

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

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

Date: 31 December 2020

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Carmel Agius, President

Registrar: Mr. Abubacarr Tambaou

Decision of: 31 December 2020

PROSECUTOR

v.

DRAGOLJUB KUNARAC

PUBLIC REDACTED VERSION

**DECISION ON DRAGOLJUB KUNARAC'S
APPLICATION FOR EARLY RELEASE**

The Office of the Prosecutor:

Mr. Serge Brammertz

Federal Republic of Germany

1. I, Carmel Agius, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively), am seised of a request, dated 8 August 2017, that Mr. Dragoljub Kunarac (“Kunarac”) submitted to my predecessor, wherein he seeks to be granted early release (“Application”).¹

I. BACKGROUND

2. Kunarac surrendered to the International Criminal Tribunal for the former Yugoslavia (“ICTY”) on 4 March 1998 and was transferred to the United Nations Detention Unit (“UNDU”) in The Hague on the same day.²

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

4. On 12 December 2002, Kunarac was transferred to the Federal Republic of Germany (“Germany”) to serve the remainder of his sentence.⁵ On 1 November 2016, he had served two-thirds of his 28-year sentence.⁶

5. On 2 February 2017, after being notified of Kunarac’s eligibility for early release under German law, and following Kunarac’s own request for early release, my predecessor issued a decision denying Kunarac early release.⁷ The high gravity of the crimes and the fact that Kunarac had not demonstrated sufficient signs of rehabilitation weighed against his early release.⁸

¹ Request (for early release from ICTY-imposed sentence), dated 8 August 2017, received by my predecessor on 14 August 2017 (confidential), paras. 1, 4. See Internal Memorandum from the then-President to the Registrar, dated 18 August 2017 (confidential) (“Memorandum of 18 August 2017”), para. 1. I note that a public redacted version of the Application was filed on 20 December 2018. See Public Redacted Version of Dragoljub Kunarac’s Pending Request for Early Release, 20 December 2018 (with public redacted annex).

² Decision of the President on the Early Release of Dragoljub Kunarac, 2 February 2017 (public redacted) (“Decision Denying Early Release”), para. 3. I note that the confidential version of the Decision Denying Early Release was filed on the same day. See also *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 (“Trial Judgement”), p. 283.

³ Trial Judgement, paras. 883, 885.

⁴ *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 (“Appeal Judgement”), p. 125. None of the Trial Chamber’s factual findings with respect to Kunarac were reversed on appeal. See e.g. Appeal Judgement, paras. 5-10, 256.

⁵ Decision Denying Early Release, para. 3.

⁶ Decision Denying Early Release, para. 23.

⁷ Decision Denying Early Release, paras. 1, 8, 15, 68, 71.

⁸ Decision Denying Early Release, paras. 20, 55, 68.

II. APPLICATION

6. On 14 August 2017, my predecessor received the Application, in which Kunarac requests that he be granted early release based on the information contained therein as well as in an earlier letter dated 31 October 2016.⁹ Kunarac submits, *inter alia*, that: (i) he has “the right” and has “met all the conditions to have [his] sentence terminated immediately”;¹⁰ (ii) he considers himself “re-socialized, at least as much as most of those for whom termination of sentence was approved”;¹¹ (iii) his work in the library and the fact that, in addition to his regular salary, he has been given the maximum available bonus is proof that he is responsible and resocialised;¹² (iv) circumstances have changed with respect to where he will live after his release;¹³ and (v) if released he does not wish to be returned to Bosnia and Herzegovina.¹⁴

7. On 18 August 2017, my predecessor requested that the Registry of the Mechanism (“Registry”) undertake the steps prescribed in paragraphs 3 to 5 of the Practice Direction (MICT/3).¹⁵

8. On 25 August 2017, the Registry requested that Germany provide the relevant information pursuant to paragraph 4 of the Practice Direction (MICT/3).¹⁶

9. On 7 November 2017, my predecessor requested that the Registry organise a visit to Kunarac with the UNDU Medical Officer, so that a report could be prepared on Kunarac’s medical situation in part for the purposes of determining the Application.¹⁷ The Registry thereafter contacted

⁹ Application, paras. 1, 5, 7 referring to a letter from Kunarac to the then-President, dated 31 October 2016 conveying the Application (for pardon, commutation of sentence or early release), dated 24 October 2016, signed 31 November [sic] 2016 (confidential with confidential attachments 1 and 2) (collectively, “Submission of 31 October 2016”). I note that, as a submission was filed by counsel on Kunarac’s behalf, my predecessor did not take the Submission of 31 October 2016 into account in adjudicating the prior early release matter. *See* Decision Denying Early Release, fn. 12. As Kunarac is not presently represented by counsel with respect to the Application, and as the Submission of 31 October 2016 was not previously considered, insofar as it is relevant and supplements the Application, I will exceptionally take it into account in my determination of this present request for early release.

¹⁰ Application, para. 1. *See* Submission of 31 October 2016, paras. 91, 104.

¹¹ Submission of 31 October 2016, para. 110. *See* Submission of 31 October 2016, para. 104.

¹² Submission of 31 October 2016, para. 109.

¹³ Application, para. 2.

¹⁴ Submission of 31 October 2016, para. 72.

¹⁵ Memorandum of 18 August 2017, para. 2; 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, 5 July 2012 (“Practice Direction (MICT/3)”) Although this matter first arose when Practice Direction (MICT/3) was in force, it has since been revised. Unless otherwise indicated, references will be made to the current Practice Direction. *See* Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, or Early Release of Persons Convicted by the ICTR, the ICTY, or the Mechanism, MICT/3/Rev.3, 15 May 2020 (“Practice Direction”).

¹⁶ Internal Memorandum from the (Acting) Registry Officer-in-Charge, Hague branch to the then-President, dated 17 October 2017 (confidential), para. 3 (indicating that German authorities had communicated that they were still awaiting this information and would follow up with their national counterparts to obtain it).

¹⁷ Internal Memorandum from the then-President to the Registrar, dated 7 November 2017 (confidential), para. 2.

