 6.

**CONSIDERING** that nothing in Martić’s submissions concerning the risk posed by COVID-19 given his age and medical condition, or his conditions of detention, demonstrates compelling or exceptional circumstances that would warrant granting early release;<sup>26</sup>

**CONSIDERING** that, as Martić is not yet eligible to be considered for early release and that no compelling or exceptional circumstances have been demonstrated, it is not necessary to consider additional information before reaching a conclusion on the Notification and the Direct Petition;<sup>27</sup>

**CONSIDERING** that Judge Liu and Judge Hofer unanimously share my opinion that early release at this stage is inappropriate;

**CONSIDERING FURTHER** that it is appropriate to address Martić’s request to be transferred to another enforcement State, including the submissions regarding his conditions of detention (“Request for Transfer”),<sup>28</sup> in a separate decision;

**FOR THE FOREGOING REASONS,**

**HEREBY DENY** the Notification;

**REMAIN SEISED** of the Request for Transfer; and

**DENY** the Direct Petition, in all other respects.

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

Done this 7th day of August 2020,  
At The Hague,  
The Netherlands.




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Judge Carmel Agius  
President

**[Seal of the Mechanism]**

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<sup>26</sup> Supplemental Submission, paras. 5-6, 9.

<sup>27</sup> *See e.g.* Practice Direction, para. 10; Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, ICTY, or the Mechanism, MICT/3/Rev.2, 20 February 2019, para. 4 (I note that this is the version that was in effect when the Notification and the Direct Petition were filed).

<sup>28</sup> Direct Petition, paras. 2-32; Supplemental Submission, paras. 3, 7-10.



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