UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

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

Date: 22 July 2024

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THE PRESIDENT OF THE MECHANISM

Before: **Judge Graciela Gatti Santana, President**

Registrar: **Mr. Abubacarr M. Tambadou**

Decision of: **22 July 2024**

PROSECUTOR

v.

DRAGOLJUB KUNARAC

PUBLIC

DECISION ON THE APPLICATION FOR EARLY RELEASE OF DRAGOLJUB KUNARAC

Counsel for Mr. Dragoljub Kunarac:

Mr. Zoran Živanović

Federal Republic of Germany

1. I, Graciela Gatti Santana, President of the International Residual Mechanism for Criminal Tribunals ("President" and "Mechanism", respectively), am seised of Mr. Dragoljub Kunarac's direct petition for early release filed on 6 March 2023 ("Kunarac" and "Application", respectively).[1]

I. BACKGROUND

2. On 4 March 1998, Kunarac surrendered to the International Criminal Tribunal for the former Yugoslavia ("ICTY") and was transferred to the United Nations Detention Unit in The Hague on the same day.[2]

3. On 22 February 2001, Trial Chamber II of the ICTY ("Trial Chamber") convicted Kunarac of torture, rape, and enslavement as crimes against humanity, and torture and rape as violations of the laws or customs of war and sentenced him to 28 years of imprisonment.[3] On 12 June 2002, the Appeals Chamber of the ICTY ("Appeals Chamber") affirmed Kunarac's convictions and sentence.[4]

4. On 12 December 2002, Kunarac was transferred to the Federal Republic of Germany ("Germany") to serve the remainder of his sentence.[5]

5. Kunarac's two previous applications for early release were denied,[6] on the basis, *inter alia*, of the high gravity of his crimes and his failure to demonstrate sufficient signs of rehabilitation.[7]

II. APPLICATION

6. On 6 March 2023, Kunarac filed the Application, in which he requests to be granted early release. Kunarac submits, *inter alia*, that he should be granted early release because: (i) torture, rape, and enslavement are of less gravity than murder and killing; (ii) prisoners similarly situated to

[1] Dragoljub Kunarac's Application for Early Release, 6 March 2023 (confidential). On 2 May 2023, a public redacted version of the Application was filed on the record following my order to do so. *See* Dragoljub Kunarac's Brief with the Public Redacted Application for Early Release, 2 May 2023. *See also* Order for a Public Redacted Version of Dragoljub Kunarac's Application for Early Release, 11 April 2023, p. 1.
[2] *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 ("Trial Judgement"), p. 283.
[3] Trial Judgement, paras. 883, 885.
[4] *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("Appeal Judgement"), p. 125. None of the Trial Chamber's factual findings with respect to Kunarac were reversed on appeal. *See e.g.* Appeal Judgement, paras. 5-10, 256.
[5] *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-A, Order Designating the State in Which Dragoljub Kunarac is to Serve his Prison Sentence, 26 July 2002; Decision on Dragoljub Kunarac's Application for Early Release, 31 December 2020 ("Second Decision Denying Early Release"), para. 4.
[6] Decision of the President on the Early Release of Dragoljub Kunarac, 2 February 2017 ("Decision Denying Early Release"), paras. 1, 8, 15, 68, 71; Second Decision Denying Early Release, paras. 86-87.

Kunarac, whom he argues are those who have also been convicted for rape, enslavement, and torture, have been granted early release; and (iii) circumstances, such as changes in his personal life and in Bosnia and Herzegovina, are indicators of his prospects to successfully reintegrate into society.[8] Kunarac indicates that, if his request for early release is granted, he would reside in Foča, Bosnia and Herzegovina.[9]

7. On 10 March 2023, I requested that the Registrar of the Mechanism ("Registrar"), *inter alia*, obtain, as soon as possible: (i) the information enumerated in paragraphs 10(a) through 10(c) and paragraph 10(e) of the applicable practice direction;[10] (ii) information from the Mechanism's Witness Support and Protection Unit ("WISP") on the victims of the crimes for which Kunarac was convicted and who testified in his case, and if any of them reside in the vicinity of Foča, Bosnia and Herzegovina, in light of Kunarac's indication that he would reside there if the Application were to be granted; and (iii) any media reports concerning Kunarac published in Bosnia and Herzegovina since January 2021.[11]

8. On 12 April 2023, the Registry of the Mechanism ("Registry") conveyed to me a memorandum from the Office of the Prosecutor of the Mechanism ("Prosecution"), dated 11 April 2023, providing its comments and information concerning the Application.[12]

9. On 1 June 2023, I invited the authorities of Bosnia and Herzegovina to, no later than 22 June 2023, *inter alia*: (i) provide any views that they may wish to offer with regard to the Application and Kunarac's indication that, if released early, he would reside in Foča, Bosnia and Herzegovina; and (ii) indicate their willingness to monitor the conditions imposed by the Mechanism in case of an early release and provide guarantees to this effect.[13]

10. On 30 June 2023, the Registrar conveyed to me a letter from the Office of the Hamm Public Prosecutor General, dated 27 June 2023, which included a statement on Kunarac's behaviour and an

[7] Decision Denying Early Release, paras. 20, 55, 68; Second Decision Denying Early Release, paras. 86-87.
[8] *See* Application, paras. 15-20, 52-58.
[9] Application, para. 53.
[10] *See* 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 ("2020 Practice Direction"). This Practice Direction has since been revised. *See* 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.4, 1 July 2024 ("Practice Direction").
[11] Internal Memorandum from the President to the Registrar, dated 10 March 2023 (confidential), paras. 3-5.
[12] Internal Memorandum from the Registrar to the President, 12 April 2023 (confidential), *transmitting* an Internal Memorandum from the Officer-in-Charge, Office of the Prosecutor, Hague branch, to the Officer-in-Charge, Registry, Hague branch, dated 11 April 2023 (confidential) ("Prosecution Memorandum"). The Prosecution Memorandum includes a list of relevant media reports and victims' associations. *See* Prosecution Memorandum, Annexes A-B.
[13] Invitation to Bosnia and Herzegovina Related to Dragoljub Kunarac's Application for Early Release, 1 June 2023 (confidential and *ex parte*), p. 2.

assessment of his eligibility for early release ("Prison Report"), and to which was appended a series of medical reports, dated between 15 October 2020 and 19 February 2023, and a certificate with results from a German language test (Council of Europe, level A1), dated 20 January 2023.[14]

11. On 11 July 2023, the Registrar provided me with a strictly confidential memorandum from the WISP ("WISP Memorandum"), conveying information in relation to witnesses who testified in Kunarac's case.[15]

12. On 26 July 2023, the Registry provided me with an overview of media reports concerning Kunarac that were published in Bosnia and Herzegovina since January 2021, as well as information about relevant victims' associations or other groups.[16]

13. On 3 August 2023, I requested the Registrar to solicit the views on the Application of those victims' associations and other relevant groups identified in the Prosecution Memorandum and the ERO Memorandum.[17] On 16 October 2023, I received an internal memorandum from the Registrar conveying the responses of five victims' associations in relation to the Application.[18]