German authorities in an effort to formalise arrangements, and subsequently indicated that it was awaiting updated medical information from the prison before it could finalise the visit.¹⁸

10. On 14 November 2017, the Registrar conveyed to my predecessor a memorandum from the Office of the Prosecutor (“Prosecution”) addressing, *inter alia*, Kunarac’s cooperation with the ICTY or Mechanism Prosecution.¹⁹

11. On 24 November 2017, the German Ministry of Foreign Affairs transmitted, *inter alia*, a report from the Director of Bochum Prison, dated 27 October 2017, which provides an assessment of Kunarac pursuant to section 57(1) of the German Criminal Code.²⁰

12. On 17 January 2018, the Embassy of Germany to the Netherlands conveyed an updated report from the prison authorities on Kunarac’s medical condition.²¹

13. Following an incident on 22 January 2018,²² the visit to Kunarac, scheduled for 29 January 2018, was postponed.²³ It was further postponed following a communication from German authorities on 12 February 2018.²⁴

¹⁸ Internal Memorandum from the (Acting) Registry Officer-in-Charge, Hague branch to the then-President, dated 4 December 2017 (confidential), paras. 2-3 (noting translation from German into English would also be needed).

¹⁹ Internal Memorandum from the (Acting) Registry Officer-in-Charge, Hague branch to the then-President, dated 14 November 2017 (confidential), *conveying* an Internal Memorandum from the Office of the Prosecutor Officer-in-Charge to the (Acting) Registry Officer-in-Charge, Hague branch, dated 25 September 2017 (confidential) (“Prosecution Memorandum on Cooperation”), paras. 1-2. I note that only the first two paragraphs of this memorandum, which address the issue of cooperation, were conveyed to Kunarac for his comment, which he subsequently provided. I also note that a confidential redacted version of the Prosecution Memorandum on Cooperation was also conveyed. *See* Internal Memorandum from the then-President to the Registrar, dated 22 November 2017 (confidential), paras. 3-4; Internal Memorandum from the (Acting) Registry Officer-in-Charge, Hague branch to the then-President, dated 16 January 2018 (confidential) (“Memorandum of 16 January 2018”), para. 14.

²⁰ Internal Memorandum from the (Acting) Registry Officer-in-Charge, Hague branch to the then-President, dated 28 November 2017 (confidential) (“Memorandum of 28 November 2017”), para. 2, *conveying, inter alia*, a communication from the Public Prosecutor’s Office, Ministry of Justice of North Rhine-Westphalia, dated 14 November 2017 (confidential); Director of Bochum Prison’s Report pursuant to Section 57(1) of the German Criminal Code, dated 27 October 2017 (confidential) (“2017 Prison Report”); Letter from Kunarac to the then-President, dated 8 November 2017 (confidential) (“Letter of 8 November 2017”). I note that a copy of the 2017 Prison Report was provided to Kunarac by German authorities. *See* 2017 Prison Report, p. 1. The Registry also translated into BCS, *inter alia*, the documents provided by Germany, so that they could be transmitted to Kunarac for any comments. *See* Memorandum of 28 November 2017, para. 6. Following the completion of the translations, the Registry sent these documents to Kunarac in BCS and English on 21 December 2017. Kunarac provided his comments in letters dated 29 December and 30 December 2017, both of which the Registry translated from BCS into English before providing them to my predecessor. *See* Memorandum of 16 January 2018, *conveying* a letter from Kunarac to the (Acting) Registry Officer-in-Charge, Hague branch, dated 29 December 2017; Letter from Kunarac to the then-President, dated 30 December 2017 (“Letter of 30 December 2017”).

²¹ Internal Memorandum from the (Acting) Registry Officer-in-Charge, Hague branch to the then-President, dated 19 January 2018 (confidential), *conveying* a *note verbale* from the Embassy of Germany to the Netherlands, dated 17 January 2018 (confidential).

²² *See infra*, para. 22.

²³ *See* Internal Memorandum from the (Acting) Registry Officer-in-Charge, Hague branch to the then-President, dated 24 January 2018 (confidential), paras. 1, 3; Internal Memorandum from the then-President to the Registrar, dated 25 January 2018 (confidential), para. 3.

14. In a letter dated 24 February 2018, Kunarac asked that consideration of the Application be put on hold until his medical situation was resolved.²⁵ By 1 March 2018, the Registry was in the process of arranging the visit to Kunarac in consultation with German authorities,²⁶ which ultimately took place on 15 March 2018.²⁷

15. On 9 April 2018, the Registrar conveyed to my predecessor the medical report that the UNDU Medical Officer prepared after visiting Kunarac.²⁸ This report was subsequently transmitted to Kunarac who provided his comments on it in a letter dated 2 June 2018.²⁹ On 19 June 2018, the Registrar was asked to liaise with the UNDU Medical Officer with respect to certain comments that Kunarac had made.³⁰ A further report by the UNDU Medical Officer was conveyed to my predecessor on 6 July 2018,³¹ who in turn shared its contents with Kunarac.³² Kunarac provided his comments on this additional report in a letter dated 17 July 2018.³³

16. On 24 October 2018, a decision ordering Kunarac to file a public redacted version of the Application was issued.³⁴ In a letter dated 8 November 2018, Kunarac identified the text that he wished to have redacted.³⁵ On 26 November 2018, noting that Kunarac did not have the benefit of Counsel and that further redactions may be needed, my predecessor requested that the Registry inform Kunarac of additional possible redactions.³⁶ In a letter dated 7 December 2018, Kunarac

²⁴ Internal Memorandum from the (Acting) Registry Officer-in-Charge, Hague branch to the then-President, dated 15 February 2018 (confidential), paras. 2-3.

²⁵ Internal Memorandum from the then-President to the Registrar, dated 6 March 2018 (confidential), paras. 3, 9.

²⁶ Internal Memorandum from the Registrar to the then-President, dated 1 March 2018 (confidential) (“Memorandum of 1 March 2018”), para. 9.

