

**UNITED  
NATIONS**



International Residual Mechanism  
for Criminal Tribunals

Case No.: MICT-14-63-ES

Date: 11 March 2021

Original: English

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**THE PRESIDENT OF THE MECHANISM**

**Before:** Judge Carmel Agius, President

**Registrar:** Mr. Abubacarr Tambadou

**Decision of:** 11 March 2021

**PROSECUTOR**

v.

**GORAN JELISIĆ**

*PUBLIC*

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**DECISION ON SENTENCE REMISSION AND EARLY RELEASE  
OF GORAN JELISIĆ**

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**The Office of the Prosecutor:**

Mr. Serge Brammertz

**Mr. Goran Jelisić**

**Italian Republic**

1. I, Carmel Agius, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively), am seized of an application by Mr. Goran Jelisić (“Jelisić”) for recognition of sentence remissions and early release dated 13 June 2018 (“Application”), renewed and supplemented on 13 September 2020 (“Renewed Application”).<sup>1</sup>

## I. BACKGROUND

2. Jelisić was arrested on 22 January 1998 and was immediately transferred to the United Nations Detention Unit in The Hague, the Netherlands.<sup>2</sup> On 29 October 1998, Jelisić entered a plea of not guilty to the count of genocide and pleaded guilty to 31 counts comprising violations of the laws or customs of war and crimes against humanity.<sup>3</sup> Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia (“Trial Chamber” and “ICTY”, respectively) was satisfied that the guilty plea entered by Jelisić was voluntary, informed, and unequivocal, and declared Jelisić guilty of the crimes he had admitted to in his guilty plea.<sup>4</sup> The proceedings before the Trial Chamber were therefore limited to the single count of genocide and to matters related to sentencing.<sup>5</sup>

3. On 19 October 1999, the Trial Chamber acquitted Jelisić of the count of genocide,<sup>6</sup> and entered convictions against him on 16 violations of the laws or customs of war, comprising murder, cruel treatment, and plunder, as well as 15 counts of crimes against humanity, comprising murder and other inhumane acts.<sup>7</sup> On 14 December 1999, the Trial Chamber sentenced him to 40 years of imprisonment.<sup>8</sup>

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<sup>1</sup> Letter from Jelisić to the then-President, dated 13 June 2018 (confidential) (“Application”); Letter from Jelisić to the President, dated 13 September 2020 (confidential) (“Renewed Application”). I use the term “Application” to refer to the direct petition submitted by Jelisić, consistent with paragraph 2 of the 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”). I note that this matter first arose while an earlier version of the Practice Direction on this topic was in force. *See* 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, MICT/3/Rev.1, 24 May 2018. Unless otherwise indicated, reference will be made to the current Practice Direction.

<sup>2</sup> *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, *Judgement*, 14 December 1999 (“Trial Judgement”), paras. 5, 123, 135.

<sup>3</sup> Trial Judgement, paras. 8, 11, 24. *See Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, *Judgement*, 5 July 2001 (“Appeal Judgement”), para. 2.

<sup>4</sup> *See* Trial Judgement, paras. 11, 24, 26-27, 58. *See also* Appeal Judgement, p. 1.

<sup>5</sup> Trial Judgement, paras. 11-17.

<sup>6</sup> Trial Judgement, paras. 16, 108, 138.

<sup>7</sup> Trial Judgement, paras. 16, 58, 109, 138.

<sup>8</sup> Trial Judgement, para. 139.

4. On 5 July 2001, the Appeals Chamber of the ICTY affirmed Jelisić's sentence of 40 years of imprisonment.<sup>9</sup> On 29 May 2003, Jelisić was transferred to the Italian Republic ("Italy") to serve the remainder of his sentence.<sup>10</sup>

5. On 11 April 2013, Judge Theodor Meron, in his capacity as President of the ICTY, recognised, on a provisional basis, the sentence remissions for which Jelisić had become eligible under Italian law.<sup>11</sup> On 1 June 2015,<sup>12</sup> and again on 22 May 2017,<sup>13</sup> the then-President of the Mechanism, Judge Meron, recognised, on a provisional basis, further sentence remissions amounting to a total of 1440 days.

## II. APPLICATION AND RENEWED APPLICATION

6. In the Application, Jelisić requests recognition of additional sentence remissions of 405 days that the Italian authorities have granted him since the issuance of the *Jelisić* 2017 Decision.<sup>14</sup> In light of previous sentence remissions provisionally recognised by the ICTY and the Mechanism, Jelisić submits that he became eligible for early release as of October 2020.<sup>15</sup> Further, according to Jelisić, if the additional sentence remissions underlying his Application are taken into account, he would have been eligible for early release as of August 2019.<sup>16</sup> He therefore seeks early release and, in support of this, he submits that his "rehabilitation process has improved significantly" in the two years preceding his Application.<sup>17</sup>

7. On 29 June 2018, the then-President requested the Registrar of the Mechanism ("Registrar") to undertake the steps prescribed in paragraphs 4 and 5 of the Practice Direction (MICT/3/Rev.1).<sup>18</sup>

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<sup>9</sup> Appeal Judgement, p. 41.

<sup>10</sup> See ICTY Press Release, Goran Jelisić Transferred to Italy to Serve Prison Sentence, 29 May 2003, <https://www.icty.org/en/press/goran-jelisc-transfered-italy-serve-prison-sentence>. See also Public Redacted Version of 22 May 2017 Decision of the President on Recognition of Commutation of Sentence, Remission of Sentence, and Early Release of Goran Jelisić, 11 August 2017 ("*Jelisić* 2017 Decision"), para. 3.

<sup>11</sup> *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-ES, Decision of the President on Sentence Remission of Goran Jelisić, 28 May 2013 (public redacted version of decision of 11 April 2013) ("*Jelisić* 2013 Decision"), paras. 34, 36.