14. On 19 September 2023, the Mechanism sent a *note verbale* to the authorities of Bosnia and Herzegovina, drawing their attention to the outstanding invitation to provide their views and related information with respect to the Application and indicating that any response should be received no later than 3 October 2023.[19]

15. On 6 November 2023, I instructed the Registry to provide all materials received in relation to the Application, with the exception of the strictly confidential information provided by WISP, to Kunarac for his comments in accordance with paragraph 12 of the 2020 Practice Direction.[20]

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[14] Internal Memorandum from the Registrar to the President, dated 30 June 2023 (confidential), *conveying*: (i) a physician's letter, dated 15 October 2020; (ii) a physician's letter, dated 19 January 2023; (iii) a German language test certificate, dated 20 January 2023; (iv) a medical history and consent form, dated 10 February 2023; (v) a physician's letter, dated 19 February 2023; (vi) an assessment letter from the Director of Bochum Prison to the Office of the Hamm Public Prosecutor General, dated 13 April 2023 ("Assessment Letter"); and (vii) a letter from the Office of the Hamm Public Prosecutor General to the Ministry of Justice of North Rhine-Westphalia conveying the assessment letter from the Director of Bochum Prison, dated 28 April 2023.

[15] Internal Memorandum from the Registrar to the President, 11 July 2023 (strictly confidential), *transmitting* an Internal Memorandum from the Head of WISP to the Registrar, dated 11 July 2023 (strictly confidential).

[16] Internal Memorandum from the Registrar to the President, 26 July 2023 (strictly confidential), *transmitting* an Internal Memorandum from the External Relations Office to the Registrar, dated 26 July 2023 ("ERO Memorandum").

[17] Internal Memorandum from the President to the Registrar, dated 3 August 2023 (confidential), paras. 2-4.

[18] Internal Memorandum from the Registrar to the President, dated 16 October 2023 (confidential) ("Registrar Memorandum of 16 October 2023"), *transmitting* letters from: (i) the Association of Camp Inmates of Bosnia and Herzegovina, dated 19 September 2023; (ii) the Association of the Victims and Witnesses of Genocide, dated 25 September 2023; (iii) the Association of Victims of War Foča 92-95, dated 29 September 2023; (iv) the Association "Our Voice", undated; and (v) the Association "Women Victims of War", dated 2 October 2023.

[19] *Note verbale* to the Embassy of Bosnia and Herzegovina to the Kingdom of the Netherlands, dated 19 September 2023 (confidential), p. 1.

[20] Internal Memorandum from the President to the Registrar, dated 6 November 2023 (confidential), paras. 2-3.

16. On 13 December 2023, the collected information was provided to Kunarac and his counsel.[21] Kunarac filed his confidential response on the record on 18 January 2024.[22]

17. As no Judge who imposed the sentence upon Kunarac is a Judge of the Mechanism, I consulted with Judge Lee G. Muthoga and Judge Carmel Agius, in accordance with Rule 150 of the Rules of Procedure and Evidence of the Mechanism ("Rules") and paragraph 16 of the 2020 Practice Direction.

III. APPLICABLE LAW

18. According to Article 25(2) of the Statute of the Mechanism ("Statute"), the Mechanism supervises the enforcement of sentences pronounced by the International Criminal Tribunal for Rwanda ("ICTR"), the ICTY, or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States.

19. Pursuant to Article 26 of the Statute, 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. While Article 26 of the Statute, like the equivalent provisions in the Statutes of the ICTR and the ICTY before it, does not specifically mention requests for early release of convicted persons, the Rules reflect the President's power to deal with such requests and the longstanding practice of the ICTR, the ICTY, and the Mechanism in this regard.

20. Rule 150 of the Rules provides that the President shall, upon receipt of a direct petition from the convicted person, 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. If none of the Judges who imposed the sentence are Judges of the Mechanism, the President shall consult with at least two other Judges.

21. The general standards for granting early release are set out in Rule 151 of the Rules, which 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.

[21] Email communication from the Office of the Registrar to the Office of the President, dated 13 December 2023.
[22] Dragoljub Kunarac's Response on the Registry Memo Dated 13 December 2023, 18 January 2024 (confidential) ("Response"). The Response was received after the 14-day deadline provided for in the Registrar's communication; however, as I understand that Kunarac did not receive all material until 4 January 2024 and as it is in the interests of justice to hear the position of the convicted person, I deemed it as timely filed.

22. Paragraph 5 of the Practice Direction provides that a convicted person may apply directly to the President for pardon, commutation of sentence, or early release, if he or she believes that he or she is eligible.

23. Paragraph 10 of the Practice Direction indicates that the President may collect information, directly or through the Registry, that he or she considers relevant to the determination of whether pardon, commutation of sentence, or early release is appropriate. Paragraph 12 of the Practice Direction provides that, once all information requested has been received, the President shall communicate, directly or through the Registry, relevant information to the convicted person in a language that he or she understands. Paragraph 13 of the Practice Direction states that the convicted person shall then be given 14 days to examine the information, following which he or she may provide any written submissions in response.

24. Paragraph 19 of the Practice Direction specifies that the President shall determine whether early release is to be granted on the basis of the interests of justice and the general principles of law, having regard to the criteria specified in Rule 151 of the Rules, and any other information, as well as the views of the Judges consulted in accordance with Rule 150 of the Rules. Paragraph 20 of the Practice Direction states that if early release is granted, it may be subject to conditions.

25. The enforcement agreement between the United Nations and Germany,[23] which applies *mutatis mutandis* to the Mechanism,[24] provides in Article 7(2) that the President shall determine whether pardon or commutation of sentence is appropriate, and if the President determines that it is not appropriate, Germany shall act accordingly.

IV. ANALYSIS

A. Eligibility

1. Eligibility before the Mechanism

26. Previous decisions have determined 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 sentence, irrespective of: (i) whether the person was convicted by the ICTR, the ICTY, or the Mechanism; (ii) where the sentence is being served; and (iii) whether the matter is brought before the President through a direct petition by the convicted person or a notification from

[23] Agreement between the International Criminal Tribunal for the former Yugoslavia and the Government of Germany concerning the enforcement of Kunarac's sentence, dated 14 November 2002.
[24] *See* Security Council Resolution 1966 (2010), 22 December 2010, para. 4.

the relevant enforcement State.[25] Further, serving two-thirds of a sentence has been described by the Mechanism's jurisprudence as being "in essence, an admissibility threshold".[26]

27. Kunarac is eligible to be considered for early release having served two-thirds of his sentence on 1 November 2016.[27]

2. Eligibility under German Law

28. Kunarac is currently serving his sentence in Germany. Under section 57(1) of the German Criminal Code, a convicted person may be released on parole if two-thirds of the imposed sentence, but not less than two months, have been served.[28] Kunarac, having served two-thirds of his sentence as of November 2016, is therefore eligible under German law to be conditionally released.

