UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-60-ES

Date: 31 December 2020

Original: English

THE PRESIDENT OF THE MECHANISM

Before: **Judge Carmel Agius, President**

Registrar: **Mr. Abubacarr Tambadou**

Decision of: **31 December 2020**

PROSECUTOR

v.

MILOMIR STAKIĆ

PUBLIC

DECISION ON SENTENCE REMISSION AND EARLY RELEASE OF MILOMIR STAKIĆ

The Office of the Prosecutor:

Mr. Serge Brammertz

Counsel for Mr. Milomir Stakić:

Mr. Branko Lukić

French Republic

1. I, Carmel Agius, President of the International Residual Mechanism for Criminal Tribunals ("President" and "Mechanism", respectively), am in receipt of: (i) a notification by the French Republic of Milomir Stakić's eligibility under French law for sentence remissions, dated 26 February 2019 ("France", "Stakić", and "Sentence Remission Notification", respectively);[1] and (ii) France's notification that Stakić has become eligible under French law to be considered for conditional release, dated 15 April 2019 ("Application").[2]

I. BACKGROUND

2. On 23 March 2001, Stakić was arrested in Belgrade, Republic of Serbia, and was transferred to the United Nations Detention Unit in The Hague, the Netherlands that same day.[3] On 28 March 2001, at his initial appearance before the International Criminal Tribunal for the former Yugoslavia ("ICTY"), Stakić pleaded not guilty to the charge of genocide, and subsequently pleaded not guilty to all additional counts contained in the fourth amended indictment.[4]

3. On 31 July 2003, Trial Chamber II of the ICTY ("Trial Chamber"), found Stakić guilty of extermination as a crime against humanity, murder as a violation of the laws and customs of war, and persecutions as crimes against humanity, incorporating murder and deportation as crimes against humanity.[5] The Trial Chamber sentenced Stakić to life imprisonment.[6]

---

[1] Internal Memorandum from the Registrar of the Mechanism ("Registrar") to the President, dated 11 February 2020 (confidential) ("Memorandum of 11 February 2020") *transmitting* a *note verbale* from the Embassy of France in the Netherlands, dated 26 February 2019, *conveying* a Letter from the Office of Mutual International Assistance in Criminal Matters to the Minister for Europe and Foreign Affairs, dated 15 January 2019, with four attachments identified as reports compiled by the French prison and legal services for the years 2017 and 2018. I note that in the Sentence Remission France refers to "sentence reductions". Therefore the word "reduction" will be used in this decision to reflect France's national law, and otherwise the word "remission" will be used.

[2] Internal Memorandum from Chief, Registry of the Mechanism ("Registry") to the President, dated 26 April 2019 (confidential) *transmitting* a *note verbale* from the Embassy of France in the Netherlands, dated 15 April 2019, *conveying* a Letter from the Court of Appeal, Colmar, dated 19 March 2019. I use the term "Application" to refer to the notification from France, 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 the previous 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, ICTY, or the Mechanism, MICT/3/Rev.2, 20 February 2019. *See also* 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, in this decision references will be made to the current Practice Direction.

[3] *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("Trial Judgement"), para. 10.

[4] Trial Judgement, para. 945.

[5] Trial Judgement, p. 253. I note that the Trial Chamber also found Stakić not guilty of genocide, complicity in genocide, and other inhumane acts (forcible transfer) as a crime against humanity.

[6] In sentencing Stakić to life imprisonment the Trial Chamber stipulated, *inter alia*, that for a "competent court", the review date would be once 20 years had been served and, that in the case of early release, Stakić would be entitled to credit for deprivation of liberty for the purposes of the proceedings ("Trial Chamber's Disposition"). Trial Judgement, pp. 253-254. However, the Trial Chamber also emphasised that Rules 123-125 of the ICTY Rules of Procedure and

4. On 22 March 2006, the Appeals Chamber of the ICTY ("Appeals Chamber"): (i) affirmed Stakić's convictions for extermination as a crime against humanity, murder as a violation of the laws or customs of war, and persecutions as a crime against humanity;[7] (ii) resolved that the Trial Chamber had incorrectly found Stakić not guilty for other inhumane acts (forcible transfer) as a crime against humanity;[8] and (iii) imposed upon Stakić a sentence of 40 years' imprisonment, subject to credit being given for time already spent in detention.[9]