<sup>12</sup> See *Jelisić* 2017 Decision, para. 25 referring to Decision of the President on the Sentence Remission of Goran Jelisić, 1 June 2015 (confidential) ("*Jelisić* 2015 Decision").

<sup>13</sup> *Jelisić* 2017 Decision, paras. 47, 59. By the same decision, my predecessor denied Jelisić's request for early release. *Jelisić* 2017 Decision, paras. 58-59.

<sup>14</sup> Application, pp. 1-2 referring to Jelisić's letter to the then-President, dated 26 August 2017 and the latter's response thereto dated 18 September 2017. Jelisić also refers to the decision of the Italian authorities correcting "a material error" in one of their previous decisions granting him sentence remission. See Application, p. 1.

<sup>15</sup> Application, p. 2.

<sup>16</sup> Application, p. 2.

<sup>17</sup> Application, p. 2.

<sup>18</sup> Internal Memorandum from the then-President to the Registrar, dated 29 June 2018 (confidential) ("*Memorandum of 29 June 2018*"), para. 3. The Registrar was also requested to liaise with the Italian authorities so that a complete overview of all sentence remission decisions granted to Jelisić could be obtained. See *Memorandum of 29 June 2018*, para. 3. On 30 July 2018, the Registry of the Mechanism ("*Registry*") indicated that it would liaise with the Italian

8. On 30 November 2018, the Registry conveyed to the then-President information provided by the Italian authorities, which set out in detail the entire process of Jelisić's gradual sentence remission.<sup>19</sup> On 8 April 2019, the Registry transmitted to me two reports concerning Jelisić.<sup>20</sup>

9. On 10 January 2020, I requested the Registry to liaise with the Italian authorities to obtain further information.<sup>21</sup> By 5 March 2020, I received most of the requested information.<sup>22</sup>

10. On 3 September 2020, pursuant to paragraphs 6 and 12 of the Practice Direction, I requested the Registrar to file a public redacted version of the Application and the English translation thereof, and to communicate to Jelisić all information collected to date pertaining to his Application.<sup>23</sup> On 11 September 2020, the Registrar filed a public redacted version of the Application.<sup>24</sup>

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authorities anew for this purpose. *See* Internal Memorandum from the Chief, Registry, Hague branch to the then-President, dated 30 July 2018 (confidential), para. 3. On 1 October 2018, the then-President requested an update regarding his request. *See* Internal Memorandum from the then-President to the Chief, Registry, Hague branch, dated 1 October 2018 (confidential), para. 2. On 11 October 2018, the Registry informed the then-President that on 6 August 2018, the Registrar wrote to the Italian Ambassador seeking his assistance in obtaining the requested information. *See* Internal Memorandum from the Deputy Chief, Registry, Hague branch to the then-President, dated 11 October 2018 (confidential), para. 2.

<sup>19</sup> *See* Internal Memorandum from the Deputy Chief, Registry, Hague branch to the then-President, dated 30 November 2018 (confidential) ("Memorandum of 30 November 2018") *transmitting a note verbale* from the Embassy of Italy to the Netherlands, dated 21 November 2018, *conveying* Letter of the Office of the Public Prosecutor General at the Court of Appeal in Rome – Criminal Enforcement Office, dated 5 November 2018 ("Letter of 5 November 2018"), and Order of the Deputy Prosecutor General at the Court of Appeal in Rome, dated 2 November 2018 ("2 November 2018 Revoking Order"). *See also* Internal Memorandum from the Deputy Chief, Registry, Hague branch to the then-President, dated 6 December 2018 (confidential) ("Memorandum of 6 December 2018").

<sup>20</sup> Internal Memorandum from the Deputy Chief, Registry, Hague branch to the President, dated 8 April 2019 (confidential) *transmitting* a letter from the Italian Ministry of Justice, Department of Judicial Affairs, Office of International Judicial Cooperation, dated 26 March 2019, *conveying* a letter from the Italian Ministry of Justice, Department of the Prison Administration, dated 12 March 2019, *conveying* a summary report of the Governor of the Prison of Massa, dated 26 February 2019 ("Summary Report"), and a psychiatric report of the Health Director and Psychiatric Consultant, dated 11 March 2019 ("Psychiatric Report").

<sup>21</sup> Internal Memorandum from the President to the Registrar, 10 January 2020 (confidential) ("Memorandum of 10 January 2020"), para. 3. In particular, I requested information on Jelisić's eligibility for pardon, commutation of sentence, or early release under Italian law, and translations of the latest Italian decisions granting Jelisić sentence remissions. I also requested a detailed report of any cooperation Jelisić had provided to the Office of the Prosecutor of the Mechanism ("Prosecution"), and the significance thereof. *See* Memorandum of 10 January 2020, para. 3.

<sup>22</sup> Internal Memorandum from the Registrar to the President, dated 22 January 2020 (confidential) *transmitting* Judgement of the Court of Padua, dated 23 January 2018 (English translation); Internal Memorandum from the Registrar to the President, dated 5 March 2020 (confidential) *transmitting* Internal Memorandum from the Senior Legal Officer, Officer-in-Charge, Prosecution, Hague branch to the Deputy Chief, Registry, Hague branch, dated 27 January 2020 (confidential) and a *note verbale* from the Embassy of Italy to the Netherlands, dated 13 February 2020, *conveying, inter alia*: (i) Order of the Surveillance Magistrate of the Surveillance Office of Massa, dated 27 June 2017; (ii) Order of the Surveillance Magistrate of the Surveillance Office of Massa, dated 29 May 2018; (iii) Certificate of the enforcement status by the Office of the Prosecutor General at the Court of Appeal of Rome, dated 29 January 2020 ("Enforcement Status Certificate"); and (iv) Letter of the Surveillance Magistrate of the Surveillance Office of Massa, dated 14 March 2019, *conveying* the Summary Report and the Psychiatric Report.

<sup>23</sup> *See* Internal Memorandum from the President to the Registrar, dated 3 September 2020 (confidential), paras. 2-3.