29. In this respect, even if Kunarac is eligible for release under German law, I recall that the early release of persons convicted by the ICTR, the ICTY, or the Mechanism falls exclusively within the President's discretion, pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules.[29]

B. General Standards for Granting

30. According to the Mechanism's jurisprudence, a convicted person having served two-thirds of his or her sentence shall be merely eligible to be considered for early release and not entitled to such release.[30] Against this backdrop, it is therefore necessary for me, in determining whether early release is appropriate, to analyse and consider the convicted person's current situation, taking into

[25] *Prosecutor v. Stojan Župljanin*, Case No. MICT-13-53-ES.1, Decision on the Application for Early Release of Stojan Župljanin, 18 January 2024 ("*Župljanin* Decision"), para. 26; *Prosecutor v. Radivoje Miletić*, Case No. MICT-15-85-ES.5, Decision on the Application for Early Release of Radivoje Miletić, 18 January 2024 ("*Miletić* Decision of 18 January 2024"), para. 25; *Prosecutor v. Radislav Krstić*, Case No. MICT-13-46-ES.1, Decision on the Early Release of Radislav Krstić, 10 September 2019, paras. 16, 18.
[26] *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-ES, Decision on the Application for Release of Ratko Mladić, 10 May 2024 ("*Mladić* Decision"), para. 27; *Župljanin* Decision, para. 26; *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 ("*Bisengimana* Decision"), para. 19.
[27] Second Decision Denying Early Release, para. 4. I note in this respect that the Assessment Letter references an end date of 3 March 2026 for Kunarac's sentence. *See* Assessment Letter, p. 4. However, according to Mechanism calculations his sentence is to end on 24 February 2026.
[28] *See* Decision Denying Early Release, para. 15.
[29] *Miletić* Decision of 18 January 2024, para. 29; *Prosecutor v. Bruno Stojić*, Case No. MICT-17-112-ES.3, Decision on the Application for Early Release of Bruno Stojić, 17 January 2024 ("*Stojić* Decision"), para. 30; *Prosecutor v. Laurent Semanza*, Case No. MICT-13-36-ES.2, Decision on Laurent Semanza's Application for Early Release, 17 September 2020, para. 29.
[30] *Župljanin* Decision, para. 28; *Miletić* Decision of 18 January 2024, para. 30; *Prosecutor v. Stanislav Galić*, Case No. MICT-14-83-ES, Decision on the Early Release of Stanislav Galić, 26 June 2019, para. 24.

account the non-exhaustive list of factors set out in Rule 151 of the Rules.[31] The mere passage of time cannot constitute sufficient grounds for early release.[32]

1. Gravity of Crimes

31. In my opinion, the early release of persons convicted by the ICTR, the ICTY, or the Mechanism for genocide, crimes against humanity, or war crimes should be exceptional.[33]

32. In relation to the gravity of crimes, past decisions have established that: (i) as a general rule, a sentence should be served in full given the gravity of the crimes within the jurisdiction of the ICTR, the ICTY, and the Mechanism, unless it can be demonstrated that a convicted person should be granted early release; (ii) while the gravity of the crimes is not the only factor in assessing an early release application pursuant to Rule 151 of the Rules, it is nevertheless a factor of fundamental importance; (iii) the graver the criminal conduct in question, the more compelling a demonstration of rehabilitation should be; and (iv) while the gravity of the crimes cannot be seen as depriving a convicted person of an opportunity to argue his or her case, it may be said to determine the threshold that the arguments in favour of early release must reach.[34]

33. As set out above, Kunarac was found guilty pursuant to Article 7(1) of the Statute of the ICTY of torture, rape, and enslavement as crimes against humanity, and torture and rape as violations of the laws or customs of war, for crimes committed during the armed conflict in the Foča area in Bosnia and Herzegovina. This armed conflict involved the Bosnian Serb Army and paramilitary groups systematically attacking the non-Serb civilian population with the aim of "cleansing" the Foča area of non-Serbs.[35] Muslim women, who were found to be a "specific target of the attack", were detained in intolerable conditions in two local schools and a sports centre.[36]

34. The Trial Chamber found that, in the relevant period, Kunarac, the leader of a reconnaissance unit that formed part of a local tactical group, was a well-informed soldier with

[31] *Župljanin* Decision, para. 28; *Miletić* Decision of 18 January 2024, para. 30; *Prosecutor v. Radislav Krstić*, Case No. MICT-13-46-ES.1, Decision on the Application for Early Release of Radislav Krstić, 15 November 2022 ("*Krstić* Decision of 15 November 2022"), para. 32.
[32] *Stojić* Decision, para. 100.
[33] *Župljanin* Decision, para. 29; *Miletić* Decision of 18 January 2024, para. 31; *Krstić* Decision of 15 November 2022, para. 33.
[34] *Župljanin* Decision, para. 30; *Miletić* Decision of 18 January 2024, para. 32; *Prosecutor v. Radivoje Miletić*, Case No. MICT-15-85-ES.5, Decision on the Early Release of Radivoje Miletić, 5 May 2021 ("*Miletić* Decision of 5 May 2021"), para. 39.
[35] Appeal Judgement, para. 3; Trial Judgement, paras. 858, 883.
[36] Appeal Judgement, para. 3; Trial Judgement, paras. 574-575.

access to the highest military command in the area and was responsible for collecting information about the enemy.[37]

35. In July and August 1992, Kunarac took girls or women from these detention centres to secondary locations where they were kept for varying lengths of time.[38] The Trial Chamber found that Kunarac personally raped five Muslim girls or women,[39] and brought these and other girls or women to the secondary locations, with the knowledge that once there they would be raped by soldiers.[40] The victims, who were taken for the very purpose of rape and were chosen on the basis of their Muslim ethnicity, were found to have suffered from severe mental and physical pain as a result of the rapes.[41] The Trial Chamber emphasised that "Kunarac […] mistreated Muslim girls and women, and only Muslim girls and women, *because* they were Muslims".[42]

36. The Trial Chamber also found that Kunarac personally committed the act of enslavement with respect to one of these girls and, by assisting in setting up the conditions at the secondary location, he aided and abetted the enslavement of another girl.[43] These two girls were found to have been denied any control over their lives while at the secondary location: they had to obey all orders, do household chores, and had no realistic option to flee or escape.[44] The Trial Chamber found that the girls were treated as the personal property of Kunarac and another soldier, and subjected to other mistreatment. For instance, Kunarac invited a soldier to the secondary location so that he could rape one of the girls for 100 Deutschmarks if the soldier so wished.[45]

37. The Trial Chamber considered several aggravating circumstances in determining Kunarac's sentence including that: (i) five victims were between about 15 ½ and 19 years old at the time of the offences;[46] (ii) the victims were "particularly vulnerable and defenceless women and girls";[47] (iii) the offences against certain victims were committed over an extended period of time, such as the two women who Kunarac enslaved for two months;[48] (iv) Kunarac played a leading organisational role and had substantial influence over some of the other perpetrators;[49] (v) his