²⁷ Internal Memorandum from Legal Officer, Registry, to the then-President, dated 3 April 2018 (confidential), para. 1.

²⁸ Internal Memorandum from Legal Officer, Registry to the then-President, dated 9 April 2018 (confidential), conveying an Internal Memorandum from the Medical Officer, UNDU to the Registrar, dated 9 April 2018 (confidential) (“First Medical Report”).

²⁹ See Internal Memorandum from then-President to the Registrar, dated 22 May 2018 (confidential), para. 3; Internal Memorandum from then-President to the Registrar, dated 19 June 2018 (confidential) (“Memorandum of 19 June 2018”), para. 1, referring, *inter alia*, to Letter from Kunarac to the then-President, dated 2 June 2018, and received on 6 June 2018 (confidential) (“Letter of 2 June 2018”).

³⁰ Memorandum of 19 June 2018, para. 4.

³¹ Internal Memorandum from the Deputy Chief, Registry, Hague branch to the then-President, dated 6 July 2018 (confidential), conveying, *inter alia*, an Internal Memorandum from the Medical Officer, UNDU to the Registrar, dated 27 June 2018 (confidential) (“Second Medical Report”).

³² Letter from the then-President to Kunarac, dated 11 July 2018 (confidential), p. 2.

³³ Letter from Kunarac to the then-President, dated 17 July 2018 (confidential) (“Letter of 17 July 2018”).

³⁴ Decision on Prosecution Request for a Public Redacted Version of Dragoljub Kunarac’s Pending Request for Early Release, 24 October 2018 (confidential), p. 2. See also Corrigendum, 30 October 2018 (confidential).

³⁵ Internal Memorandum from the Deputy Chief, Registry, Hague branch to the then-President, dated 19 November 2018 (confidential), para. 2.

³⁶ Internal Memorandum from the then-President to the Deputy Chief, Registry, Hague branch, dated 26 November 2018 (confidential), paras. 3-4.

provided an updated set of redactions for the Application.³⁷ The public redacted version of the Application was thereafter filed on 20 December 2018.³⁸

17. On 13 February 2019, the Prosecution filed submissions opposing Kunarac’s early release.³⁹

18. On 20 January 2020, I received a memorandum from the Registrar conveying, *inter alia*: (i) a letter from the Hamm Public Prosecutor General; and (ii) a report of the Director of Bochum Prison, dated 15 November 2019, which provides an assessment of Kunarac pursuant to section 57(1) of the German Criminal Code.⁴⁰

19. In a letter dated 28 October 2020, Kunarac submitted that he opposed the Prosecution Submissions and that the competent court had cleared him of any legal responsibility.⁴¹

20. With regard to the Application, I have consulted with Judge Meron in his capacity as a Judge of the sentencing Chamber,⁴² as foreseen under Rule 150 of the Rules of Procedure and Evidence of the Mechanism (“Rules”). As no other Judges who imposed the sentence upon Kunarac are Judges of the Mechanism, I also consulted with Judge Lee G. Muthoga, in accordance with Rule 150 of the Rules and paragraph 16 of the Practice Direction.

III. INTERVENING EVENTS: ONGOING CRIMINAL INVESTIGATIONS

21. Criminal investigations stemming from an incident at the Bochum Prison that involved Kunarac were initiated in February 2018 and were not resolved until late 2020.⁴³ The Mechanism

³⁷ Internal Memorandum from the then-President to the Deputy Chief, Registry, Hague branch, dated 19 December 2018 (confidential), paras. 1-2.

³⁸ Public Redacted Version of Dragoljub Kunarac’s Pending Request for Early Release, 20 December 2018 (with public redacted annex).

³⁹ Prosecution Submissions Regarding Request for Dragoljub Kunarac’s Early Release, 13 February 2019 (confidential with confidential Annexes A-C and confidential and ex parte Annex D) (“Prosecution Submission”), paras. 2, 11-14, 16.

⁴⁰ Internal Memorandum from the Registrar to the President, dated 20 January 2020 (confidential), *conveying a note verbale* from the Embassy of Germany to the Netherlands, dated 15 January 2020 (confidential), *transmitting* a letter from the Hamm Public Prosecutor General, dated 20 November 2019 (confidential), and the Director of Bochum Prison’s Assessment of Dragoljub Kunarac Pursuant to Section 57(1) of the German Criminal Code, dated 15 November 2019 (confidential) (“2019 Prison Report”). I note that a copy of the 2019 Prison Report was provided to Kunarac by German authorities. *See* 2019 Prison Report, pp. 2, 8.

⁴¹ Letter from Kunarac to the President, dated 28 October 2020 (confidential) (“Letter of 28 October 2020”), pp. 1- 2.

⁴² *See* Appeal Judgement, p. 127, para. 431.

⁴³ Memorandum of 1 March 2018, *conveying, a note verbale* from the Embassy of Germany to the Netherlands, dated 26 February 2018 (confidential), *transmitting* communications from the Hamm Public Prosecutor General, dated 16 February 2018 (confidential), and the Director of Bochum Prison, dated 5 February 2018, (confidential) (collectively, “February 2018 Communications”); Internal Memorandum from the (Acting) Registry Officer-in-Charge, Hague branch to the then-President, dated 22 March 2018 (confidential), *conveying* English translations of the February 2018 Communications; Internal Memorandum from the Registrar to the President, dated 8 July 2020 (confidential) *conveying, inter alia*, a letter from Kunarac to the Deputy Chief, Registry, Hague branch, dated 28 May 2020 (confidential) (“Letter of 28 May 2020”), and the decision of the competent, dated 18 May 2020 (confidential)

and German authorities remained in regular contact throughout this period and. Kunarac was informed that the Application would be determined once the matter was resolved.⁴⁴

22. On 22 January 2018, there was incident between Kunarac and other inmates during which it is alleged that: (i) an inmate grabbed Kunarac [REDACTED]; and (ii) the same inmate, along with other inmates, pushed Kunarac to the ground (“22 January 2018 Incident”).⁴⁵ The following day, Kunarac was admitted to the prison hospital [REDACTED].⁴⁶ Disciplinary proceedings were initiated against those involved in the incident and an investigation was launched.⁴⁷ On 29 March 2019, the investigation into the 22 January 2018 Incident was closed [REDACTED].⁴⁸