<sup>24</sup> Registrar's Submission of Mr. Goran Jelisić's Application for Pardon, Commutation of Sentence and/or Provisional Early Release, 11 September 2020.

11. On 13 September 2020, while I was considering his Application, in a letter addressed to me Jelisić reiterated his request for early release and made a number of further submissions pertaining to his rehabilitation.<sup>25</sup>

12. On 28 October 2020, the Registrar communicated to Jelisić, in a language that he understands, all information that had been collected pertaining to his Application.<sup>26</sup> On 29 January 2021, I received Jelisić's comments on the materials sent to him by the Registrar.<sup>27</sup>

13. Since no Judge who imposed the sentence upon Jelisić continues to be a Judge of the Mechanism, I consulted with Judge José R. de Prada Solaesa and Judge Ivo Nelson de Caires Batista Rosa in accordance with Rule 150 of the Rules of Procedure and Evidence of the Mechanism ("Rules") and paragraph 16 of the Practice Direction.

### III. APPLICABLE LAW

14. 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.

15. 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.

16. Rule 149 of the Rules provides that if, according to the law of the State of imprisonment, a convicted person is eligible for pardon, commutation of sentence, or early release the State shall, in accordance with Article 26 of the Statute, notify the Mechanism of such eligibility. Rule 150 of the

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<sup>25</sup> Renewed Application, pp. 1-3. I received the Renewed Application and its English translation on 28 September 2020.

<sup>26</sup> Internal Memorandum from the Registrar to the President, dated 28 October 2020 (confidential), para. 3.

<sup>27</sup> Internal Memorandum from the Registrar to the President, dated 29 January 2021 (confidential) ("Memorandum of 29 January 2021") *transmitting* two letters from Jelisić, dated 7 November 2020 (confidential) ("Letter of 7 November 2020") and 7 January 2021 ("Letter of 7 January 2021"), respectively. In the Letter of 7 January 2021, Jelisić submits that he originally sent his response to the Mechanism on 7 November 2020, but his letter was returned to him with the explanation that the address was incorrect. The Registry informs me that Jelisić's Letter of 7 January 2021 was received on 19 January 2021 *via* email from an Italian lawyer, who is not recognised as counsel for Jelisić. *See* Memorandum of 29 January 2021, para. 3, fn. 1. Despite the irregularity in how these letters were sent to the Mechanism, I have no reason to doubt Jelisić's explanation, and therefore accept his letters as validly submitted.

Rules stipulates that the President shall, upon such notice or 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.

17. The general standards for granting pardon, commutation of sentence, or 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 Prosecutor.

18. Paragraph 5 of the Practice Direction specifies that a convicted person may directly petition the President for pardon, commutation of sentence, or early release, if the convicted person believes that he or she is eligible. While such petition may be submitted at any time, a convicted person serving a sentence under the supervision of the Mechanism will generally be eligible to be considered for early release only upon having served two-thirds of his or her sentence as imposed by the ICTR, the ICTY, or the Mechanism.<sup>28</sup> Paragraph 9 of the Practice Direction sets out the duties of the Registry including, in case of a direct petition, to request the enforcement State to inform the Mechanism whether the convicted person is eligible for pardon, commutation of sentence, or early release under the law of the enforcement State.

19. Paragraph 10 of the Practice Direction indicates that the President may direct the Registry to collect information which the President considers may be relevant to the determination of whether pardon, commutation of sentence, or early release is appropriate.<sup>29</sup> Paragraph 13 of the Practice Direction states that the convicted person shall be given 14 days to examine the information and provide any written submissions in response.

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<sup>28</sup> Practice Direction, paras. 7-8.

<sup>29</sup> Practice Direction, para. 10 ("To assist in his or her determination of an Application, the President may direct the Registry, where applicable, to collect information such as: (a) [a]ny reports and observations from the appropriate authorities in the enforcement State as to the behaviour of the convicted person during his or her period of incarceration and the general conditions under which he or she was imprisoned; (b) [a]ny psychiatric or psychological evaluations prepared on the mental condition of the convicted person, including in relation to any risks posed by release, as well as any remarks of the convicted person regarding the crimes for which he or she was convicted and the victims of these crimes; (c) [a]ny medical reports on the physical condition of the convicted person, including whether the convicted person is capable of serving his or her sentence in the enforcement State; (d) [i]nformation on where the convicted person intends to live if released early; (e) [a] detailed report from the [...] Prosecution [...] on any co-operation of the convicted person with the Prosecution of the ICTR, the ICTY, or the Mechanism and the significance thereof, as well as

20. The relevant enforcement agreement between the United Nations and Italy,<sup>30</sup> which applies *mutatis mutandis* to the Mechanism,<sup>31</sup> provides in Article 3(1) that the Italian authorities shall be bound by the duration of the sentence imposed by the ICTY. Article 3(2) provides that the conditions of imprisonment shall be governed by Italian law, subject to the supervision of the Mechanism. Article 3(3) stipulates that if under Italian law a convicted person becomes eligible for non-custodial measures or working activities outside the prison, or is entitled to benefit from conditional release, the relevant Italian authority is to notify the President. According to Article 8(2), following notification by the relevant Italian authority of a convicted person's eligibility for pardon or commutation under Italian law, if the President, in consultation with Judges of the Mechanism, does not consider that granting pardon or commutation is appropriate, the Registrar shall inform the relevant Italian authority, who will provide for the transfer of the convicted person to the Mechanism.

#### IV. ANALYSIS

21. I will first consider the sentence remissions granted to Jelisić by the Italian authorities, and thereafter his request for early release.

