

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No. MICT-15-87-ES

Date: 29 March 2016

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President
Registrar: Mr. John Hocking
Decision of: 29 March 2016

IN THE CASE AGAINST FLORENCE HARTMANN

PUBLIC

**DECISION OF THE PRESIDENT ON THE
EARLY RELEASE OF FLORENCE HARTMANN**

***Amicus Curiae* Prosecutor**

Mr. Bruce MacFarlane

Counsel for Ms. Florence Hartmann

Mr. Guénaél Mettraux

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals (“Mechanism”), am seized of the “Urgent Request to the President of the MICT to Grant Florence Hartmann Early Release” dated 25 March 2016 (“Application”) and transmitted to me by the Registry of the Mechanism on 29 March 2016.¹ 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 paragraph 3 of the Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism (“Practice Direction”).²

I. BACKGROUND

2. On 14 September 2009, Florence Hartmann (“Hartmann”) was found guilty by the Specially Appointed Chamber of the International Criminal Tribunal for the former Yugoslavia (“Specially Appointed Chamber” and “ICTY”, respectively) of having knowingly and wilfully interfered with the administration of justice by disclosing the contents, purported effect and confidential nature of two decisions of the Appeals Chamber of the ICTY from the case of *Prosecutor v. Slobodan Milošević* in a book entitled “*Paix et Châtiment*”, published by Flammarion on 10 September 2007, as well as in an article authored by Hartmann entitled “Vital Genocide Documents Concealed”, published by the Bosnian Institute on 21 January 2008.³ Hartmann was found guilty and ordered to pay a fine of 7000 Euros, to be paid in two instalments of 3500 Euros each.⁴

3. On 19 July 2011, the Appeals Chamber of the ICTY affirmed the imposition of the 7000 Euro fine, payable to the Registrar of the ICTY in two instalments on 18 August 2011 and 19 September 2011, and instructed the Registrar of the ICTY to take the necessary measures to enforce the Appeal Judgement.⁵

4. Following the issuance of the Appeal Judgement, Hartmann sent three letters that were considered by the Appeals Chamber of the ICTY, on 16 August 2011, on 19 September 2011, and on 20 October 2011, respectively.⁶ In her letters, Hartmann recalled that she was determined indigent by the Registry of the ICTY on 13 November 2008,⁷ and provided the details of the bank

¹ Internal Memorandum from Ms. Kate Mackintosh, Deputy Registrar of the ICTY, to Judge Theodor Meron, President, dated 29 March 2016 (“29 March 2016 Memorandum”), conveying, *inter alia*, the Application.

² MICT/3, 5 July 2012.

³ *In the Case Against Florence Hartmann*, Case No. ICTY-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009 (“Judgement”), para. 89.

⁴ Judgement, para. 90.

⁵ *In the Case Against Florence Hartmann*, Case No. ICTY-02-54-R77.5-A, Judgement, 19 July 2011 (“Appeal Judgement”), para. 172.

⁶ *In The Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Second Order on Payment of Fine Pursuant to Rule 77 *bis* and Warrant of Arrest, 16 November 2011 (“Second Order”), paras. 3, 5, 8.

⁷ Second Order, para. 3.

account where money was deposited by persons who support her, which remained at the disposal of the ICTY.⁸

5. On 11 October 2011, the Appeals Chamber of the ICTY reiterated Hartmann's obligation to pay the 7000 Euro fine in the exact manner prescribed by the Registry of the ICTY, and that Hartmann, or an agent acting on her behalf, transfer the funds to pay the fine no later than 25 October 2011.⁹

6. On 16 November 2011, following confirmation by the Registry of the ICTY on three occasions that the ICTY's finance department had not received either the first or the second instalment of the payments from Hartmann in accordance with the Appeal Judgement, the Appeals Chamber of the ICTY converted the whole of the fine to a term of imprisonment of seven days.¹⁰ The Appeals Chamber of the ICTY further authorized Hartmann's arrest, detention, and prompt surrender to the ICTY.¹¹

7. Having evaded arrest for over four years, Hartmann was finally arrested on 24 March 2016, and was transferred to the United Nations Detention Unit ("UNDU") on that same day.¹²