5. On 12 January 2007, Stakić was transferred to France to serve his sentence.[10]

6. On three previous occasions, France notified the ICTY, and subsequently the Mechanism, of Stakić's eligibility under French Law for sentence remissions. On the first occasion Judge Patrick Robinson, the then-President of the ICTY, declined to grant Stakić sentence remission.[11] Later, on 19 December 2013 and 6 October 2017, the then-President of the Mechanism, Judge Theodor Meron, provisionally recognised sentence remissions for Stakić of 30 months and 15 months, respectively.[12]

Evidence ("ICTY Rules"), and the Practice Direction on Pardon, Commutation of Sentence and Early Release remained unaffected by the disposition. Trial Judgement, para. 937, *referring to* ICTY Rules, 28 July 2003, IT/32/Rev.28, and Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, IT/146, 7 April 1999.

[7] *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 ("Appeal Judgement"), p. 142.

[8] Appeal Judgement, p. 142.

[9] Appeal Judgement, p. 142. The Appeals Chamber held that the Trial Chamber's Disposition did not impose a minimum sentence on Stakić and did not preclude a review of the sentence before Stakić had served 20 years. Referring to Rules 123 and 124 of the ICTY Rules, the Appeals Chamber reiterated that if the laws of the host State allow for pardon or commutation of sentence before 20 years of Stakić's life sentence have passed, the State shall notify the Tribunal and the President shall determine whether pardon or commutation is appropriate. However, the Appeals Chamber found that the apparent imposition of "a '20-year review obligation' on the Host State" was inconsistent with, and contrary to the provisions contained in the Statute of the ICTY, the ICTY Rules, the relevant practice direction, and the model agreement for enforcing sentences. The Appeals Chamber also considered that "by vesting the courts of the Host State with the power to suspend the sentence, the Trial Chamber effectively removes the power from the President of the Tribunal to make the final determination regarding the sentence". In light of this, the Appeals Chamber found that the Trial Chamber had acted *ultra vires* by imposing a review obligation on the Host State and set aside the Trial Chamber's Disposition "insofar as it imposed an obligation on the Host State to review the sentence after a specified time had elapsed". *See* Appeal Judgement, paras. 391-392, p, 142. I also note that the Appeals Chamber affirmed the Trial Chamber's acquittal of Stakić for genocide and complicity in genocide. *See* Appeal Judgement, p. 141.

[10] *See* ICTY Press Release, Milomir Stakić Transferred to Serve Sentence in France, 12 January 2007, https://www.icty.org/en/press/milomir-staki%C4%87-transferred-serve-sentence-france. *See also Prosecutor v. Milomir Stakić*, Case No. IT-97-24-ES, Order Designating the State in Which Milomir Stakić is to Serve His Prison Sentence, 31 August 2006; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-ES, Order Withdrawing the Confidential Status of Order Designating the State in Which Milomir Stakić is to Serve His Prison Sentence, 29 October 2008.

[11] *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-ES, Decision of President on Early Release of Milomir Stakić, 15 July 2011 ("*Stakić* 2011 Decision"), paras. 38-40.

[12] Decision of the President on Sentence Remission of Milomir Stakić, 17 March 2014 (public redacted version of decision issued confidentially on 19 December 2013) ("Public Redacted Version of *Stakić* 2013 Decision"), para. 32; Decision of the President on Sentence Remission of Milomir Stakić, 6 October 2017 ("*Stakić* 2017 Decision"), paras. 30-33.

7. In February 2019, France submitted to the Registry, by way of *note verbale*, the Sentence Remission Notification for the years 2017 and 2018.[13]

8. On 26 April 2019, I received, *via* internal memorandum, France's Application dated 15 April 2019.[14]

9. On 24 March 2020, I requested the Registrar, pursuant to paragraph 4(a) of the Practice Direction (MICT/3/Rev.2), to inform Stakić of the Application,[15] and this took place on 30 March 2020.[16] No response was received from Stakić in this regard.