##### A. Sentence Remissions

22. At the outset, I would like to recall that in my recent decision pertaining to another person convicted by the ICTY, issued on 31 December 2020,<sup>32</sup> I revisited the matter of sentence remissions more generally. This resulted from a survey of relevant jurisprudence which revealed that the approach adopted by the ICTY and the Mechanism in relation to sentence remissions had created some ambiguity.<sup>33</sup> As a result, convicted persons could have had the expectation that sentence remissions at the domestic level may automatically be taken into account by the Mechanism when calculating the two-thirds threshold for the purposes of early release, or the end date of the sentence.<sup>34</sup>

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any other comments or information that the Prosecution considers of relevance for the determination of the Application; and (f) [a]ny other information that the President considers relevant.”).

<sup>30</sup> Agreement between the Government of the Italian Republic and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia, dated 6 February 1997 (“Enforcement Agreement”).

<sup>31</sup> See Security Council Resolution 1966 (2010), 22 December 2010, para. 4.

<sup>32</sup> *Prosecutor v. Milomir Stakić*, Case No. MICT-13-60-ES, Decision on Sentence Remission and Early Release of Milomir Stakić, 31 December 2020 (“*Stakić* 2020 Decision”).

<sup>33</sup> I note the absence of relevant practice regarding sentence remissions before the ICTR. See *Stakić* 2020 Decision, para. 24, fn. 26.

<sup>34</sup> See *Stakić* 2020 Decision, para. 24.

23. Given this context, I found it important to clarify the issues and distinguish between sentence remissions at the domestic level before the enforcement State, and applications for commutation of sentence at the international level before the Mechanism.<sup>35</sup> The relevant part of this decision is presented below.

1. Treatment of domestic sentence remissions by the ICTY and the Mechanism

24. Sentence remissions may be regarded as a form of commutation of sentence.<sup>36</sup> Indeed, in 2013, the then-President of the ICTY stated that “sentence remissions, as reductions of a prisoner’s sentence [...] while in detention amount, in essence, to commutations of the sentence”.<sup>37</sup>

25. The ICTY and the Mechanism have consistently noted the use of sentence remissions in managing prison populations in domestic systems, and that if sentence remissions were not provisionally recognised, inequality would arise for the convicted person *vis-à-vis* the domestic prison population.<sup>38</sup> However, persons convicted by the ICTR, the ICTY, or the Mechanism will always be in a different position *vis-à-vis* other persons serving sentences in enforcement States.<sup>39</sup> The fact that the former are convicted of international crimes and that the enforcement of their sentences is supervised by the Mechanism, results in any comparison of their status with that of the domestic prison population being counterproductive.<sup>40</sup> Instead, the Mechanism must ensure that, to the extent possible, persons convicted by the ICTR, the ICTY, or the Mechanism are treated equally.<sup>41</sup>

26. In this regard, I note that sentence remissions introduce an element of inequality when viewed in relation to similarly-situated convicted persons in other enforcement States.<sup>42</sup> Any recognition of domestic sentence remissions by the Mechanism prior to a convicted person having served two-thirds of his or her sentence would result in the unequal application of the two-thirds eligibility threshold, which is the Mechanism’s threshold for considering applications for pardon,

<sup>35</sup> *Stakić* 2020 Decision, para. 25. See *Stakić* Decision, paras. 26-38.

<sup>36</sup> *Stakić* 2020 Decision, para. 26.

<sup>37</sup> *Jelisić* 2013 Decision, para. 13. See *Prosecutor v. Milomir Stakić*, Case No. MICT-13-60-ES, Decision of the President on Sentence Remission of Milomir Stakić, 6 October 2017 (“*Stakić* 2017 Decision”), para. 10; *Jelisić* 2017 Decision, para. 16; *Prosecutor v. Milomir Stakić*, Case No. MICT-13-60-ES, Decision of the President on Sentence Remission of Milomir Stakić, 17 March 2014 (public redacted version of decision of 19 December 2013) (“*Stakić* 2013 Decision”), para. 11. See also *Stakić* 2020 Decision, para. 26.

<sup>38</sup> See e.g. *Stakić* 2017 Decision, para. 17; *Jelisić* 2017 Decision, para. 29; *Stakić* 2013 Decision, para. 18; *Jelisić* 2013 Decision, para. 20; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-ES, Decision of President on Early Release of Milomir Stakić, 18 July 2011 (“*Stakić* 2011 Decision”), para. 22. See also *Stakić* 2020 Decision, para. 27.

<sup>39</sup> *Stakić* 2020 Decision, para. 27.

<sup>40</sup> See e.g. *Prosecutor v. Stanislav Galić*, Case No. MICT-14-83-ES, Decision on the Early Release of Stanislav Galić, 26 June 2019 (public redacted) (“*Galić* Decision”), para. 31. See also *Stakić* 2020 Decision, para. 27.

<sup>41</sup> *Stakić* 2020 Decision, para. 27.

<sup>42</sup> *Stakić* 2020 Decision, para. 28.



commutation of sentence, or early release.<sup>43</sup> This is because only those convicted persons serving their sentence in enforcement States whose domestic laws provide for such a possibility, would be able to benefit from sentence remissions.<sup>44</sup> Consequently, these persons would become eligible for early release sooner than other similarly-situated convicted persons.<sup>45</sup>

27. In the case of *Prosecutor v. Haradin Bala*,<sup>46</sup> Judge Patrick Robinson, in his capacity as President of the ICTY, provided a compromise solution in deciding to recognise the domestic system of sentence remissions, albeit on the basis that such remissions remain subject to the supervision of the ICTY.<sup>47</sup> President Robinson emphasised that any provisional recognition of sentence remissions would not impact the ICTY's practice of considering a prisoner eligible for early release only upon having served two-thirds of his or her sentence.<sup>48</sup>

28. Further, it was determined that sentence remissions could be provisionally recognised, if "other criteria in Rule 125 militate in favour of such remission",<sup>49</sup> upon which President Robinson embarked on an assessment of the criteria of the gravity of crimes, demonstration of rehabilitation, and cooperation with the Prosecution.<sup>50</sup> Until recently, the criteria contained in what is now the Mechanism's equivalent rule, Rule 151 of the Rules, had been assessed in each instance of a decision being taken on sentence remission.<sup>51</sup>

29. In order to ensure the equal treatment of similarly-situated convicted persons, the ICTY and the Mechanism had provisionally recognised sentence remissions if the criteria of Rule 151 of the Rules militated for such recognition.<sup>52</sup> However, the jurisprudence was ambiguous as to whether sentence remissions *will* in fact automatically impact the Mechanism's calculation of two-thirds or the end date of the sentence.<sup>53</sup> As set out in the *Bala* Decision, there was the possibility that

<sup>43</sup> *Stakić* 2020 Decision, para. 28. *See infra*, paras. 33, 41-44.