8. As of the date of this Decision, Hartmann remains in custody at the UNDU.

II. THE APPLICATION

9. On 29 March 2016, I received a memorandum from the Registry of the Mechanism ("Registry"), conveying: (i) the Application; and (ii) a letter from the Commanding Officer of the UNDU ("Commanding Officer") dated 27 March 2016 ("Commanding Officer Letter").¹³

III. DISCUSSION

10. In coming to my decision on whether it is appropriate to grant Hartmann early release, I have consulted a majority of the Judges of the sentencing Chamber who are Judges of the Mechanism, pursuant to Rule 150 of the Rules.¹⁴

⁸ Second Order, paras. 3, 5, 8.

⁹ *In The Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Order on Payment of Fine Pursuant to Rule 77 bis, 11 October 2011, para. 9.

¹⁰ Second Order, para. 11. *See also In The Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Registry Notice Pursuant to Rule 33(B) Concerning Non-Receipt of Funds, 25 August 2011; *In The Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Registry Notice Pursuant to Rule 33(B) Concerning Non-Receipt of Funds, 27 September 2011; *In The Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Registry Notice Pursuant to Rule 33(B) Concerning Non-Receipt of Funds, 28 October 2011.

¹¹ Second Order, p. 4.

¹² *See* Press Release "Mechanism arrests contempt convict" dated 24 March 2016, available at <http://www.unmict.org/en/news/mechanism-arrests-contempt-convict>.

¹³ 29 March 2016 Memorandum.

A. Applicable Law

11. Article 26 of the Statute 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 150 of the Rules provides that the President shall, upon receipt of, *inter alia*, an application for early release, 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.

13. The jurisprudence of the Mechanism recognizes that, in the situation where there is no appeal pending and a convicted person is still detained at either the United Nations Detention Facility (“UNDF”) or at the UNDU in The Hague, a request for early release may be entertained by the President.¹⁵ Following the approach taken by the International Criminal Tribunal for Rwanda (“ICTR”) and the ICTY, the President may consider such requests given that “the conditions for eligibility regarding pardon or commutation of sentence should be applied equally to all individuals convicted and sentenced” by the ICTR, the ICTY, or the Mechanism and that the eligibility of individuals serving their sentences at the UNDF or the UNDU “must be determined by reference to the equivalent conditions for eligibility established by the enforcement states”.¹⁶

B. Gravity of Crimes

14. 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.

15. The Specially Appointed Chamber noted that by virtue of Hartmann’s actions, she had “created a real risk that States may not be as forthcoming in their cooperation with the [ICTY]

¹⁴ See *infra*, para. 29.

¹⁵ See *Prosecutor v. Alphonse Nteziryayo*, Case No. MICT-15-90, Decision of the President on the Early Release of Alphonse Nteziryayo, 9 March 2016 (“*Nteziryayo* Decision”), para. 11. See also *Prosecutor v. Innocent Sagahutu*, Case No. MICT-13-43-ES, Public Redacted Version of the 9 May 2014 Decision of the President on the Early Release of Innocent Sagahutu, 13 May 2014, paras. 11-12; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Decision on Tharcisse Muvunyi’s Application for Early Release, 6 March 2012, para. 10; *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1-ES, Decision of President on Early Release of Shefqet Kabashi, 28 September 2011, para. 11.

¹⁶ *Nteziryayo* Decision, para. 11.

where provision of evidentiary material is concerned”.¹⁷ This, in turn, negatively impacted upon the ICTY’s “ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law as prescribed by its mandate”.¹⁸ The Specially Appointed Chamber found that the book that gave rise to the criminal proceedings against Hartmann was still available for sale and that evidence suggested that it had been translated into Bosnian for wider distribution.¹⁹ The Specially Appointed Chamber also found that the publication of the article on the internet had infinitely expanded the dissemination of the information which was the subject of the Indictment.²⁰

16. The Specially Appointed Chamber further observed that Hartmann made express reference to the fact that the two decisions of the Appeals Chamber of the ICTY were confidential,²¹ and noted that as a former senior employee of the ICTY she knew how to accurately convey information to the public “without taking the risk of infringing on any [confidential] decisions”.²²

17. In these circumstances, I am of the view that the gravity of Hartmann’s offences weighs against her early release.

C. Eligibility and Treatment of Similarly-Situated Prisoners

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

19. In this respect, I recall that ICTY convicts, like Hartmann, 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

20. As of the date of this Decision, and based on my own calculation, Hartmann served two-thirds of her 7-day sentence on 28 March 2016. I am therefore of the view that the amount of time that Hartmann has served for her crimes weighs in favour of her early release.