23. On 24 April 2019, I was informed that the Prosecutor’s Office in Bochum had launched a new investigation against Kunarac [REDACTED] in relation to the 22 January 2018 Incident.⁴⁹

24. On 18 May 2020, the competent court denied the request to conduct a trial against Kunarac [REDACTED].⁵⁰

25. On 25 September 2020, I received a *note verbale* from German authorities informing the Mechanism of the Decision of 18 May 2020 and that it was not appealed.⁵¹

IV. APPLICABLE LAW

26. Pursuant to Article 26 of the Statute of the Mechanism (“Statute”), there shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the interests of justice and the general principles of law. While Article 26 of the Statute, like the

(“Decision of 18 May 2020”); Internal Memorandum from the Registrar to the President, dated 25 September 2020 (confidential) (“Memorandum of 25 September 2020”).

⁴⁴ See e.g. Letter from the then-President to Kunarac, dated 20 June 2018 (confidential), p. 2; Letter from the then-President to Kunarac, dated 16 August 2018 (confidential), p. 2; Letter from Kunarac to the President, dated 24 April 2019 (confidential) (“Letter of 24 April 2019”), pp. 2-3.

⁴⁵ February 2018 Communications, p. 3. See Memorandum of 1 March 2018, paras. 1, 3-6. See also 2019 Prison Report, pp. [REDACTED] (discussed in the assessment the social service provided), [REDACTED] (discussed in the assessment the psychological service provided).

⁴⁶ February 2018 Communications, p. 2. See Memorandum of 1 March 2018, para. 1.

⁴⁷ February 2018 Communications, pp. 1, 3-5. See Memorandum of 1 March 2018, paras. 3, 7.

⁴⁸ Internal Memorandum from the Deputy Chief, Registry, Hague branch to the President, dated 24 April 2019 (confidential) (“Memorandum of 24 April 2019”), conveying a *note verbale* from the Embassy of Germany to the Netherlands, dated 16 April 2019 (confidential) (“*Note verbale* of 16 April 2019”), p. 1.

⁴⁹ Memorandum of 24 April 2019, conveying the *Note verbale* of 16 April 2019, p. 1.

⁵⁰ Decision of 18 May 2020, pp. 1, 3-4.

⁵¹ Memorandum of 25 September 2020, conveying a *note verbale* from the Embassy of Germany to the Netherlands, dated 14 August 2020 (confidential).

equivalent provisions in the Statutes of the International Criminal Tribunal for Rwanda (“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.

27. Rule 150 of the Rules provides that the President shall, upon receipt of a direct petition from the convicted person, determine, in consultation with any Judges of the sentencing Chamber who are Judges of the Mechanism, whether 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.⁵²

28. The general standards for granting early release are set out in Rule 151 of the Rules, which provides that in making a determination on pardon, commutation of sentence, or early release, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner’s demonstration of rehabilitation, and any substantial cooperation of the prisoner with the Prosecution.

29. Paragraph 5 of the Practice Direction provides that a convicted person may apply directly to the President for pardon, commutation of sentence, or early release, if he or she believes that he or she is eligible. Paragraph 10 of the Practice Direction indicates that the President may direct the Registry to collect information which he or she considers relevant to the determination of whether pardon, commutation of sentence, or early release is appropriate.⁵³ Paragraph 13 of the Practice Direction states that the convicted person shall be given 14 days to examine the information received by the Registrar, following which he or she may provide any written submissions in response. Paragraph 19 of the Practice Direction specifies that the President shall determine whether early release is to be granted having regard to the criteria specified in Rule 151 of the Rules, the interests of justice, the general principles of law and any other information that he or she considers relevant.

30. According to Article 25(2) of the Statute, the Mechanism supervises the enforcement of sentences pronounced by the ICTR, the ICTY, or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States. The agreement between the ICTY and the Government of Germany concerning the enforcement of Kunarac’s sentence, dated 14 November 2002 (“Enforcement Agreement”), applies *mutatis*

⁵² See also Practice Direction, para. 16.

⁵³ See Practice Direction, para. 10.

mutandis to the Mechanism.⁵⁴ Article 7(2) of the Enforcement Agreement provides, *inter alia*, that the President shall determine whether pardon or commutation of sentence is appropriate, and if the President determines that pardon or commutation of sentence is not appropriate Germany shall act accordingly.

V. ANALYSIS

A. Eligibility

1. Eligibility before the Mechanism

31. All convicted persons serving a sentence under the Mechanism’s supervision are eligible to be considered for early release upon having served two-thirds of their sentence, irrespective of: (i) whether the person was convicted by the ICTR, the ICTY, or the Mechanism; (ii) where the sentence is being served; and (iii) whether the matter is brought before the President through a direct petition by the convicted person or a notification from the relevant enforcement State.⁵⁵ The two-thirds mark has been described as being “in essence, an admissibility threshold”.⁵⁶ As Kunarac passed this two-thirds threshold on 1 November 2016,⁵⁷ he is eligible to be considered for early release.

2. Eligibility under German Law

32. Under section 57(1) of the German Criminal Code, a convicted person may be released on parole if two-thirds of the imposed sentence, but not less than two months, have been served.⁵⁸ In this respect, I recall that even if Kunarac is eligible for release on parole under German law, the early release of persons convicted by the ICTY falls exclusively within the President’s discretion, pursuant to Article 26 of the Statute and Rules 150 and 151 of the Rules.⁵⁹

⁵⁴ See Security Council Resolution 1966 (2010), 22 December 2010, para. 4.

⁵⁵ 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. 26; *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. 29; *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. 22.

⁵⁶ *Semanza Decision*, para. 25 and references cited therein.

⁵⁷ Decision Denying Early Release, para. 23.

⁵⁸ See Decision Denying Early Release, para. 15.