10. Subsequently, I consulted with Judge Meron in his capacity as a Judge of the sentencing Chamber,[17] as foreseen under Rule 150 of the Rules of Procedure and Evidence of the Mechanism ("Rules"). Since no other Judge who imposed the sentence continues to be a Judge of the Mechanism, I availed myself of the right to consult with another Judge of the Mechanism, Judge Claudia Hoefer.

II. SENTENCE REMISSION NOTIFICATION

11. According to the Sentence Remission Notification, Stakić is eligible for a total of ten months of sentence reductions for the years 2017 and 2018 under the "principles of equality and fairness in the treatment of persons imprisoned in France" pursuant to the French Code of Criminal Procedure.[18] The reports underlying the Sentence Remission Notification conclude that the French authorities are in favour of granting this amount, based on the efforts made by Stakić in prison.[19]

[13] *Supra* fn. 1.
[14] *Supra* fn. 2.
[15] Internal Memorandum from the President to the Registrar, dated 24 March 2020 (confidential).
[16] The Registry has confirmed, by way of informal communication dated 16 November 2020, that Stakić was informed of the Application on 30 March 2020.
[17] *See* Appeal Judgement.
[18] Sentence Remission Notification, p. 3 *citing* Article 728-4 of the Code of Criminal Procedure. According to the Sentence Remission Notification, Articles 721 and 721-1 of the Code of Criminal Procedure govern sentence reduction credit and additional sentence reductions. Sentence reduction credit is calculated on the basis of the duration of the sentence served in France, and can amount to up to three months for the first year, and two months for each successive year. After one year of imprisonment, additional sentence reductions may follow, subject to a judicial decision. In such instances, a judge examines, on a yearly basis, the situation of the convicted person and decides whether or not to reduce their sentence. Such additional reductions cannot exceed three months per year of incarceration and, if serious efforts towards social rehabilitation are demonstrated by the convicted person, she or he can expect to see their sentence reduced by up to three months each year. *See* Sentence Remission Notification, p. 3.
[19] Sentence Remission Notification, pp. 4, 6, 8-12. It should be noted that there is a discrepancy in the underlying reports as to whether the total number of months of additional sentence reduction is five or six months. In one of the underlying reports, a total of five months was calculated, however in the other underlying reports, a total of six months was calculated. I am satisfied that the figure of six months is accurate, especially in light of the statement that the authorities are "in favour of granting this maximum amount". *See* Sentence Remission Notification, pp. 3-4, 7, 10-13.

12. France recalls the decisions of the Mechanism of 19 December 2013 and 6 October 2017 which provisionally recognised sentence remissions, arising from French law, of 30 months and 15 months, respectively.[20]

III. APPLICATION

13. In the Application, France informs the Mechanism of the provisions under French law that govern conditional release, and of which Stakić could avail himself as of 7 May 2019, being the date at which he would have served half of his sentence.[21] It is upon that date that he could submit an application to that effect to the French authorities.[22] To date, Stakić has not submitted any such application.

IV. 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.

17. Rule 150 of the 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,

[20] Sentence Remission Notification, pp. 4, 9, 11.
[21] Application, pp. 2-3. The Application provides that Article 707 of the Code of Criminal Procedure pertains to sentence modification, while Article 729 "provides that conditional release may be granted if the length of the sentence served by convicted persons is at least equal to the length of the sentence remaining to be served, and if they have demonstrated meaningful efforts towards social reintegration […]". *See* Application, p. 3.
[22] Application, p. 3.

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.

18. 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 Prosecution.

19. Paragraph 3 of the Practice Direction provides that upon the convicted person becoming eligible for pardon, commutation of sentence, or early release under the law of the State in which the convicted person is serving his or her sentence, the State shall, in accordance with Article 26 of the Statute and with its agreement with the United Nations and, where practicable, at least 45 days prior to the date of eligibility, notify the Mechanism accordingly.