¹⁷ Judgement, para. 80.

¹⁸ Judgement, para. 80.

¹⁹ Judgement, para. 82.

²⁰ Judgement, para. 82.

²¹ Judgement, paras. 58, 64.

²² Judgement, para. 66.

²³ See *Nteziryayo* Decision, para. 16. 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 *Nteziryayo* Decision, para. 16; *Bisengimana* Decision, paras. 21, 35.

D. Demonstration of Rehabilitation

21. 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[.]

22. Hartmann contends that she has shown good behavior whilst in detention.²⁵ This contention is supported by the Commanding Officer of the UNDU who states that Hartmann has shown respect towards the staff of the UNDU, adhering to orders and instructions.²⁶ The Commanding Officer further informed that Hartmann does not pose a threat to herself or other detainees.²⁷ Lastly, the Commanding Officer stated that there have been no internal or external threats to Hartmann during her detention at the UNDU.²⁸

23. I note that while Hartmann’s conduct at the UNDU has been exemplary, Counsel on behalf of Hartmann submitted the Urgent Request to Registrar concerning her conditions of detention on 25 March.²⁹ In that Urgent Request to Registrar, Counsel claimed that Hartmann was being held in isolation, and that she was being monitored around the clock while in her cell, which included keeping the light in her cell on at all times.³⁰ These claims are repeated in the application for Early Release.

24. On 26 March 2016, the Registry brought to my attention the Urgent Request to Registrar, having determined that it constituted a formal complaint in accordance with paragraph 5 of the Regulations for the Establishment of a Complaints Procedure for Detainees, April 1995, IT/96 (“Regulations”). The Registry informed Hartmann’s counsel that, pursuant to paragraph 7 of the Regulations, it had been determined that the Urgent Request to Registrar related to an alleged breach of Hartmann’s rights and was therefore referred to the President for consideration. In accordance with paragraph 8 of the Regulations, the Commanding Officer provided his views on the allegations made by Hartmann.

²⁵ Application, para. 9.

²⁶ Commanding Officer Letter.

²⁷ Commanding Officer Letter.

²⁸ Commanding Officer Letter.

²⁹ Urgent Request to the Registrar to Modify the Conditions of Detention of Florence Hartmann, dated 25 March 2016 (“Urgent Request to Registrar”). *See also* Application, para. 3.

³⁰ Urgent Request to Registrar, paras. 7-15.

25. On 26 March 2016, I issued my decision on the Urgent Request to Registrar. In the interest of transparency and in view of the fact that this matter goes to Hartmann's conditions of detention, which are relevant to the determination of a request for early release, I hereby set forth my decision on the Urgent Request to Registrar:

The core of the complaint concerns a segregation order issued orally by the Commanding Officer of the United Nations Detention Unit on 24 March pursuant to Rule 43 of the Rules of Detention for the preservation of security and good order. I have been advised that the Commanding Officer's decision was based on the following considerations:

(a) International best practice to fully separate male and female detainees consistent with Rule 11 of the Mandela Rules which states: "The different categories of prisoners shall be kept in separate institutions, taking account of their sex, age, criminal record, the legal reasons for the detention and the necessities of their treatment; thus (a) Men and Women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate.["]

The Commanding Officer is not aware of any detention regime where female and male detainees would be allowed to freely mingle with each other, and past UNDU practice has been to separate male and female detainees consistent with international best practice.

(b) The physical safety of Ms. Hartmann: The Commanding Officer advises that it would be extremely difficult to guarantee the physical safety of Ms. Hartmann, as a high profile former member of the ICTY Prosecution team should she be allowed to mingle with detainees. He adds that to allow this to happen has the potential to escalate to security incidents that would be very hard to control without use of physical force.