⁵⁹ See *e.g.* *Semanza Decision*, para. 29; *Brđanin Decision*, para. 33; *Bralo Decision*, para. 26. See also Decision Denying Early Release, para. 16.

B. General Standard for Granting

33. A convicted person having served two-thirds of his or her sentence shall be merely eligible to apply for early release and not entitled to such release, which may only be granted by the President as a matter of discretion, after considering the totality of the circumstances in each case, as required by Rule 151 of the Rules.⁶⁰ I recall that Rule 151 of the Rules provides a non-exhaustive list of factors to be considered by the President, which I will address in turn below.

1. Gravity of Crimes

34. The crimes for which Kunarac has been convicted are of a high gravity. He was found guilty of torture, rape, and enslavement as crimes against humanity, and torture and rape as violations of the laws or customs of war for crimes committed during the armed conflict in the Foča area in Bosnia and Herzegovina, where the Bosnian Serb Army and paramilitary groups systematically attacked the non-Serb civilian population.⁶¹ The aim of the campaign was to “cleanse” the Foča area of non-Serbs. Muslim women, who were a “specific target of the attack”, were detained in intolerable conditions in two local schools and a sports centre.⁶²

35. Kunarac, the then-leader of a reconnaissance unit which formed part of a local tactical group,⁶³ took girls or women from these detention centres to secondary locations where they were kept for varying lengths of time.⁶⁴ Kunarac personally raped five Muslim girls or women,⁶⁵ and brought these and other girls or women to the secondary locations, with the knowledge that once there they would be raped by soldiers.⁶⁶ The Trial Chamber found that the rapes resulted in severe mental and physical pain and suffering for the victims who were taken for the very purpose of rape and were chosen only because of their Muslim ethnicity.⁶⁷ Kunarac also personally committed the act of enslavement with respect to one of these girls and, by assisting in setting up the conditions at the secondary location, he aided and abetted the enslavement of another girl.⁶⁸ The Trial Chamber found that, during their stay at this secondary location, these two girls were denied any control over their lives: they had to obey all orders, they had to do household chores, and they had no realistic

⁶⁰ *Semanza* Decision, para. 30; *Brđanin* Decision, para. 34; *Bralo* Decision, para. 27 and references cited therein.

⁶¹ Appeal Judgement, para. 3; Trial Judgement, paras. 858, 883.

⁶² Appeal Judgement, para. 3; Trial Judgement, paras. 574-575.

⁶³ See Appeal Judgement, paras. 2, 5; Trial Judgement, para. 49.

⁶⁴ See Trial Judgement, paras. 638, 663, 670, 685, 700, 724.

⁶⁵ See e.g. Trial Judgement, paras. 583, 654, 656, 670 (referring to D.B. and FWS-87), 684 (referring to FWS-95), 711 (referring to FWS-183), 724 (referring to FWS-191).

⁶⁶ See Trial Judgement, paras. 656, 666, 670, 685, 701, 711, 724-725, 727-729, 744.

⁶⁷ Trial Judgement, para. 669. See also Trial Judgement, paras. 583-585, 653-656, 669, 711.

⁶⁸ Trial Judgement, para. 742. See also Trial Judgement, para. 864.

option to flee.⁶⁹ The girls were treated as the personal property of Kunarac and another soldier, and were otherwise mistreated as illustrated by Kunarac inviting a soldier to the house so that he could rape one of the girls for 100 Deutschmark if the soldier so wished.⁷⁰

36. In determining Kunarac’s sentence, the Trial Chamber considered several aggravating circumstances including: (i) the “youthful age” of six of the victims who ranged in age between about fifteen and a half and nineteen years old at the time of the offences;⁷¹ (ii) that these offences were committed against “particularly vulnerable and defenceless women and girls”;⁷² (iii) the extended period of time over which the offences were committed in relation to certain of victims, such as the two women who Kunarac enslaved for two months;⁷³ (iv) Kunarac’s leading organisational role and the substantial influence he had over some of the other perpetrators;⁷⁴ (v) the involvement of more than one victim in his offences and the commission of some of the offences by more than one perpetrator at the same time, such as his “co-perpetration of the rape of FWS-183, and his aiding and abetting of the rape of FWS-75 by about fifteen soldiers and the rape of FWS-87 by three soldiers”;⁷⁵ and (vi) the “discriminatory grounds—ethnic and gender discrimination—upon which Dragoljub Kunarac committed those offences other than torture, which was committed for discriminatory purposes”.⁷⁶

37. Kunarac acknowledges that the crimes for which he was convicted are “extremely serious and that the victims are from a particularly sensitive population”,⁷⁷ but in his view, as the gravity of these crimes was taken into account at the sentencing stage, it should not be used as an “aggravating factor” in denying him early release.⁷⁸

38. In this respect, I reiterate that pursuant to Rule 151 of the Rules, the President “shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted” when determining whether early release is appropriate, and I will do so accordingly here. To the extent that Kunarac implies that it is unfair for gravity to factor into both the sentence and the early release determination to his detriment, I observe that other factors that may be in his favour are also

⁶⁹ Trial Judgement, para. 742.

⁷⁰ Trial Judgement, para. 742.

⁷¹ Trial Judgement, para. 864 (“FWS-87 was about fifteen and a half years old, A.S. and D.B were about nineteen years old, FWS-50 was about sixteen years old, FWS-191 was about seventeen years old and FWS-186 was about sixteen and a half years old”).

⁷² Trial Judgement, para. 867.

⁷³ Trial Judgement, para. 865 (referring to FWS-191 and FWS-186).

⁷⁴ Trial Judgement, para. 863.

⁷⁵ Trial Judgement, para. 866.

⁷⁶ Trial Judgement, para. 867.

⁷⁷ Submission of 31 October 2016, para. 76.