<sup>44</sup> *Stakić* 2020 Decision, para. 28.

<sup>45</sup> *Stakić* 2020 Decision, para. 28.

<sup>46</sup> *Prosecutor v. Haradin Bala*, Case No. IT-03-66-ES, Decision on Application of Haradin Bala for Sentence Remission, 15 October 2010 ("*Bala* Decision").

<sup>47</sup> *Bala* Decision, para. 15. *See Stakić* 2020 Decision, para. 29.

<sup>48</sup> *See Bala* Decision, paras. 14-15. *See also Stakić* 2020 Decision, para. 29.

<sup>49</sup> *Bala* Decision, para. 16. *See Stakić* 2020 Decision, para. 30.

<sup>50</sup> *Bala* Decision, paras. 17-27. *See Stakić* 2020 Decision, para. 30. Rule 125 of the ICTY Rules of Procedure and Evidence (IT/32/Rev.44, 10 December 2009) provided that "[i]n determining whether pardon or commutation is appropriate, 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, as well as any substantial cooperation of the prisoner with the Prosecutor".

<sup>51</sup> *See e.g. Stakić* 2017 Decision, paras. 19-29; *Jelisić* 2017 Decision, paras. 31-46; *Stakić* 2013 Decision, paras. 20-28; *Jelisić* 2013 Decision, paras. 22-33; *Stakić* 2011 Decision, paras. 26-37. *See also Stakić* 2020 Decision, para. 30.

<sup>52</sup> *See e.g. Stakić* 2017 Decision, paras. 13, 18; *Jelisić* 2017 Decision, paras. 28, 30; *Stakić* 2013 Decision, paras. 17, 19; *Jelisić* 2013 Decision, para. 21. *See also Stakić* 2020 Decision, para. 31.

<sup>53</sup> *Stakić* 2020 Decision, para. 31.

provisionally recognised sentence remissions “[...] may be *withdraw[n]* at a subsequent time”.<sup>54</sup> The approach before the ICTY and the Mechanism then evolved to include that the President also had the discretion, in determining whether early release is appropriate, “to *recognize the remissions granted under domestic law and consider the detainee eligible for early release*”<sup>55</sup> or “*not to count [the provisionally recognised] remissions*”<sup>56</sup> in calculating the amount of time served for other purposes, including in determining whether two-thirds of the sentence had been served.<sup>57</sup>

30. While the possibilities set out above could be applied in such a way as to avoid practical inequalities between similarly-situated convicted persons,<sup>58</sup> they nevertheless created uncertainty and could lead convicted persons to have false expectations that sentence remissions granted by an enforcement State may automatically impact the Mechanism’s calculation of the two-thirds threshold or the end date of any given sentence.<sup>59</sup>

31. When a convicted person becomes eligible for sentence remission under the domestic law of the enforcement State, I am willing to recognise this on a provisional basis.<sup>60</sup> However, I wish to clarify and reiterate that, while sentence remission decisions taken by an enforcement State may affect the enforcement State’s *own* calculation of the length of a convicted person’s sentence, they will not impact the Mechanism’s calculation of: (i) the two-thirds threshold for the purpose of early release; or (ii) the end date of the convicted person’s sentence.<sup>61</sup> In other words, sentence remissions may be seen as a form of commutation of sentence pursuant to the domestic law of an enforcement State, but will not constitute commutation of sentence before the Mechanism.<sup>62</sup> Nevertheless, I do note that the factors underlying sentence remission decisions taken by an enforcement State may be used to evidence good behaviour and progress with regard to rehabilitation for the purposes of applications for pardon, commutation, or early release before the Mechanism.<sup>63</sup>

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<sup>54</sup> *Bala* Decision, para. 15 (emphasis added). See *Stakić* 2017 Decision, para. 18; *Jelisić* 2017 Decision, para. 24; *Stakić* 2013 Decision, paras. 16-17; *Jelisić* 2013 Decision, para. 19; *Stakić* 2011 Decision, para. 22. See also *Stakić* 2020 Decision, para. 31.

<sup>55</sup> *Jelisić* 2013 Decision, para. 19 (emphasis added). See *Jelisić* 2017 Decision, para. 28. See also *Stakić* 2020 Decision, para. 31.

<sup>56</sup> *Jelisić* 2013 Decision, para. 34 (emphasis added). See *Stakić* 2017 Decision, para. 32; *Stakić* 2013 Decision, paras. 16, 31. See also *Stakić* 2020 Decision, para. 31.

<sup>57</sup> *Stakić* 2020 Decision, para. 31.

<sup>58</sup> See *supra*, para. 26.

<sup>59</sup> See *Stakić* 2020 Decision, para. 32.

<sup>60</sup> *Stakić* 2020 Decision, para. 33.

<sup>61</sup> *Stakić* 2020 Decision, para. 33.

<sup>62</sup> *Stakić* 2020 Decision, para. 33.

<sup>63</sup> See *Stakić* 2020 Decision, para. 33.