20. 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.[23]

21. The relevant enforcement agreement between the United Nations and France,[24] which applies *mutatis mutandis* to the Mechanism,[25] provides in Article 3(1) that the competent French authorities shall be bound by the duration of the sentence under the conditions set out in the Statute and the Enforcement Agreement. Article 3(2) stipulates that the conditions of imprisonment shall be governed by French law, subject to the supervision of the Mechanism. Article 3(3) of the Enforcement Agreement specifies that France shall notify the Registrar if the convicted person

[23] *See* 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 Office of the Prosecutor ("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 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".

[24] Agreement between the United Nations and the Government of the French Republic on the Enforcement of Sentences of the ICTY, 25 February 2000 ("Enforcement Agreement").

[25] *See* U.N. Security Council Resolution 1966, U.N. Doc. S/RES/1966 (2010), 22 December 2010, para. 4. *See also* Rule 128 of the Rules.

becomes eligible under national law for release on parole or any other measure altering the conditions or length of detention. Article 3(4) provides that if the President determines that the convicted person is not eligible for release on parole or any other measure altering the conditions or length of detention, the Registrar shall inform France, and France shall inform the Registrar if it intends either to continue to enforce the sentence of the convicted person under the same conditions, or to transfer the convicted person to the Mechanism.

22. Article 8 of the Enforcement Agreement relates to pardon and commutation of sentences, with Article 8(1) requiring that, if the convicted person becomes eligible under national law for pardon or commutation of sentence, France shall notify the Registrar accordingly. Article 8(2) provides, in relevant part, that if the President determines that pardon or commutation of the sentence is inappropriate, the Registrar will inform France, and France shall then "transfer the convicted person to the [Mechanism]" pursuant to the procedure set out in Article 10 of the Enforcement Agreement.

V. ANALYSIS

23. I will first consider the Sentence Remission Notification, and thereafter the Application.

A. Sentence Remission Notification

24. At the outset, I would like to revisit the matter of sentence remissions more generally, given that a survey of relevant jurisprudence reveals that the approach adopted by the ICTY and the Mechanism[26] in relation to sentence remissions has created some ambiguity. As a result, convicted persons may have the expectation that sentence remissions at the domestic level will 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.

25. In this context, I find 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.

[26] I note the absence of relevant practice regarding sentence remission before the ICTR, an observation also made by the then-President, Judge Meron. *See* Public Redacted Version of *Stakić* 2013 Decision, para. 14. As a result, the following discussion will be based upon the jurisprudence of the ICTY and the Mechanism.

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

26. Sentence remissions may be regarded as a form of commutation of sentence. Indeed, as stated by the then-President of the ICTY, Judge Meron, "sentence remissions, as reductions of a prisoner's sentence while in detention amount, in essence, to commutation of the sentence".[27]

27. 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.[28] 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. 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.[29] Instead, the Mechanism must ensure that, to the extent possible, persons convicted by the ICTR, the ICTY, or the Mechanism are treated equally.[30]

28. 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. 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, commutation of sentence, or early release.[31] 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. Consequently, these persons would become eligible for early release sooner than other similarly-situated convicted persons.

[27] *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 dated 11 April 2013, filed publicly on 12 April 2013 and made confidential on 28 May 2013) ("Public Redacted Version of *Jelisić* 2013 Decision"), para. 13. *See Stakić* 2017 Decision, para. 10; *Prosecutor v. Goran Jelisić*, Case No. MICT-14-63-ES, 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 ("Public Redacted Version of *Jelisić* 2017 Decision") para. 16; Public Redacted Version of *Stakić* 2013 Decision, para. 11.
[28] *Stakić* 2017 Decision, para. 17; Public Redacted Version of *Jelisić* 2017 Decision, para. 29; Public Redacted Version of *Stakić* 2013 Decision, para. 18; Public Redacted Version of *Jelisić* 2013 Decision, para. 20.
[29] *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.
[30] As regards the need for equal treatment *see infra* para. 42.
[31] *See infra* paras. 35, 42-44.