⁷⁸ Submission of 31 October 2016, para. 80.

taken into account at both these stages. For instance, substantial cooperation with the Prosecutor and expressions of genuine remorse or regret will be taken into account even if they also served as mitigating factors at the sentencing stage.⁷⁹

2. Treatment of Similarly-Situated Prisoners

39. Persons sentenced by the ICTY, like Kunarac, are considered “similarly-situated” to all other prisoners under the Mechanism’s supervision. As noted above, all convicted persons supervised by the Mechanism are considered eligible to apply for early release upon the completion of two-thirds of their sentences, irrespective of the tribunal that convicted them and where they serve their sentence.⁸⁰ Having passed this two-thirds threshold on 1 November 2016, Kunarac is eligible to be considered for early release.⁸¹

40. I also note that Kunarac compares his situation to that of other persons convicted by the ICTY. In that respect, he argues that: (i) other persons convicted of similar or more serious crimes and with a similar level of responsibility received more lenient sentences;⁸² (ii) most other persons convicted by the ICTY were released after having served two-thirds of their sentences and in some cases before;⁸³ and (iii) by serving his sentence in Germany, he is subject to conditions that are stricter than other enforcement States where convicted persons have the opportunity for various benefits or privileges.⁸⁴ In my view, once a person has been found to be eligible to be considered for early release, further comparisons to other similarly-situated persons are inconsequential when determining whether early release is appropriate as each case presents unique circumstances that the President must consider on their own merits.⁸⁵

3. Demonstration of Rehabilitation

41. Before turning to an individualised assessment of Kunarac’s demonstration of rehabilitation, I recall that I have recently set forth some of the considerations that will guide my assessment of whether a convicted person has demonstrated rehabilitation under Rule 151 of the Rules.⁸⁶ In the interests of transparency, I recall these considerations here as well.

⁷⁹ *Supra*, para. 28; *infra*, para 43.

⁸⁰ *Supra*, para. 28.

⁸¹ *See supra*, para. 31.

⁸² *See* Submission of 31 October 2016, paras. 76-81.

⁸³ Submission of 31 October 2016, paras. 83-96, 102.

⁸⁴ Application, para. 3; Submission of 31 October 2016, paras. 40-43, 82, 96-101.

⁸⁵ *See Semanza* Decision, para. 43; *Brđanin* Decision, para. 46.

⁸⁶ *Semanza* Decision, paras. 44-48; *Brđanin* Decision, paras. 47-51; *Bralo* Decision, paras. 37-41.

42. In my view, it is not appropriate to look at the rehabilitation of perpetrators of genocide, crimes against humanity, or war crimes through exactly the same paradigm as rehabilitation of perpetrators of ordinary domestic crimes.⁸⁷ For instance, while good behaviour in prison may generally be a positive indicator of rehabilitation in a national context, given the particular nature and scope of the crimes within the jurisdiction of the ICTR, the ICTY, and the Mechanism, I do not consider that such behaviour can on its own demonstrate rehabilitation of a person convicted for some of the most heinous international crimes.⁸⁸

43. There are, however, a number of positive indicators of rehabilitation of persons convicted by the ICTR, the ICTY, or the Mechanism which have been recognised as such in the past or may be of persuasive relevance.⁸⁹ Such indicators include: (i) the acceptance of responsibility for the crimes a person was convicted for or for actions which enabled the commission of the crimes; (ii) signs of critical reflection of the convicted person upon his or her crimes; (iii) public or private expressions of genuine remorse or regret; (iv) actions taken to foster reconciliation or seek forgiveness; (v) evidence that a convicted person has a positive attitude towards persons of other backgrounds, bearing in mind the discriminatory motive of some of the crimes; (vi) participation in rehabilitation programmes in prison; (vii) a convicted person's mental health status; and (viii) a positive assessment of a convicted person's prospects to successfully reintegrate into society.⁹⁰ This is a non-exhaustive list and I do not expect convicted persons to fulfil all of these indicators in order to demonstrate rehabilitation.⁹¹ It falls, however, upon the convicted person to convince me that sufficient progress has been made in his or her rehabilitation, and that granting release before the full sentence is served would be a responsible exercise of my discretion.⁹²

44. Rehabilitation entails that a convicted person may be trusted to successfully and peacefully reintegrate into a given society.⁹³ Consequently, I consider that rehabilitation involves indicators of readiness and preparedness to reintegrate into society.⁹⁴ I will, therefore, generally consider the convicted person's post-release plans, including the envisaged place of residence.⁹⁵ If the convicted person intends to return to the region where his or her crimes were committed, extra scrutiny will be called for, keeping in mind that the ICTR, the ICTY, and the Mechanism were established under

⁸⁷ *Semanza* Decision, para. 45; *Brđanin* Decision, para. 48; *Bralo* Decision, para. 38 and reference cited therein.

⁸⁸ *Semanza* Decision, para. 45; *Brđanin* Decision, para. 48; *Bralo* Decision, para. 38 and reference cited therein.

⁸⁹ *Semanza* Decision, para. 46; *Brđanin* Decision, para. 49; *Bralo* Decision, para. 39.

⁹⁰ *Semanza* Decision, para. 46; *Brđanin* Decision, para. 49; *Bralo* Decision, para. 39 and references cited therein.

⁹¹ *Semanza* Decision, para. 46; *Brđanin* Decision, para. 49; *Bralo* Decision, para. 39.

⁹² *Semanza* Decision, para. 46; *Brđanin* Decision, para. 49; *Bralo* Decision, para. 39.

⁹³ *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50; *Bralo* Decision, para. 40 and references cited therein.

⁹⁴ *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50; *Bralo* Decision, para. 40.

⁹⁵ *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50; *Bralo* Decision, para. 40.