## 2. Commutation of sentence before the Mechanism

32. Commutation of sentence has not been clearly defined in the Statute or Rules of the Mechanism or its predecessor Tribunals, or, until very recently, in the jurisprudence.<sup>64</sup> However, I have noted that it is a distinct legal concept from that of pardon and early release and, accordingly, has a different impact on the character of the sentence.<sup>65</sup> A pardon sets aside the sentence imposed for a crime, while commutation changes the nature of the sentence, by reducing it or otherwise making it less severe. Early release, on the other hand, means that a prisoner is freed before the end of his or her sentence, either with or without conditions.<sup>66</sup> Thus, with regard to the latter, the sentence does not change and the breach of any conditions imposed upon early release can result in the person being transferred back to the Mechanism to serve the rest of his or her sentence.<sup>67</sup>

33. I recall that applications for commutation of sentence before the Mechanism can be made regardless of whether a person was convicted by the Mechanism or its predecessor Tribunals.<sup>68</sup> Moreover, they can be made irrespective of where the person is currently serving his or her sentence.<sup>69</sup> Further, the Mechanism's practice confirms that the two-thirds eligibility threshold applies not only to early release, but to applications for commutation of sentence before the Mechanism.<sup>70</sup>

34. As to the process to be undertaken upon receipt of an application for commutation of sentence, I have noted that since the *Bala* Decision, the ICTY and the Mechanism had, until recently, conducted an assessment pursuant to Rule 151 of the Rules or the ICTY's equivalent provision.<sup>71</sup> However, the need for a Rule 151 assessment turns on whether I am seised of an application for recognition of sentence remission pursuant to the laws of the enforcement State, or an application for commutation of sentence before the Mechanism.<sup>72</sup>

35. Sentence remissions stemming from the domestic laws of an enforcement State do not amount to commutation of sentence *before the Mechanism*.<sup>73</sup> Such remissions instead equate to commutation of sentence *before the enforcement State*.<sup>74</sup> Given that such sentence remissions cannot influence the length of the sentence under the Mechanism's framework, it is therefore

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<sup>64</sup> *Stakić* 2020 Decision, para. 34.

<sup>65</sup> *Stakić* 2020 Decision, para. 34.

<sup>66</sup> *Stakić* 2020 Decision, para. 34.

<sup>67</sup> *Stakić* 2020 Decision, para. 34.

<sup>68</sup> *Stakić* 2020 Decision, para. 35.

<sup>69</sup> *Stakić* 2020 Decision, para. 35.

<sup>70</sup> *Stakić* 2020 Decision, para. 35. See *Stakić* 2013 Decision, paras. 14-15.

<sup>71</sup> See *supra*, para. 28.

<sup>72</sup> *Stakić* 2020 Decision, para. 36.

<sup>73</sup> *Stakić* 2020 Decision, para. 37.

unnecessary to embark on a Rule 151 assessment in such situations.<sup>75</sup> Consequently, it is appropriate to conduct a Rule 151 assessment only when seized of a petition for pardon, commutation of sentence, or early release *before the Mechanism*, and where the convicted person has reached two-thirds of his or her sentence.<sup>76</sup>

36. Such a conclusion does not impact the need for me to make a decision when notified of sentence remissions pursuant to the relevant enforcement agreement in place.<sup>77</sup> Under normal circumstances, sentence remissions based on domestic law will either be acknowledged (if the enforcing State has already granted such remission) or provisionally recognised (if the enforcing State makes its decision dependent on the Mechanism’s approval) by the President, by way of a decision.<sup>78</sup> However, this decision can be taken without analysing the criteria set out in Rule 151 of the Rules, and will be based only upon the information provided by the enforcing State or, as seen in this particular case, the convicted person.<sup>79</sup>

### 3. Sentence remissions granted to Jelisić

37. In the *Jelisić* 2017 Decision, the then-President recognised, on a provisional basis, Jelisić’s sentence remissions arising from Italian law, totalling 1440 days.<sup>80</sup>

38. I note some inconsistencies in the material submitted by the Italian authorities regarding the precise number of days remitted from Jelisić’s sentence. On 30 November 2018, the then-President was informed that due to a “material error” Jelisić was unduly granted a remission of 135 days.<sup>81</sup> Consequently, after correction, the total number of remission days granted to Jelisić by the Italian authorities was set as 1710.<sup>82</sup> The Enforcement Status Certificate indicates that on 13 December 2019, Jelisić was granted a further sentence remission of 135 days, which would bring the total number of days to 1845.<sup>83</sup> I note that the Enforcement Status Certificate contains an error in its calculation of the number of sentence remission days granted to Jelisić. While it takes into account

<sup>74</sup> *Stakić* 2020 Decision, para. 37.

<sup>75</sup> *Stakić* 2020 Decision, para. 37.

<sup>76</sup> *Stakić* 2020 Decision, para. 37.

<sup>77</sup> *Stakić* 2020 Decision, para. 38.

<sup>78</sup> *Stakić* 2020 Decision, para. 38.

<sup>79</sup> *Stakić* 2020 Decision, para. 38.

<sup>80</sup> *See supra*, para. 5.

<sup>81</sup> *See* Memorandum of 30 November 2018, *transmitting* 2 November 2018 Revoking Order. On 6 December 2018, the Registry provided the then-President with its analysis of the Italian authorities’ submissions. In particular, the Registry pointed out that due to the “material error”, the *Jelisić* 2017 Decision had provisionally recognised 45 days of sentence remission that had now been “correct[ed]” under Italian law. *See* Memorandum of 6 December 2018, paras. 4-9.

<sup>82</sup> *See* Letter of 5 November 2018, pp. 3-4. In a letter dated 25 November 2018, Jelisić informed the then-President that after correcting the error on part of the Italian authorities the total number of sentence remission days granted to him was 1710. Letter from Jelisić to the then-President, dated 25 November 2018 (confidential), p. 1. *See* Application, p. 1.

<sup>83</sup> Enforcement Status Certificate, p. 3.

the 2 November 2018 Revoking Order when determining a final release date, it fails to do so when calculating the total number of sentence remission days. As a consequence, I find that the number provided in the Enforcement Status Certificate, 1980, should be corrected to read 1845. In other words, since the issuance of the *Jelisić* 2017 Decision, Jelisić has essentially been granted a further sentence remission of 405 days arising from Italian law,<sup>84</sup> bringing his total sentence remissions to 1845 days.