29. In the case of *Prosecutor v. Haradin Bala*,[32] the then-President of the ICTY, Judge Robinson, 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.[33] In so doing, he also referred to, *inter alia*, Article 3(3) the Enforcement Agreement with France, which provided "[…] not only for 'release on parole' but also for 'any other measure altering the conditions of length of detention' [which in his view] can encompass sentence remissions".[34] President Robinson emphasised, however, 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.[35]

30. Further, it was determined that sentence remissions would be provisionally recognised, if "other criteria in Rule 125 militate in favour of such remission",[36] upon which President Robinson embarked on an assessment of the criteria of gravity of crimes, demonstration of rehabilitation, and cooperation with the Prosecution.[37] Since that decision, the criteria contained in what is now the Mechanism's equivalent rule, Rule 151 of the Rules, have been assessed in each instance of a decision being taken on sentence remission.[38]

31. In order to ensure the equal treatment of similarly-situated convicted persons, the ICTY and the Mechanism have provisionally recognised sentence remissions, if the criteria of Rule 151 of the Rules militate for such recognition.[39] However, the jurisprudence is ambiguous as to whether sentence remissions will in fact be taken into account when calculating two-thirds of the sentence. As set out in the *Bala* Decision, there is the possibility that provisionally recognised sentence remissions "[…] may be *withdraw[n]* at a subsequent time".[40] Since then, the approach before the ICTY and Mechanism has evolved to include that the President also has the discretion, in determining whether early release is appropriate, "to *recognize the remissions* granted under

[32] *Prosecutor v. Haradin Bala*, Case No. IT-03-66-ES, Decision on Application of Haradin Bala for Sentence Remission, 15 October 2010 ("*Bala* Decision").
[33] *Bala* Decision, para. 15.
[34] *Bala* Decision, para. 14.
[35] *Bala* Decision, para. 15.
[36] *Bala* Decision, para. 16.
[37] *Bala* Decision, paras. 17-27. Rule 125 of the ICTY Rules (IT/32/Rev.4, 10 December 2009) provided that "In 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".
[38] *See e.g. Stakić* 2017 Decision; Public Redacted Version of *Jelisić* 2017 Decision; Public Redacted Version of *Stakić* 2013 Decision; Public Redacted Version of *Jelisić* 2013 Decision; *Stakić* 2011 Decision.
[39] *Stakić* 2017 Decision, paras. 13, 18; Public Redacted Version of *Jelisić* 2017 Decision, paras. 28, 30; Public Redacted Version of *Stakić* 2013 Decision, paras. 17, 19; Public Redacted Version of *Jelisić* 2013 Decision, para. 21.
[40] *Bala* Decision, para. 15 (emphasis added). *See also Stakić* 2017 Decision, para. 18; Public Redacted Version of *Jelisić* 2017 Decision, para. 24; Public Redacted Version of *Stakić* 2013 Decision, paras. 16-17; Public Redacted Version of *Jelisić* 2013 Decision, para. 19; *Stakić* 2011 Decision, para. 22.

domestic law *and consider the detainee eligible for early release*"[41] or "*not to count [the provisionally recognised remission]*"[42] in calculating the amount of time served for other purposes, including in determining whether two-thirds of the sentence have been served.

32. While the possibilities set out above could be applied in such a way as to avoid practical inequalities between similarly-situated convicted persons,[43] they nevertheless create uncertainty and could lead convicted persons to have false expectations that sentence remissions granted by an enforcement State may be taken into account by the Mechanism in calculating the two-thirds threshold or the end date of any given sentence.

33. 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. However, I wish to clarify 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. 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. I do note, however, that 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.

2. Commutation of sentence before the Mechanism

34. Commutation of sentence has not been clearly defined in the Statute or Rules of the Mechanism or its predecessor Tribunals, or in the jurisprudence. However, I note 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. 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 sentence, either with or without conditions. 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.

[41] Public Redacted Version of *Jelisić* 2013 Decision, para. 19 (emphasis added). *See also* Public Redacted Version of *Jelisić* 2017 Decision, para. 28.

35. 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. Moreover, they can be made irrespective of where the person is currently serving his or her sentence.[44] 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.[45]

36. As to the process to be undertaken upon receipt of an application for commutation of sentence, I note that since the *Bala* Decision, the ICTY and the Mechanism have always conducted an assessment pursuant to Rule 151 of the Rules or the ICTY's equivalent provision.[46] However, I am of the opinion that 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.