Chapter VII of the United Nations Charter to contribute to the restoration and maintenance of peace and security.⁹⁶ Bearing this in mind, I generally do not consider it appropriate to enable convicted persons to return to the affected regions before they have served their full sentence without having demonstrated a greater degree of rehabilitation.⁹⁷

45. Rehabilitation is a process rather than a definite result, and it is just one factor that I will consider alongside other factors when deciding on the early release of a convicted person who is eligible to be considered for such relief.⁹⁸ Conversely, there may be instances where, despite a lack of sufficient evidence of rehabilitation, I may consider pardon, commutation of sentence, or early release to be appropriate in light of the prevalence of other factors.⁹⁹

46. Turning to the extent to which Kunarac has demonstrated rehabilitation, I note that the most relevant materials before me are: (i) the Application and the Submission of 31 October 2016; (ii) correspondence from Kunarac addressing relevant issues or those that arose after he submitted the Application;¹⁰⁰ and (iii) information provided by the enforcement State, Germany, namely the 2017 Prison Report and the 2019 Prison Report (collectively, “Prison Reports”).¹⁰¹

(a) Behaviour in Prison

47. According to the Prison Reports, often Kunarac: (i) is “arrogant and subtly verbally aggressive”; (ii) “finds it difficult to adjust to situations in the prison”; and (iii) “uses pressure to further his desires”.¹⁰² The Prison Reports state that he is “not always able to handle negative decisions appropriately” and that Kunarac does not accept such negative decisions, often wanting to discuss them.¹⁰³

48. The Prison Reports outline a number of physical or verbal confrontations that Kunarac had with other inmates or prison staff, some of which resulted in disciplinary action.¹⁰⁴ These include, *inter alia*: (i) “furiously” throwing a one kilogram bag of groceries in the direction of a female

⁹⁶ *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50; *Bralo* Decision, para. 40 and references cited therein.

⁹⁷ *Semanza* Decision, para. 47; *Brđanin* Decision, para. 50; *Bralo* Decision, para. 40.

⁹⁸ *Semanza* Decision, para. 48; *Brđanin* Decision, para. 51; *Bralo* Decision, para. 41.

⁹⁹ *Semanza* Decision, para. 48; *Brđanin* Decision, para. 51; *Bralo* Decision, para. 41.

¹⁰⁰ See Letter of 8 November 2017; Letter of 30 December 2017; Letter of 24 April 2019; Letter of 28 October 2020.

¹⁰¹ See *supra*, fns. 20, 40. I note that both reports incorporate information from the prison’s general service, work service, social service, and psychological service and refer to earlier assessments of Kunarac. See 2017 Prison Report, pp. 2-3, 5-6; 2019 Prison Report, pp. 3-5.

¹⁰² 2019 Prison Report, p. 3; 2017 Prison Report, p. 2.

¹⁰³ 2019 Prison Report, p. 3; 2017 Prison Report, p. 2. See also 2019 Prison Report, p. 4.

¹⁰⁴ 2019 Prison Report, pp. 4-5 (discussing incidents on 24 October 2017, on 22 January 2018, and in May 2019); 2017 Prison Report, pp. 2, 5 (discussing incidents on 19 January 2017, 22 January 2017, and 24 October 2017).

prison employee “because of an error in his purchases” (“19 January 2017 Incident”);¹⁰⁵ (ii) trying to take items from his cell to the free time area of the prison, and then disobeying the instructions of a female prison employee to return those items to his cell;¹⁰⁶ (iii) a verbal altercation with a fellow prisoner who was distributing food to the prisoners as part of his work duties;¹⁰⁷ and (iv) as discussed in detail above, the physical confrontation with another inmate in January 2018.¹⁰⁸

49. According to the 2017 Prison Report, throughout his incarceration, prison authorities often suspected Kunarac of “sub-cultural behaviour” which was confirmed in April 2017, when he was found to be in possession of narcotics, including [REDACTED] tablets.¹⁰⁹ As a result, Kunarac temporarily lost his job in the prison library and was moved to a more restricted section of the prison for approximately three months.¹¹⁰

50. The Prison Reports also indicate that, with the exception of the period when he was in the more restricted section of the prison, Kunarac worked in the library for many years.¹¹¹ His attendance was regular, he dressed appropriately and he was familiar with all library procedures, which he diligently performed.¹¹² When working at the library, Kunarac: (i) “demonstrate[d] no negative or conspicuous behaviours in his contacts with fellow prisoners”; (ii) was “fair and polite toward the employees”; and (iii) “seem[ed] even-tempered”.¹¹³

51. According to the 2019 Prison Report, Kunarac makes plentiful use of his outdoor break and the kitchen wing. He is also said to participate in recreational and other activities, including a recent special religious event.¹¹⁴

52. Kunarac submits that “the claim that [he is] ‘prone to incidents and conflicts with staff and inmates’ is unfounded”.¹¹⁵ With respect to the 19 January 2017 Incident, Kunarac asserts that: (i) he “regretted it at that very instant” and apologised to the female prison employee the following day;

¹⁰⁵ 2017 Prison Report, pp. 2, 5.

¹⁰⁶ 2017 Prison Report, pp. 2, 5. Although the 2017 Prison Report only identifies this individual as “an employee”, Kunarac specifies that this was a “female colleague” of the “female guard” from the 19 January 2017 Incident. Letter of 8 November 2017, p. 5.

¹⁰⁷ 2019 Prison Report, p. 4; 2017 Prison Report, pp. 2, 4.

¹⁰⁸ 2019 Prison Report, p. 4. *See supra*, para. 22.

¹⁰⁹ 2017 Prison Report, pp. 2, 5.

¹¹⁰ 2017 Prison Report, pp. 2-4.

¹¹¹ 2019 Prison Report, p. 3; 2017 Prison Report, p. 3.

¹¹² 2019 Prison Report, p. 3; 2017 Prison Report, p. 3.

¹¹³ 2017 Prison Report, p. 3. *See also* 2019 Prison Report, p. 3 (“His conduct towards staff and other prisoners is friendly and appropriate.”).

¹¹⁴ 2019 Prison Report, p. 3.