[37] *See* Appeal Judgement, paras. 2, 5; Trial Judgement, para. 49.
[38] *See* Trial Judgement, paras. 638, 663, 670, 685, 700, 724.
[39] *See e.g.* Trial Judgement, paras. 583, 654, 656, 670 (referring to D.B. and FWS-87), 684 (referring to FWS-95), 711 (referring to FWS-183), 724 (referring to FWS-191).
[40] *See* Trial Judgement, paras. 656, 666, 670, 685, 701, 711, 724-725, 727-729, 744.
[41] Trial Judgement, para. 669. *See also* Trial Judgement, paras. 583-585, 653-656, 711.
[42] Trial Judgement, para. 592.
[43] Trial Judgement, para. 742. *See also* Trial Judgement, para. 864.
[44] Trial Judgement, para. 742.
[45] Trial Judgement, para. 742.
[46] Trial Judgement, para. 864.
[47] Trial Judgement, para. 867.
[48] Trial Judgement, para. 865 (referring to FWS-191 and FWS-186).
[49] Trial Judgement, para. 863.

offences involved more than one victim and some were committed by more than one perpetrator at the same time, such as his "co-perpetration of the rape of FWS-183, and his aiding and abetting of the rape of FWS-75 by about 15 soldiers and the rape of FWS-87 by three soldiers";[50] and (vi) the offences were committed on discriminatory grounds including ethnic and gender discrimination.[51]

38. Kunarac submits that all convictions rendered by the ICTY are of high gravity since it was established "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".[52] He contends that "even among them, there are different levels of gravity",[53] and he argues that "[a]lthough torture, rape, and enslavement, as crimes against humanity and as violations of laws and customs of war, are of high gravity […] they are of less gravity than murder, killing, etc.".[54] In Kunarac's view, "[s]uch levels of gravity must be taken into account in the decision on the early release".[55]

39. I note that Kunarac himself acknowledges that torture, rape, and enslavement, as crimes against humanity and as violations of the laws or customs of war, are crimes of a high gravity.[56] In so far as his crimes may be "of less gravity" than other crimes under the ICTY's jurisdiction, this will be taken into account when I assess his demonstration of rehabilitation and in determining the threshold that arguments in favour of his early release must reach.[57] However, I recall that the gravity of the crimes is to be understood as an overall assessment of the severity of a convicted person's criminal conduct which determines the length of a sentence imposed by the sentencing Chamber.[58] In this respect, I observe that Kunarac's 28-year sentence, which is based on being found guilty on 11 counts for torture and rape, as violations of the laws or customs of war, and torture, rape and enslavement, as crimes against humanity, as well as aggravating and mitigating circumstances,[59] is among the higher sentences imposed by the ICTY.[60] In my view, this is a reflection of the severity of his criminal conduct.

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[50] Trial Judgement, para. 866.
[51] Trial Judgement, para. 867.
[52] Application para. 13, referring to Article 1 of the Statute of the ICTY.
[53] Application para. 13.
[54] Application para. 14. *See* Response, paras. 6, 8.
[55] Application para. 15.
[56] Application para. 14.
[57] *See supra*, para. 32.
[58] *Miletić* Decision of 5 May 2021, para. 39.
[59] I note that, while the Appeals Chamber found that the Trial Chamber should have considered Kunarac's family situation as a mitigating factor, the relative weight of this factor was not deemed to be sufficient to revise the sentence under appeal. *See* Appeal Judgement, paras. 362, 366.
[60] I note that only 14 of the 93 persons sentenced by the ICTY and Mechanism for crimes committed in the territory of the former Yugoslavia, had sentences longer than Kunarac. Those with longer sentences are: Ljubiša Beara, Stanislav Galić, Radovan Karadžić, Milan Lukić, Ratko Mladić, Vujadin Popović, and Zdravko Tolimir who were each sentenced to life imprisonment; Goran Jelisić and Milomir Stakić who were each sentenced to 40 years of imprisonment; Radislav

40. In light of the above, I consider that Kunarac's crimes are of a high gravity. Accordingly, I am of the view that this factor weighs against his early release.

2. Treatment of Similarly-Situated Prisoners

41. When considering the treatment of similarly-situated prisoners, decisions on early release have emphasised that persons sentenced by the ICTY, like Kunarac, are considered "similarly-situated" to all other prisoners under the Mechanism's supervision.[61] As noted above, the eligibility threshold of having served two-thirds of the sentence applies to all convicted persons serving a sentence under the Mechanism's supervision.[62] Having passed this two-thirds threshold on 1 November 2016,[63] Kunarac is eligible to be considered for early release.

42. Kunarac submits that it is neither in the interests of justice nor consistent with general principles of law for all persons sentenced by the ICTY to be considered as similarly-situated to all other persons under the Mechanism's supervision.[64] Rather, Kunarac contends that the gravity of the crimes for which a person was convicted must be taken into account when determining those with whom he is similarly-situated.[65] In his view, he is only similarly-situated to persons convicted of the same crimes as him, namely rape, enslavement, and torture, and not the crimes of genocide, conspiracy to commit genocide, or murder.[66] Kunarac asserts that persons who, like him, were convicted of rape, enslavement, and torture were "[a]ll […] early released after two-thirds of their sentences expired".[67] In addition, Kunarac argues that the "highest-ranking political and military leaders" should not be considered to be similarly-situated "with their ranks and files".[68]

43. I recall that, in determining whether early release is to be granted, the President must consider the unique circumstances that each case presents on its own merits.[69] To this end, in addition to the severity of his criminal conduct, I will consider whether Kunarac demonstrates signs of rehabilitation by examining his behaviour in prison, his acceptance of responsibility, signs that he has reflected critically or expressed genuine remorse or regret, as well as his mental state and his prospects to successfully reintegrate into society, should he be released. I will also consider whether

Krstić, Milan Martić and Drago Nikolić who were each sentenced to 35 years of imprisonment; Radoslav Brđanin who was sentenced to 30 years of imprisonment; and Dragomir Milošević who was sentenced to 29 years of imprisonment.
[61] *Župljanin* Decision, para. 39; *Miletić* Decision of 18 January 2024, para. 43; *Bisengimana* Decision, paras. 16-17.
[62] *See supra* para. 26.
[63] *See supra* para. 27.
[64] Application, para. 16.
[65] Application, para. 16.
[66] Application, para. 16.
[67] Application, para. 17. *See also* fn. 7 referring to the cases of Radomir Kovač, Mlađo Radić, Zoran Vuković, and Dragan Zelenović. *See also* Response, paras 9-14.
[68] Application, para. 18.
[69] *Krstić* Decision of 15 November 2022, para. 44.

Kunarac cooperated substantially with the Prosecution and may consider other information or specific circumstances as they pertain directly to Kunarac. In light of such specific and personalised information, it becomes evident that any comparison to other cases in the context of an early release application can be inconsequential to the President's decision.[70] For the foregoing reasons, I find that Kunarac's submission in this respect is without merit.

3. Demonstration of Rehabilitation

44. A decision on whether to grant an early release application is taken by the President on the basis of the interests of justice and the general principles of law, having regard, *inter alia*, to the criteria specified in Rule 151 of the Rules. The prisoner's demonstration of rehabilitation is just one factor to be considered when deciding upon such an application.