37. As set out above, sentence remissions stemming from the domestic laws of an enforcement State do not amount to commutation of sentence *before the Mechanism*.[47] Such remissions instead equate to commutation of sentence *before the enforcement State*. Given that such sentence remissions cannot influence the length of the sentence under the Mechanism's framework, it is therefore unnecessary to embark on a Rule 151 assessment in such situations. I consider it appropriate to conduct a Rule 151 assessment only when seised 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, or has demonstrated exceptional or compelling circumstances warranting a waiver of the two-thirds eligibility threshold.

38. 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. 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. 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.

[42] Public Redacted Version of *Jelisić* 2013 Decision, para. 34 (emphasis added). *See also Stakić* 2017 Decision, para. 32; Public Redacted Version of *Stakić* 2013 Decision, paras. 16, 31.
[43] *Supra* para. 28.
[44] *See infra* para. 42.
[45] Public Redacted Version of *Stakić* 2013 Decision, paras. 14-15.
[46] *Supra* fn. 38.
[47] *Supra* para. 33.

3. Analysis of the Sentence Remission Notification

39. In the Sentence Remission Notification, France indicates that Stakić is eligible for a total of four months of sentence reduction credit for the period 31 January 2017 to 31 January 2019, and a total of six months of additional sentence reduction for the same period.[48]

40. Based on the information before me, I am of the opinion that the sentence remission of ten months for which Stakić has become eligible under French law should be provisionally recognised. Nevertheless, such provisionally recognised 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 Stakić'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. Application

41. To reflect the existing practice of the Mechanism, in assessing the Application I will start by examining Stakić's eligibility for early release.[49]

1. Eligibility before the Mechanism

42. 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.[50] 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.[51] 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.[52] This eligibility threshold has, unfortunately, not been consistently enforced,[53] but it is one aspect that I will continue to stress and further clarify

[48] Sentence Remission Notification, pp. 3-4, 7, 11-13. *See supra* para. 11.
[49] *See 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; *Prosecutor v. Miroslav Bralo*, Case No. MICT-14-78-ES, Decision on the Early Release of Miroslav Bralo, 31 December 2019 (public redacted) ("*Bralo* Decision"), para. 21.
[50] *Semanza* Decision, para. 26; *Brđanin* Decision, para. 29; *Bralo* Decision, para. 22. *See Prosecutor v. Paul Bisengimana*, Case No. MICT-12-07, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012 (public redacted) ("*Bisengimana* Decision"), para. 20.
[51] *Semanza* Decision, para. 26; *Brđanin* Decision, para. 29; *Bralo* Decision, para. 22. *See Bisengimana* Decision, paras. 17, 20.
[52] *Semanza* Decision, para. 26; *Brđanin* Decision, para. 29; *Bralo* Decision, para. 22.
[53] *See e.g. 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, ("*Simba* Decision"), para. 32, *relying, inter alia, on Bisengimana* Decision; *Prosecutor v. Radivoje Miletić*, Case No. MICT-15-85-ES.5, Decision of the

in all my decisions on applications for early release. The eligibility threshold does not entitle a convicted person to release, which may only be granted 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.[54]

43. 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 considered promptly, and without necessarily triggering the multi-step and resource-intensive process of requesting, receiving, translating, sharing, and considering additional information before determining whether the application should be denied as premature.[55]

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 and therefore merit the full process. While this is provided for by the Mechanism's practice,[56] I would anticipate that such compelling or exceptional circumstances will arise only rarely and would need to be duly substantiated.

45. Stakić will reach two-thirds of his 40 year sentence in November 2027[57] and is therefore not eligible to be considered for early release at this stage. Further, the Application does not demonstrate any compelling or exceptional circumstances that might warrant granting early release before having reached the two-thirds eligibility threshold. In these circumstances, I do not find it necessary to consider any additional information before reaching a conclusion on the Application[58] or to engage in an assessment of the criteria set out in Rule 151 of the Rules.[59]

President on the Early Release of Radivoje Miletić, 23 October 2018 (public redacted) ("*Miletić* Decision"), para. 23, *relying, inter alia, on Bisengimana* Decision.