(c) Circumvention of Rule 64bis of the Rules of Detention: Ms. Hartmann is a journalist who has published several works on the former Yugoslavia. Allowing her to mix with the rest of the detainee population would both give any detainees who wished to communicate via her direct access to the media in circumvention of Rule 64bis of the Rules of Detention, while also exposing those who did not wish to do so to potential violations of their privacy should she use her conversations or observations in her future publications, interviews and news articles. The Commanding Officer considers that this would breach his responsibility to ensure that the rights of all detainees are respected.

In addition, the Registry has advised me that the segregation order does not amount to isolation. Ms. Hartmann is permitted to receive visitors, and had been provided with a briefing on how to request permission to receive visits. In addition to visits, Ms. Hartmann can freely communicate with her family and friends by phone or by mail and can use the privileged phone to communicate with her lawyer. She also has the possibility to meet with consular representatives in a privileged setting, as she did on Friday. The Registry further advises that all of these procedures were explained to Ms. Hartmann in detail during her intake meeting.

Having considered the submissions of the Commanding Officer I am satisfied that the segregation order is justified and necessary for the good order and security of the UNDU. The order segregating Ms. Hartmann from the rest of the prison population - who are all male detainees - was made in accordance with international best practice that demands male and female prisons be held separately. In addition, the security concerns for Ms. Hartmann expressed by the Commanding Officer are not without merit. It is entirely plausible that Ms. Hartmann's profile would place her at risk in the prison population. Additionally, preservation of the procedure of Rule 64bis and the rights of other detainees is a consideration towards maintaining the good order and security of the UNDU.

I further reject the complaint["]s characterization of the segregation order as an isolation order requiring communication in writing pursuant to Rule 45(B) of the Rules of Detention. The fact that Ms. Hartmann, the only female detainee, has had no contact with any other detainee, all of whom are male is a justified segregation and not isolation. Ms. Hartmann has the means at her disposal to communicate with family and friends and is permitted to receive requested visits and is not in isolation.

The second complaint made by Ms. Hartmann is that since her arrival at the UNDU she has been subject to around the clock monitoring and that this has involved keeping the light on in her room at all times including during the night without any apparent justification for such a measure.

In response to this complaint I am advised by the Registry that Ms. Hartmann has a light switch in her room and can turn the light on and off as she wishes. Upon that basis, I reject this complaint as unfounded.

26. Pursuant to my request to the Registry on 26 March 2016, my determination was communicated to Hartmann and her counsel in accordance with paragraph 11 of the Regulations.

27. While the allegations contained in the Urgent Request to the Registrar were determined to be unfounded and based on a misunderstanding of detention regimes, all detainees have a right to submit complaints regarding their conditions of detention to the Registrar at any time and no adverse inference can be drawn against Hartmann for the filing of any such complaint.

28. In my view, the Commanding Officer's description of Hartmann's behaviour while in custody at the UNDU, as well as Hartmann's own submissions, militate in favour of early release.

E. Conclusion

29. In light of the above, and having considered the factors identified in Rule 151 of the Rules, as well as all the relevant information on the record, I hereby grant Hartmann's Application, effective as soon as practically possible following the issuance of the decision on the Application. Although the crimes for which Hartmann was convicted are grave, Hartmann's completion of more than two-thirds of her sentence and her exemplary conduct in the UNDU are factors that favour her early release. The view that Hartmann should be granted early release is shared by a majority of the Judges of the sentencing Chamber who are Judges of the Mechanism. I note in this regard that I was unable to consult with one Judge of the sentencing Chamber who is a Judge of the Mechanism, given the short time frame for this consultation.

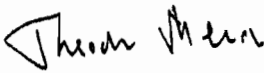
IV. DISPOSITION

30. 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** the Application, to be implemented as soon as practically possible following the issuance of this Decision.

31. The Registrar is hereby **DIRECTED** to inform the UNDU authorities of this decision as soon as practicable.

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

Done this 29th day of March 2016,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Mechanism]