45. Before turning to an individualised assessment of Kunarac's demonstration of rehabilitation, I note that the Mechanism's jurisprudence expands upon certain elements pertaining to whether a convicted person has demonstrated rehabilitation under Rule 151 of the Rules, and I find it appropriate to set this out here.[71]

46. A number of positive indicators of rehabilitation of persons convicted by the ICTR, the ICTY, or the Mechanism have been recognised as such in the past or may be of persuasive relevance.[72] Such indicators include: (i) the acceptance of responsibility for the crimes a person was convicted for or for actions which enabled the commission of the crimes; (ii) signs of critical reflection of the convicted person upon his or her crimes; (iii) public or private expressions of genuine remorse or regret; (iv) actions taken to foster reconciliation or seek forgiveness; (v) evidence that a convicted person has a positive attitude towards persons of other backgrounds, bearing in mind the discriminatory motive of some of the crimes; (vi) participation in rehabilitation programmes in prison; (vii) a convicted person's mental health status; and (viii) a positive assessment of a convicted person's prospects to successfully reintegrate into society.[73] This is a non-exhaustive list and convicted persons are not expected to fulfil all of these indicators in order to demonstrate rehabilitation.[74]

[70] *Krstić* Decision of 15 November 2022, para. 44.
[71] *Župljanin* Decision, paras. 43-47; *Miletić* Decision of 18 January 2024, paras. 47-51; *Prosecutor v. Miroslav Bralo*, Case No. MICT-14-78-ES, Decision on the Early Release of Miroslav Bralo, 31 December 2019 ("*Bralo* Decision"), paras. 37-41.
[72] *Župljanin* Decision, para. 44; *Miletić* Decision of 18 January 2024, para. 48; *Bralo* Decision, para. 39.
[73] *Župljanin* Decision, para. 44; *Miletić* Decision of 18 January 2024, para. 48; *Bralo* Decision, para. 39 and references cited therein.
[74] *Župljanin* Decision, para. 44; *Miletić* Decision of 18 January 2024, para. 48; *Bralo* Decision, para. 39.

47. It falls upon the convicted person to demonstrate that sufficient progress has been made in his or her rehabilitation, and that granting release before the full sentence is served would be a responsible exercise of the President's discretion.[75] Given that genocide, crimes against humanity, and war crimes are among the gravest crimes known to humankind, it is not appropriate to view the rehabilitation of perpetrators of such crimes as one would view the rehabilitation of perpetrators of so-called ordinary crimes adjudicated at the national level.[76] Good behaviour in prison is the very minimum to be expected of a convicted person while serving his or her sentence.[77]

48. Further, a convicted person who intends to return to the region where his or her crimes were committed before serving his or her full sentence will ordinarily have to demonstrate a greater degree of rehabilitation.[78]

49. The most probative materials before me concerning the extent to which Kunarac has demonstrated rehabilitation are: (i) the Application; (ii) the Response; and (iii) the Prison Report.

(a) Behaviour in Prison

50. Kunarac submits that he has participated in rehabilitation programmes and refers, in particular, to his successful completion of a German course and his work for a local company.[79] Kunarac asserts that he "has a positive attitude towards persons of other backgrounds and treats all the people without discrimination".[80] Kunarac contends that during his 25 years in prison, "he had no serious accidents on a discriminatory basis with anybody".[81] Referring to incidents with a fellow prisoner and a prison employee,[82] Kunarac asserts that "[t]he criminal investigation against him was suspended since he was attacked by a Chechen prisoner" and that "an accident with a guard was not on a discriminatory basis".[83] He further asserts that both incidents took place more than 5 years ago, and that he has not been "involved in any other similar incident".[84]

51. According to the Prison Report, Kunarac "continues to display a notable lack of acceptance for negative decisions".[85] He "does not accept that his needs and those of other prisoners need to be

[75] *Župljanin* Decision, para. 45; *Miletić* Decision of 18 January 2024, para. 49; *Bralo* Decision, para. 39.
[76] *Župljanin* Decision, para. 45; *Miletić* Decision of 18 January 2024, para. 49; *Bralo* Decision, para. 38.
[77] *Župljanin* Decision, para. 46; *Miletić* Decision of 18 January 2024, para. 50, *Krstić* Decision of 15 November 2022, para. 49.
[78] *Župljanin* Decision, para. 47; *Miletić* Decision of 18 January 2024, para. 51; Second Decision Denying Early Release, para. 44.
[79] Application, para. 51.
[80] Application, para. 49.
[81] Application, para. 49.
[82] *See also* Second Decision Denying Early Release, paras. 22, 48.
[83] Application, para. 49.
[84] Application, para. 50.
[85] Prison Report, p. 1.

coordinated in day-to-day prison life". [86] In situations where "his demands are not met immediately or exactly as stated" it is reported that Kunarac "often reacts in a quick tempered, at times aggressive manner towards the prison officers".[87] In December 2021, such a situation led to disciplinary proceedings being instituted against him.[88] In addition, Kunarac is said to react "loudly and aggressively towards fellow prisoners, for example when a prison worker did not give him enough socks during a laundry round in June 2022".[89]

52. Good behaviour in prison is the very minimum to be expected of a convicted person while serving his or her sentence, and Kunarac has objectively struggled to meet this standard. I note that the incidents described in the Prison Report seem to be less serious and less frequent than those reported in previous periods,[90] which may indicate that his behaviour has improved somewhat in recent years. Nevertheless, I find the persistent confrontations with prison staff and other inmates - with no reasonable explanation provided in his submissions - to be troubling. Kunarac's behaviour has remained problematic throughout his time in custody, which, in my view, suggests that he is not motivated to genuinely rehabilitate himself and weighs against granting him early release.[91]

(b) Acceptance of Responsibility, Signs of Critical Reflection, and Expressions of Genuine Remorse or Regret

53. The Mechanism's jurisprudence has recognised that: (i) an important factor in assessing a convicted person's progress towards rehabilitation is the acceptance of responsibility for his or her crimes, even if this does not constitute a legal requirement to demonstrate rehabilitation and is not a precondition for early release; and (ii) a convicted person's partial acceptance of responsibility for his or her crimes will merit positive weight, however, any notable difference between the role a convicted person ascribes to himself or herself, and the role actually played, can suggest a lack of sufficient critical reflection upon his or her crimes.[92]

[86] Prison Report, p. 1.
[87] Prison Report, p. 1.
[88] Prison Report, p. 1.
[89] Prison Report, p. 1.
[90] *Cf.* Second Decision Denying Early Release, paras. 47-52; Decision Denying Early Release, paras. 25-32.
[91] I also note that in the Response, Kunarac argues that information about his lack of rehabilitation was the "result of the informal pressure made by the various victims associations". Response, paras. 17-18.
[92] *Župljanin* Decision, para. 52; *Miletić* Decision of 18 January 2024, para. 56; *Prosecutor v. Vlastimir Đorđević*, Case No. MICT-14-76-ES, Decision on the Applications for Early Release of Vlastimir Đorđević, 30 November 2021, para. 70.