39. Based on the information before me, I am of the opinion that the further sentence remission of 405 days granted to Jelisić by the Italian authorities after the *Jelisić* 2017 Decision should be acknowledged. Nevertheless, this acknowledgement of the sentence remission already granted by the Italian authorities will not automatically impact the Mechanism's calculation of the two-thirds threshold for the purposes of early release, or the end date of Jelisić's sentence. I reiterate further that I do not see a need, in these circumstances, to embark on a Rule 151 assessment in coming to this conclusion.

## **B. Early release**

40. To reflect the existing practice of the Mechanism, I will start by examining Jelisić's eligibility for early release.<sup>85</sup>

### **1. Eligibility before the Mechanism**

41. As noted above, all convicted persons whose enforcement is supervised by the Mechanism are eligible to be considered for early release upon the completion of two-thirds of their sentences.<sup>86</sup> Given the need for equal treatment, this uniform eligibility threshold applies irrespective of whether the person was convicted by the ICTR, the ICTY, or the Mechanism.<sup>87</sup> Similarly, the two-thirds threshold applies irrespective of where a convicted person serves his or her sentence and 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>88</sup> This eligibility threshold is one aspect that I will continue to stress and further clarify in all my decisions on applications for early release.<sup>89</sup> The eligibility threshold does not entitle a convicted person to early release, which may only be granted

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<sup>84</sup> See Enforcement Status Certificate, p. 3; Letter of 5 November 2018, p. 4.

<sup>85</sup> See e.g. *Stakić* 2020 Decision, para. 41; *Prosecutor v. Laurent Semanza*, Case No. MICT-13-36-ES.2, Decision on Laurent Semanza's Application for Early Release, 17 September 2020 (public redacted) ("*Semanza* Decision"), para. 25; *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) ("*Brđanin* Decision"), para. 28.

<sup>86</sup> *Stakić* 2020 Decision, para. 42; *Semanza* Decision, para. 26; *Brđanin* Decision, para. 29.

<sup>87</sup> *Stakić* 2020 Decision, para. 42; *Semanza* Decision, para. 26; *Brđanin* Decision, para. 29.

<sup>88</sup> *Stakić* 2020 Decision, para. 42; *Semanza* Decision, para. 26; *Brđanin* Decision, para. 29.

<sup>89</sup> *Stakić* 2020 Decision, para. 42.

by the President as a matter of discretion, after considering the totality of the circumstances in each case, as required by Rule 151 of the Rules.<sup>90</sup>

42. By applying the eligibility threshold of two-thirds of the sentence having been served, this generally means that if a convicted person applies for early release before having served two-thirds of his or her sentence, the application may be adjudicated promptly, and without necessarily triggering the multi-step and resource-intensive process of requesting, receiving, translating, sharing, and considering additional information before dismissing it as premature.<sup>91</sup>

43. I have consistently noted that irrespective of national provisions governing early release, there is no obligation placed on the Mechanism to conduct a Rule 151 assessment before the person has reached the two-thirds eligibility threshold.<sup>92</sup> Given that Jelisić will only have served two-thirds of his 40-year sentence in September 2024,<sup>93</sup> Jelisić is not yet eligible to be considered for early release, and I will therefore not conduct an assessment of the factors set out in Rule 151 of the Rules.

44. Having said this, compelling or exceptional circumstances could arise in specific instances prior to the two-thirds threshold having been reached, which, in the exercise of my discretion as President, may overcome any eligibility concerns.<sup>94</sup> While this is provided for by the Mechanism's practice, I would anticipate that such compelling or exceptional circumstances will arise only rarely and would need to be duly substantiated.<sup>95</sup>

45. I have carefully read Jelisić's submissions in which he states that he has made progress with regards to his rehabilitation.<sup>96</sup> I note that Jelisić asks me to consider his Renewed Application together with the Application, and to seek further information from the Italian authorities regarding his conduct in prison.<sup>97</sup> However, Jelisić will only have served two-thirds of his 40-year sentence in September 2024<sup>98</sup> and is therefore not yet eligible to be considered for early release at this stage.

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<sup>90</sup> *Stakić* 2020 Decision, para. 42; *Galić* Decision, para. 24 *relying, inter alia, on Prosecutor v. Aloys Simba*, Case No. MICT-14-62-ES.1, Public Redacted Version of the President's 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019, para. 32; *Prosecutor v. Radivoje Miletić*, Case No. MICT-15-85-ES.5, Decision of the President on the Early Release of Radivoje Miletić, 23 October 2018 (public redacted), para. 23.

<sup>91</sup> See *Stakić* 2020 Decision, para. 43. See also Practice Direction, para. 10.

<sup>92</sup> See e.g. *Prosecutor v. Milan Martić*, Case No. MICT-14-82-ES, Decision on the Early Release of Milan Martić, 7 August 2020 ("*Martić* Decision"), pp. 4-5; *Prosecutor v. Dragomir Milošević*, Case No. MICT16-98-ES, Decision on the Early Release of Dragomir Milošević, 29 July 2020 ("*Milošević* Decision"), p. 4.

<sup>93</sup> Internal Memorandum from the Registrar to the President, dated 6 February 2019 (confidential) ("*Memorandum of 6 February 2019*"), p. 23.

<sup>94</sup> *Stakić* 2020 Decision, para. 44.

<sup>95</sup> *Stakić* 2020 Decision, para. 44.

<sup>96</sup> Renewed Application, pp. 1-3.

<sup>97</sup> Letter of 7 November 2020, p. 2.

<sup>98</sup> Memorandum of 6 February 2019, p. 23.

While I consider Jelisić's efforts towards rehabilitation commendable, such information will only be taken into account once he has served two-thirds of this sentence. Therefore, I do not find it necessary at this stage to consider any additional information before reaching a conclusion or to engage in an assessment of the criteria set out in Rule 151 of the Rules.