[54] *Galić* Decision, para. 24, *relying on Simba* Decision, para. 32; *Miletić* Decision, para. 23; *Prosecutor v. Sreten Lukić*, Case No. MICT-14-67-ES.4, Decision of the President on the Early Release of Sreten Lukić, 17 September 2018 (public redacted) ("*Lukić* Decision"), para. 17.

[55] *See* Practice Direction, para. 10.

[56] *See e.g. Prosecutor v. Alfred Musema*, Case No. MICT-12-15-ES.1, Decision on the Application of Alfred Musema Related to Early Release, 7 August 2019, p. 3, fn. 17; *Galić* Decision, paras. 46-47; *Lukić* Decision, para. 16 and references cited therein.

[57] Internal Memorandum from the Registrar to the President, dated 6 February 2019 (confidential), p. 23.

[58] *See supra* para. 20.

[59] *See supra* para. 18. *See Galić* Decision, paras. 24-25.

2. Eligibility under French Law

46. As described above, according to the Application, as of 7 May 2019, Stakić became eligible for conditional release under French law.[60] The threshold pursuant to the French Code of Criminal Procedure is "if the length of the sentence served by convicted persons is at least equal to the length of the sentence remaining to be served".[61] This essentially equates to one-half of the sentence being served, while also taking into account the sentence reductions permitted under French law.

47. There are in this case therefore two concurrent thresholds: the French threshold of half of the sentence being served, and the Mechanism's threshold of two-thirds of the sentence being served. I recall that, even if Stakić is eligible for conditional release under French law, the early release of persons convicted by the ICTR, the ICTY, or the Mechanism falls exclusively within the discretion of the President, pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules.[62]

48. 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.

C. Consultation

49. In coming to my decision on whether to provisionally recognise the Sentence Remission Notification and whether to grant the Application, I have consulted with two other Judges of the Mechanism.[63] Judge Meron and Judge Hoefer have both indicated that they agree that Stakić is not yet eligible for early release, having not yet served two-thirds of his sentence, and given that no compelling or exceptional circumstances justifying departure from the two-thirds eligibility threshold have been demonstrated. Judge Meron has also expressed his agreement that domestic sentence remissions do not affect the calculation of two-thirds of Stakić's sentence. Further, Judge Hoefer has expressed her agreement that the Sentence Remission Notification should be

[60] *Supra* para. 13.
[61] Application, p. 3.
[62] *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; *Prosecutor v. Milan Martić*, Case No. MICT-14-82-ES, Decision on the Early Release of Milan Martić, 7 August 2020, p. 4; *Prosecutor v. Dragomir Milošević*, Case No. MICT-16-98-ES, Decision on the Early Release of Dragomir Milošević, 29 July 2020, p. 4; *Brđanin* Decision, para. 33.
[63] *Supra* para. 10.

provisionally recognised, but that this should have no impact on calculating two-thirds of Stakić's sentence.

50. I am grateful for my colleagues' views on these matters, and have taken them into account in my ultimate assessment of the Sentence Remission Notification and Application.

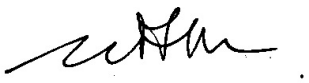
VI. CONCLUSION

51. Based on the foregoing, I am of the view that the four months of sentence reduction credit for the period 31 January 2017 to 31 January 2019 and six months of additional sentence reduction for the same period, for which Stakić has become eligible under French law, should be provisionally recognised. However, this provisionally recognised sentence remission will not impact the Mechanism's calculation of the two-thirds threshold for the purpose of early release or the end date of Stakić's sentence. Further, Stakić is not eligible to be considered for early release at this stage as he has not yet served two-thirds of his sentence, and has not demonstrated any compelling or exceptional circumstances that might nevertheless warrant granting early release.

VII. DISPOSITION

52. For the foregoing reasons, and pursuant to Articles 25 and 26 of the Statute and Rule 150 of the Rules, I hereby provisionally recognise a sentence remission of 10 months for which Stakić has become eligible under French law. Further, for the foregoing reasons, and pursuant to Articles 25 and 26 of the Statute and Rule 150 of the Rules, I hereby **DENY** the Application.