54. Kunarac submits that he has accepted responsibility for "the rape that took place on August 3, 1992",[93] and that during his trial he publicly expressed his "remorse and regret for the events of August 3, 1992" and has not had an opportunity to repeat it publicly since that time.[94]

55. With respect to the other crimes, Kunarac asserts that accepting responsibility for "all convictions from the ICTY" would deprive him of: (i) the right to a fair trial and "compromise his presumption of innocence" in relation to proceedings in Bosnia and Herzegovina where, in 2017, he was indicted for "new crimes allegedly committed in July 1992, approximately simultaneously with the crimes for which Kunarac was convicted by the ICTY";[95] and (ii) "the effective use of the [r]eview" of his judgement, which he contends was "based on the evidence […] which [he] was not able to challenge during the trial".[96] With respect to the latter, Kunarac submits that my consideration of this factor in determining his application for early release "pressures him" not to petition for review "even if he finds a new fact that could have been a decisive factor in reaching the decision",[97] and that, were he to accept responsibility "for the acts he did not do" and subsequently petition for review, such review would "lose credibility".[98] Ultimately, Kunarac submits that he "is not willing to accept responsibility for the [rest of his] conviction just because he failed to effectively challenge the evidence against him".[99]

56. In relation to actions taken to foster reconciliation or seek forgiveness, Kunarac submits that "[t]his indicator is unclear", reasoning that "'reconciliation' has more than one meaning" including to "restore friendship, resolve differences, conform to the circumstances, accept something unpleasant".[100] He also submits that he had "no opportunity to foster reconciliation, whatever that meant" as he was "in isolation for more than 25 years".[101] According to Kunarac, "[f]orgiveness implies contact with the victim(s)" and he has had "no opportunity to contact any of them, either directly or indirectly, and ask for their forgiveness".[102]

57. The prison's psychological service reports that Kunarac "continues to trivialise and deny the offences" of which he was convicted, and "does not accept his own guilt, but rather sees himself as

[93] Application, para. 45.
[94] Application, para. 47. *See also* Application, para. 46 *referring* to Second Decision Denying Early Release, para. 56 citing a letter from Kunarac to the then-President, dated 31 October 2016.
[95] Application, paras. 40-41.
[96] Application, para. 43.
[97] Application, para. 43.
[98] Application, para. 43.
[99] Application, para. 45.
[100] Application, para. 48.
[101] Application, para. 49.
[102] Application, para. 49.

a victim of the justice system, which refuses to release him".[103] It further reports that "[a]cceptance of guilt, remorse or empathy for [Kunarac's] victims cannot be detected".[104]

58. As a preliminary point, I note that although Kunarac refers to "the rape that took place on August 3, 1992", and "the events of August 3, 1992", this particular date, 3 August 1992, was not specified in the Trial Judgement or the Appeal Judgement in relation to his convictions. I understand Kunarac's submission to refer to his conviction for crimes against humanity (torture and rape) and violations of the laws or customs of war (torture and rape) under Counts 1-4 in so far as it concerns his raping D.B. and his aiding and abetting the gang-rape of FWS-75 by several of his soldiers.[105]

59. Turning to Kunarac's submissions in relation to these particular crimes, I accept that during his trial he expressed his remorse and regret for the gang-rape of FWS-75,[106] but I note that his statements regarding his acceptance of responsibility for raping D.B. are more equivocal. When addressing the Appeals Chamber, Kunarac stated that he was "plagued by remorse" and wished to apologise to D.B. and to ask for forgiveness because of what happened.[107] The Trial Chamber did not accept the statements he made regarding D.B. at trial. More specifically, the Trial Chamber did not consider that either Kunarac's statement "that, in retrospect, he understands that D.B. was not acting of her own free will" or his "testimony to the effect that she supposedly seduced him" speak of remorse.[108]

60. Nevertheless, even if Kunarac fully accepted responsibility and demonstrated critical reflection of or genuine regret for these crimes, he continues to deny or distance himself from the many other crimes for which he was convicted. These other crimes include: (i) raping four other Muslim girls or women,[109] including two that he raped on more than one occasion;[110] (ii) aiding and

[103] Prison Report, p. 2.
[104] Prison Report, p. 2.
[105] Trial Judgement, para. 869 (referring to Kunarac's statements that, "in retrospect, he understands that D.B. was not acting of her own free will" and that "he felt guilty about the fact that FWS-75 was gangraped while he was raping D.B. in an adjoining room"); Appeal Judgement, para. 6.
[106] Trial Judgement, para. 869.
[107] *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-A & IT-96-23/1-A, Transcript of 6 December 2001, T. 345. *See also* Trial Judgement, para. 869.
[108] Trial Judgement, para. 869.
[109] Appeal Judgement, paras. 6-9 (referring to FWS-87, FWS-95, FWS-183, and FWS-191).
[110] Trial Judgement, paras. 670, 685 (referring to Kunarac raping FWS-87 on 2 August 1992); 701-702, 704 (referring to Kunarac raping FWS-87 sometime in either September or October 1992); 734 ("Kunarac constantly raped FWS-191 for about two months while she was kept in the house"); 744 (referring to Kunarac raping FWS-191 on 2 August 1992 and for a period of about 2 months, when he sporadically visited the house where she was being kept and treated as his property).

abetting the torture and/or rapes of four Muslim girls or women by other soldiers;[111] and (iii) over the course of approximately six months, personally enslaving two Muslim girls, one 16 years old and the other 17 years old, as well as aiding and abetting the enslavement of one of these girls by another soldier.[112]

61. In relation to Kunarac's submission that accepting responsibility for all the crimes for which he was convicted by the ICTY would prejudice him in proceedings pending before a court in Bosnia and Herzegovina, I recall that any prosecution of Kunarac for crimes for which he has already been tried before the ICTY would fall foul of the principle of *non bis in idem*, which protects persons from double jeopardy, and which is explicitly provided for in Article 7(1) of the Statute.[113] Given this, I find no merit in Kunarac's submission.

62. With respect to Kunarac's remaining submissions, and in particular the submission that accepting responsibility for all the crimes for which he was convicted by the ICTY would undermine the credibility of any potential review that he might seek to advance, I reiterate that while accepting responsibility for his or her crimes can be an important factor in assessing a convicted person's progress towards rehabilitation, it does not constitute a legal requirement to demonstrate rehabilitation and is not a precondition for early release. I also reiterate that it falls upon Kunarac to demonstrate that he has made sufficient progress in his rehabilitation, and that, if such progress were demonstrated, granting release before the full sentence is served would be a responsible exercise of the President's discretion. Kunarac's submissions fail to persuade me in this regard as there is very little to suggest that he has made any real progress in his rehabilitation. In addition to the fact that Kunarac continues to deny the crimes he was convicted of, I find the report from the prison's psychological service, indicating that Kunarac trivialises his crimes and that no remorse or empathy for the victims can be detected, to be particularly troubling.

(c) Mental State and Prospects of Successful Reintegration into Society

63. Kunarac states that, if released early, he would live in Foča, Bosnia and Herzegovina.[114] He indicates that he would receive two pensions from different sources.[115]

[111] Appeal Judgement, paras. 6-9 (referring to aiding and abetting the torture and rapes of FWS-50, FWS-75, FWS-87 by other soldiers, and the rape of FWS-186 by another soldier).
[112] Appeal Judgement, para. 9. Trial Judgement, paras. 732, 742, 744-745.
[113] Article 7(1) of the Statute provides that "[n]o person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the ICTY, the ICTR or the Mechanism".
[114] Application, para. 53. *See also* Prison Report, pp. 3-4.
[115] Application, para. 53. *See* Application, Annex, Registry Pagination ("RP") 290-286.