## 2. Eligibility under Italian Law

46. Italian law provides for a system of gradual sentence remissions which applies from the beginning of serving a sentence, and which can be earned by demonstrating progress in terms of rehabilitation. Jelisić has been granted several such remissions by Italian Surveillance Offices.<sup>99</sup> However, I note that even if Jelisić becomes eligible for release under Italian law due to the system of gradual sentence remissions, Italy is bound by the duration of the sentence imposed by the ICTY as set out in the Enforcement Agreement. Therefore, any release of Jelisić before the completion of his 40-year sentence falls exclusively within the discretion of the President, pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules.<sup>100</sup>

47. In these circumstances, it is important to strictly adhere to the two-thirds threshold, not only for judicial certainty, but also because any departure from this minimum time period would result in the unequal treatment of persons convicted by the ICTR, the ICTY, or the Mechanism who are serving their sentences in enforcement States with varying thresholds for eligibility for early release.

## 3. Existence of compelling or exceptional circumstances

48. With regard to the potential existence of compelling or exceptional circumstances, I note that in the Application and Renewed Application Jelisić does not demonstrate any compelling or exceptional circumstances that may warrant his early release prior to his reaching the two-thirds eligibility threshold. Further, should Jelisić decide to submit any new application for early release before September 2024, such an application must reveal the existence of compelling or exceptional circumstances that would warrant my granting early release before he reaches the two-thirds eligibility threshold.

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<sup>99</sup> See Enforcement Status Certificate.

<sup>100</sup> See *Stakić* 2020 Decision, para. 47; *Prosecutor v. Vujadin Popović*, Case No. MICT-15-85-ES.2, Decision on the Early Release of Vujadin Popović, 30 December 2020 (public redacted), p. 4; *Semanza* Decision, para. 29; *Martić* Decision, p. 4; *Milošević* Decision, p. 4; *Brđanin* Decision, para. 33.

### C. Consultation

49. In coming to my decision on whether to grant the Application and the Renewed Application I have consulted with two other Judges of the Mechanism.<sup>101</sup> Both Judge de Prada and Judge Rosa have indicated that they agree with acknowledging the 405 days of sentence remission granted to Jelisić by the Italian authorities and that such an acknowledgement should have no impact on calculating the two-thirds threshold for the purpose of early release. They have also expressed their agreement that Jelisić is not yet eligible to be considered for early release.

50. At the same time, I note that Judge de Prada has conveyed his opinion that previous sentence remissions which have been provisionally recognised by the ICTY and the Mechanism have created a legitimate expectation of a reduction of Jelisić's sentence as a whole and that this expectation should be protected.

51. I agree with Judge de Prada that legitimate expectations deserve protection. However, I note that none of the previous decisions issued by my predecessor can be seen as creating any expectation that provisionally recognised sentence remissions *will* automatically impact the Mechanism's calculation of the end date of Jelisić's sentence. The decision whether to do so has repeatedly been expressed as remaining exclusively within the President's discretion.<sup>102</sup> Indeed, my predecessor was unambiguous in stating that:

I stress that this recognition is provisional and without prejudice to the discretion of the President not to count this provisionally-recognised remission of sentence, or additional future remissions granted or claimed under Italian law, in calculating the amount of time served for other purposes, including in determining Jelisić's eligibility for early release pursuant to the practice of the Mechanism.<sup>103</sup>

52. The clarifications I introduced in my recent decision,<sup>104</sup> and which also form part of the present decision, strive to ensure the equal treatment of all convicted persons serving their sentences under the supervision of the Mechanism. To this end, and as explained above, if sentence remissions granted pursuant to national law were to be taken into account in calculating the two-thirds or end date of a sentence, this would result in some convicted persons being released earlier than those serving their sentences in enforcement States that do not provide for sentence remissions. The clarifications also make the crucial distinction between sentence remissions arising from the national law of the enforcement State, and commutation of sentence before the Mechanism. It is now clear for all convicted persons, including Jelisić, that to apply for a change in

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<sup>101</sup> See *supra*, para. 13.

<sup>102</sup> Jelisić 2017 Decision, para. 47; Jelisić 2015 Decision, para. 28; Jelisić 2013 Decision, para. 34.

<sup>103</sup> Jelisić 2017 Decision, para. 47.

<sup>104</sup> See Stakić 2020 Decision.



the nature of their respective sentence, by reducing it or otherwise making it less severe, they can apply for commutation of sentence. Such an application would be considered upon the convicted person having served at least two-thirds of his or her sentence. However, I reiterate that the factors underlying the decision of the Italian authorities to grant Jelisić sentence remissions may be used by Jelisić as supporting any application he may make for pardon, commutation of sentence, or early release.

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

## V. CONCLUSION


54. Based on the foregoing, I acknowledge the sentence remission of 405 days granted to Jelisić by the Italian authorities since the *Jelisić* 2017 Decision. However, acknowledgement of this sentence remission will not impact the Mechanism's calculation of the two-thirds threshold for the purposes of early release, or the end date of Jelisić's sentence. Further, I find that Jelisić is not eligible to be considered for early release at this stage as he has not yet served two-thirds of his sentence. Finally, Jelisić has not demonstrated any compelling or exceptional circumstances that might nevertheless warrant granting early release.

## VI. DISPOSITION

55. For the foregoing reasons, and pursuant to Article 25 of the Statute, I hereby acknowledge a sentence remission of 405 days granted to Jelisić by the Italian authorities. Further, for the foregoing reasons, and pursuant to Article 26 of the Statute and Rule 150 of the Rules, I hereby **DENY** the Application and the Renewed Application insofar as they relate to the request for early release.

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

Done this 11th day of March 2021,  
At The Hague,  
The Netherlands.



Judge Carmel Agius  
President

[Seal of the Mechanism]



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