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



Done this 31st day of December 2020,
At The Hague,
The Netherlands.

Judge Carmel Agius
President

[Seal of the Mechanism]

UNITED NATIONS
International Residual Mechanism
for Criminal Tribunals

NATIONS UNIES
Mécanisme international appelé à exercer
les fonctions résiduelles des Tribunaux pénaux

IRMCT · MIFRTP

TRANSMISSION SHEET FOR FILING OF DOCUMENTS / *FICHE DE TRANSMISSION POUR LE DEPOT DE DOCUMENTS*

I - FILING INFORMATION / *INFORMATIONS GÉNÉRALES*

To/ *À* :	IRMCT Registry/ *Greffe du MIFRTP*		☐ Arusha/ *Arusha*	☒ The Hague/ *La Haye*
From/ *De* :	☒ President / *Président*	☐ Chambers / *Chambre*	☐ Prosecution/ *Bureau du Procureur*	☐ Defence / *Défense*
	☐ Registrar / *Greffier*	☐ Other/ *Autre*		
Case Name/ *Affaire* :	**PROSECUTOR v. MILOMIR STAKIĆ**		**Case Number/ *Affaire n°* :**	**MICT-13-60-ES**
Date Created/ *Daté du* :	**31 December 2020**	**Date transmitted/ *Transmis le* :**	**31 December 2020**	**No. of Pages/ *Nombre de pages* :** **15**
Original Language / *Langue de l'original* :	☒ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda ☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :
Title of Document/ *Titre du document* :	**DECISION ON SENTENCE REMISSION AND EARLY RELEASE OF MILOMIR STAKIĆ**			
Classification Level/ *Catégories de classification* :	☒ Unclassified/ *Non classifié* ☐ Confidential/ *Confidentiel* ☐ Strictly Confidential/ *Strictement confidentiel*	☐ Ex Parte Defence excluded/ *Défense exclue* ☐ Ex Parte Prosecution excluded/ *Bureau du Procureur exclu* ☐ Ex Parte R86(H) applicant excluded/ *Art. 86 H) requérant exclu* ☐ Ex Parte Amicus Curiae excluded/ *Amicus curiae exclu* ☐ Ex Parte other exclusion/ *autre(s) partie(s) exclue(s)* (specify/*préciser*) :		

Document type/ *Type de document* :

☐ Motion/ *Requête*	☐ Judgement/ *Jugement/Arrêt*	☐ Book of Authorities/ *Recueil de sources*	☐ Warrant/ *Mandat*
☒ Decision/ *Décision*	☐ Submission from parties/ *Écritures déposées par des parties*	☐ Affidavit/ *Déclaration sous serment*	☐ Notice of Appeal/ *Acte d'appel*
☐ Order/ *Ordonnance*	☐ Submission from non-parties/ *Écritures déposées par des tiers*	☐ Indictment/ *Acte d'accusation*	

II - TRANSLATION STATUS ON THE FILING DATE/ *ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT*

☐ Translation not required/ *La traduction n'est pas requise*

☒ Filing Party hereby submits only the original, and requests the Registry to translate/
La partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction :
(Word version of the document is attached/ *La version Word est jointe)*

☐ English/ *Anglais* ☒ French/ *Français* ☐ Kinyarwanda ☒ B/C/S ☐ Other/*Autre*(specify/*préciser*) :

☐ Filing Party hereby submits both the original and the translated version for filing, as follows/
La partie déposante soumet l'original et la version traduite aux fins de dépôt, comme suit :

Original/ *Original en*	☐ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda ☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :
Translation/ *Traduction en*	☐ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda ☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :

☐ Filing Party will be submitting the translated version(s) in due course in the following language(s)/
La partie déposante soumettra la (les) version(s) traduite(s) sous peu, dans la (les) langue(s) suivante(s) :

☐ English/ *Anglais* ☐ French/ *Français* ☐ Kinyarwanda ☐ B/C/S ☐ Other/*Autre* (specify/*préciser*) :

Send completed transmission sheet to/ *Veuillez soumettre cette fiche dûment remplie à :*
JudicialFilingsArusha@un.org OR/ *OU* JudicialFilingsHague@un.org