64. In Kunarac's view, since 1992, when the crimes for which he was convicted took place, circumstances in Foča and his personal life have changed.[116] He states that in 1992, when he was 32, he was the "commander of a volunteer unit with some limited authority in the town".[117] According to Kunarac, in 1995, "the peace was firmly established without ethnic violations. There are no volunteer or paramilitary units as in 1992, but just a police force under the firm control of the government".[118] He further contends that he "is now 62 years old and since 1995 invalid in his right hand", "has no authority in Foča", and "has no command over a volunteer or any other regular force as he did in 1992".[119] Kunarac argues that all these circumstances are "indicators of [his] prospects to successfully reintegrate into Foča and Bosnian society".[120]

65. In addition, Kunarac submits that his mental state "is good enough", [121] that he would accept any condition for his early release imposed by the President, and that he "will not try to contact or approach any victim and/or witness who testified against him".[122]

66. According to the prison's psychological service, overall there have been no changes in Kunarac's desistance prognosis since the last statement.[123] In this respect, the psychological service indicates that "[a]lthough the war is no longer ongoing and present as a factor relevant to the offences there are nevertheless persisting personality factors that are relevant to the offences and which remain untreated" and concludes that "from a psychological point of view, the negative factors continue to outweigh positive aspects at present in [Kunarac's] desistance prognosis".[124]

67. In this respect, the Prison Report indicates that Kunarac's participation in treatment measures continues to be impeded by the language barrier.[125] Despite having completed a German language course in December 2022, and securing a "very good" grade,[126] from a social work perspective, Kunarac's German language skills remain insufficient for him to participate in social work treatment measures.[127]

[116] Application, paras. 56-57.
[117] Application, para. 55.
[118] Application, para. 56.
[119] Application, para. 57.
[120] Application, para. 57.
[121] Application, RP 298.
[122] Application, para. 54. *See* Response, paras. 18, 34
[123] Prison Report, p. 2.
[124] Prison Report, p. 3.
[125] Prison Report, p. 3.
[126] Prison Report, p. 5.
[127] Prison Report, p. 3.

68. In addition, the Prison Report indicates that Kunarac continues to maintain telephone contact with his family and receives visits from acquaintances.[128]

69. I take note of the fact that Kunarac has kept in contact with his family while incarcerated and that he appears to have sufficient means to sustain himself once released. However, I also recall that, as Kunarac intends to return to Foča, where he committed the crimes for which he was convicted, it is incumbent upon him to demonstrate a greater degree of rehabilitation.[129] Considering that I have found that Kunarac fails to demonstrate that he has made any real progress in his rehabilitation,[130] I am not persuaded that he has met the required heightened rehabilitation standard.

(d) Overall Assessment

70. While Kunarac has maintained ties with his family and appears to have sufficient means to sustain himself if released, I find little else in the information before me to suggest that he will easily reintegrate into society. I am particularly concerned by the complete absence of critical reflection or of genuine regret about his role in the crimes for which he was convicted, his failure to accept his own responsibility, and the fact that he continues to have disproportionally aggressive responses over simple day-to-day matters. Consequently, I conclude that Kunarac has not demonstrated that he has been sufficiently rehabilitated so as to merit early release as a responsible exercise of my discretion.

4. Substantial Cooperation with the Prosecutor

71. The Trial Chamber considered Kunarac's voluntary surrender to the ICTY and his "substantial co-operation with the Prosecutor in giving two statements" as mitigating factors in sentencing.[131] The Prosecution submits that since Kunarac's cooperation was already taken into account as mitigation in sentencing and he has not given any additional cooperation, any such cooperation does not sufficiently weigh in favour of his early release.[132] Neither the Application nor the Response contains any submissions about Kunarac's cooperation with the Prosecutor.

72. Rule 151 of the Rules provides that the President "shall take into account […] any substantial cooperation of the prisoner with the Prosecutor" when making an early release determination. Kunarac's cooperation with the Prosecution beneficially impacted the efficient

[128] Prison Report, p. 4.
[129] *See supra* para. 48.
[130] *See supra* para. 62.
[131] Trial Judgement, para. 868.

administration of justice. However, he fails to demonstrate any subsequent instances of cooperation with the Prosecution while serving his sentence. As a result, in my assessment of the Application, I will not attach any weight to the fact that Kunarac voluntarily surrendered to the ICTY and gave two statements to the Prosecution.[133]

C. Other Considerations

1. Comments and Information Provided by the Prosecution

73. Decisions on early release have established that the President may receive and consider general comments and information from the Prosecution with regard to early release applications.[134] In doing so, the President shall exercise caution to avoid any unreasonable imbalance to the detriment of the convicted person, and carefully assess on a case-by-case basis which submissions are of actual relevance in a given case, mindful of the rights of the convicted person.[135]

74. The Prosecution submits that Kunarac has not demonstrated that his early release is warranted and refers to the high gravity of his crimes,[136] insufficient evidence of rehabilitation,[137] and a lack of substantial cooperation with the Prosecution.[138] Should I nevertheless decide to grant the Application, the Prosecution requests that I impose appropriate conditions on Kunarac.[139]

75. In particular, the Prosecution asserts that the high gravity of Kunarac's crimes strongly weighs against his early release and that he should only be granted early release if there is persuasive evidence of rehabilitation.[140] According to the Prosecution, no such evidence has been offered in the Application.[141] The Prosecution further argues that consideration must also be given to the security of victims and witnesses and the possible impact that Kunarac's early release may have on them.[142] It submits that before any possible release, Bosnia and Herzegovina should be: (i) "apprised of the nature of [Kunarac's] past violent offences against victims including minors which included the use of weapons to threaten and coerce them";[143] and (ii) consulted to prevent

[132] Prosecution Memorandum, para. 16.
[133] *See e.g. Prosecutor v. Miroslav Bralo*, Case No. MICT-14-78-ES, Decision on the Application for Early Release of Miroslav Bralo, 28 December 2023, paras. 80-81. *See also Stojić* Decision, paras. 72-73.
[134] *Župljanin* Decision, para. 65; *Miletić* Decision of 18 January 2024, para. 69; *Bralo* Decision, para. 69.
[135] *Župljanin* Decision, para. 65; *Miletić* Decision of 18 January 2024, para. 69; *Prosecutor v. Radoslav Brđanin*, Case No. MICT-13-48-ES, Decision on the Application of Radoslav Brđanin for Early Release, 28 February 2020, para. 83.
[136] Prosecution Memorandum, paras. 2, 4-8, 27.
[137] Prosecution Memorandum, paras. 2, 9-15, 27.
[138] Prosecution Memorandum, paras. 2, 16, 27.
[139] Prosecution Memorandum, paras. 2, 22-27.
[140] Prosecution Memorandum, paras. 4, 8.
[141] Prosecution Memorandum, paras. 10, 13, 15.
[142] Prosecution Memorandum, para. 19.
[143] Prosecution Memorandum, para. 19.

Kunarac from absconding following his release and to ensure appropriate conditions are in place to secure his appearance to face these charges, especially since Kunarac is also under indictment in Bosnia and Herzegovina for killings and other crimes.[144]

76. The Prosecution disputes Kunarac's submission that the circumstances in Foča and in his personal life have changed considerably and contends that in assessing the possible impact of his release on the community, I should consider the revisionism and glorification of convicted war criminals in the Republika Srpska where he intends to reside.[145]

77. I have given due regard to the Prosecution's comments and information on the Application.

2. Impact on Victims and Witnesses

78. WISP submits that the early release of a convicted person may impact victims and witnesses in different ways.[146] Learning of a convicted person's release through the media, other channels or through an unexpected encounter in public could increase the perception of risk by victims and witnesses, affect their psycho-social wellbeing, or re-traumatise them.[147] Other victims and/or witnesses may potentially come under threat of being physically harmed or intimidated by the convicted person or his supporters, as retribution for their involvement in the proceedings and for contributing to the conviction by the ICTY.[148]

79. According to the information gathered by WISP, all the witnesses residing in Foča are defence witnesses and none are considered to be vulnerable or have reported security concerns.[149] Most of the witnesses living elsewhere in Bosnia and Herzegovina, including a few who reside in nearby communities, are considered to be vulnerable due to psychological trauma and health issues as a result of sexual violence and enslavement during the war but none have reported security concerns.[150] Of the witnesses living outside of Bosnia and Herzegovina some are considered to be vulnerable due to psychological trauma and health issues and/or have reported security concerns.[151]

80. WISP also expressed its concern about the geopolitical situation in Foča, and the Republika Srpska in general.[152] According to WISP, witnesses, especially those of ethnic minority groups

[144] Prosecution Memorandum, para. 20
[145] Prosecution Memorandum, para. 21. *See also* Annex B.
[146] WISP Memorandum, para. 7.
[147] WISP Memorandum, para. 7.
[148] WISP Memorandum, para. 7.
[149] WISP Memorandum, paras. 8, 12.
[150] WISP Memorandum, para. 13.
[151] WISP Memorandum, paras. 8-10.
[152] WISP Memorandum, para. 15.

which are among the witnesses in Kunarac's case, continue to have a feeling of insecurity which is fuelled by historical and current events.[153]

81. In addition, I received the views of the Association of Camp Inmates of Bosnia and Herzegovina, the Association of the Victims and Witnesses of Genocide; the Association of Victims of War Foča '92-'95, the Association "Our Voice", and the Association "Women Victims of War" – all of which oppose granting the Application.[154] The reasons advanced include: (i) the "upheaval" that Kunarac's release would cause in the Republika Srpska;[155] (ii) the poor security situation in Bosnia and Herzegovina and the continued ethnic tensions in Foča;[156] (iii) the fear and further trauma that his release would cause to surviving victims;[157] and (iv) Kunarac's continued denial of the crimes he committed.[158]

82. In response to Kunarac's submission that no specific method of rehabilitation is prescribed in the Mechanism's legal framework, one of the victims' associations submits that "[a] person filing an application for early release who claims that he deserves to be released does not wait for someone to provide instructions on how to achieve rehabilitation and become a better person or to instruct him to express his sincere remorse".[159]

83. Kunarac considers the participation of victims or their associations in early release proceedings to be "unjustified and unfair"[160] and asks that I disregard these submissions that, in his view, "pour out a blind hatred to" him.[161]

84. I have remained mindful of all of this information in considering the Application.

3. Health of the Convicted Person

85. Previous decisions have taken into account the state of the convicted person's health in the context of an early release application.[162] In particular, I observe that a convicted person's health

[153] WISP Memorandum, para. 15.
[154] Registrar Memorandum of 16 October 2023, para. 3; Association of Camp Inmates of Bosnia and Herzegovina Letter; Association of the Victims and Witnesses of Genocide Letter; Association of Victims of War Foča 92-95 Letter; "Our Voice" Letter; "Women Victims of War" Letter.
[155] Association of Camp Inmates of Bosnia and Herzegovina Letter, p. 1.
[156] *See* Association of Victims of War Foča 92-95 Letter, p. 1; "Women Victims of War" Letter, p. 6.
[157] *See* Association of the Victims and Witnesses of Genocide Letter, p. 2; Association of Victims of War Foča 92-95 Letter, p. 1; "Women Victims of War" Letter, p. 6.
[158] "Our Voice" Letter, p. 1; "Women Victims of War" Letter, pp. 4-5.
[159] "Women Victims of War" Letter, p. 5.
[160] Response, para. 20.
[161] Response, paras. 21-24. *See* Response, paras. 26-31.
[162] *Mladić* Decision, para. 28; *Župljanin* Decision, para. 73; *Bisengimana* Decision, para. 32.

must be considered when the seriousness of his or her condition makes it inappropriate for the convicted person to remain in prison any longer.[163]

86. I note that Kunarac does not advance any submissions suggesting that his health should be taken into account in my consideration of the Application, and that the Prison Report is equally silent in this respect. I therefore find no indication that his continued imprisonment is inappropriate.

4. Consultation

87. In coming to my decision on whether to grant the Application, I have consulted with two other Mechanism Judges.[164] Both Judge Muthoga and Judge Agius agree that while Kunarac is eligible to be considered for early release, the crimes for which he was convicted were of utmost gravity and that he has not demonstrated any remorse or genuine regret for his conduct.

88. I am grateful for my Colleagues' views on these matters, and have taken them into account in my ultimate assessment of the Application.

V. CONCLUSION

89. In conclusion, I do not consider that the conditions for early release have been met and, accordingly, I am of the view that the Application should be denied. Although Kunarac is eligible to be considered for early release, there continue to be significant factors strongly militating against his early release, including the high gravity of his crimes, and his failure to demonstrate sufficient signs of rehabilitation. Further, there is no evidence before me that demonstrates the existence of compelling humanitarian grounds which would warrant overriding this negative assessment.

VI. DISPOSITION

90. For the foregoing reasons, and pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules, I hereby **DENY** the Application.

91. The Registrar is **DIRECTED** to provide the Prosecutor of the Mechanism with a copy of this decision as soon as practicable.

[163] *Mladić* Decision, para. 28; *Župljanin* Decision, para. 73; *Prosecutor v. Ljubiša Beara*, Case No. MICT-15-85-ES.3, Public Redacted Version of 7 February 2017 Decision of the President on the Early Release of Ljubiša Beara, 16 June 2017, paras. 47-49.
[164] *See supra* para. 17.

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

Done this 22nd day of July 2024,
At The Hague,
The Netherlands.

Judge Graciela Gatti Santana
President

[Seal of the Mechanism]

UNITED NATIONS
International Residual Mechanism
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Case Name/ *Affaire* : **Prosecutor v. Dragoljub Kunarac** **Case Number/ *Affaire n°* :** **MICT-15-88-ES.1**

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Title of Document/ *Titre du document* : **Decision on the application for early release of Dragoljub Kunarac**

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