¹¹⁵ Letter of 30 December 2017, p. 3. *See* Letter of 8 November 2017, pp. 5, 9; Submission of 31 October 2016, para. 106. In the Submission of 31 October 2016, there are two paragraphs numbered 106, and I refer to the second paragraph as 106*bis*.

and (ii) the female prison employee was also punished for her involvement in providing the wrong food items.¹¹⁶ Kunarac also submits that on the occasions where he has violated the rules, it has been out of necessity.¹¹⁷ For instance, regarding the allegations that he possessed narcotics Kunarac contends that he “really never would have bought or taken those damned tablets had [he] really not had very serious health problems”.¹¹⁸ Kunarac acknowledges that he had [REDACTED] tablets [REDACTED], but denies being in possession of other narcotics or contraband.¹¹⁹

(b) Mental State, Acceptance of Responsibility, and Reflection on Crimes Committed

53. The 2019 Prison Report refers to an expert report from August 2016, which concluded that [REDACTED].¹²⁰ In the view of the [REDACTED], these characteristics had been most recently discernible in the context of the 22 January 2018 Incident.¹²¹ In referring to this same incident, [REDACTED].¹²²

54. The 2019 Prison Report also refers to a November 2018 conversation between two employees of the psychological service and Kunarac, with the help of a sworn interpreter.¹²³ [REDACTED].¹²⁴ [REDACTED].¹²⁵ During the conversation, Kunarac stated that [REDACTED].¹²⁶ Kunarac told the psychological service employees that [REDACTED].¹²⁷

55. The psychological service considers the fact that [REDACTED].¹²⁸ However, it also notes that [REDACTED].¹²⁹ The psychological service concludes that [REDACTED].¹³⁰

¹¹⁶ Letter of 8 November 2017, pp. 4-5; Letter of 30 December 2017, pp. 2-3.

¹¹⁷ Submission of 31 October 2016, paras. 106*bis*, 10; Letter of 8 November 2017, p. 9. *See also* Application, para. 3.

¹¹⁸ Letter of 8 November 2017, p. 9.

¹¹⁹ Letter of 30 December 2017, pp. 3-4; Letter of 8 November 2017, pp. 7-9

¹²⁰ 2019 Prison Report, p. 7. In addition to the information detailed in this section, I have taken into account the reported [REDACTED] conditions from which Kunarac is said to suffer, which I address more fully below. *See infra*, paras. 82-83.

¹²¹ 2019 Prison Report, [REDACTED].

¹²² 2019 Prison Report, [REDACTED].

¹²³ 2019 Prison Report, p. 6.

¹²⁴ 2019 Prison Report, [REDACTED].

¹²⁵ 2019 Prison Report, [REDACTED].

¹²⁶ 2019 Prison Report, p. 6. *See* 2019 Prison Report, p. 7 ([REDACTED]).

¹²⁷ 2019 Prison Report, p. 6. *See* 2019 Prison Report, p. 7.

¹²⁸ 2019 Prison Report, p. 7.

¹²⁹ 2019 Prison Report, p. 7.

¹³⁰ 2019 Prison Report, p. 7.

56. In the Submission of 31 October 2016, Kunarac states that: (i) he made “a grave mistake”;¹³¹ (ii) “the entire time, and right now I feel guilty and regret what I had allowed myself to do”;¹³² and (iii) “[i]t is true that I committed one crime because of which I had a guilty consci[ence] back then and do so now”.¹³³ In the same submission, Kunarac disputes his responsibility for several of the crimes he committed and the correctness of the findings against him.¹³⁴

57. Kunarac acknowledges that he is “temperamental by nature” and that although he always tries “to refrain from reacting badly towards anyone” he sometimes fails,¹³⁵ however, he submits that “no one has ever tried to help me [by providing [REDACTED] to deal] with this issue”.¹³⁶ He asserts that he has tried to become involved in rehabilitation the entire time he has been at Bochum prison, but contends that he has not been able to participate in the available program as he does not speak German well enough and was told that it does not envisage the resocialisation of war criminals.¹³⁷ Kunarac also contends that [REDACTED] told him that nothing further could be done for him because he “do[es] not admit to everything [for which he has] been found guilty”.¹³⁸

(c) Prospects of Successful Reintegration into Society

58. In interviews with the social service about where he wanted to go if released, Kunarac said: (i) in October 2016, that he no longer wanted to go to [REDACTED] but could live [REDACTED];¹³⁹ and (ii) in July 2017, that he wanted to [REDACTED] and had made inquiries with [REDACTED] about this possibility.¹⁴⁰ In October 2019, the social service

¹³¹ Submission of 31 October 2016, p. 2

¹³² Submission of 31 October 2016, para. 113 (emphasis in omitted).

¹³³ Submission of 31 October 2016, fn. 8.

¹³⁴ Submission of 31 October 2016, fn. 10 (“Unfortunately during my trial the truth was not established and the real culprits avoided responsibility but I was found guilty and punished draconically for everything, in addition to what I had done, for which I do feel guilt, I was found to be guilty of everything else, for which I really have not guilt”), para. 104 (“To my misfortune I cannot now turn back and ‘right’ what I did. The fact is that I have been punished draconically for my mistakes, for those that I did commit and for those that I did not commit but were attributed to me”) (emphasis omitted).

¹³⁵ Letter of 30 December 2017, p. 3.

¹³⁶ Letter of 30 December 2017, p. 3.

¹³⁷ See Application, para. 3; Submission of 31 October 2016, p. 1, paras. 39, 73, 105, Attachment 1 (letter from the Head of Bochum Prison, dated 9 December 2011).

¹³⁸ Submission of 31 October 2016, para. 39. See Submission of 31 October 2016, Attachment 2 (letter from the Head of Bochum Prison, dated 25 April 2012) ([REDACTED]).

¹³⁹ 2017 Prison Report, p. 3.

¹⁴⁰ 2017 Prison Report, p. 4.

indicated that it “remains unclear where Kunarac will be able to take up residence in the longer term”.¹⁴¹

59. The psychological service considers [REDACTED].¹⁴² In relation to [REDACTED], the psychological service notes that he [REDACTED].¹⁴³ More specifically, it indicates that upon release, Kunarac [REDACTED].¹⁴⁴ Ultimately, the psychological service concludes that [REDACTED].¹⁴⁵ As a result of these and other points outlined in the 2019 Prison Report, the Director of Bochum Prison was not in favour of suspending the remainder of Kunarac’s prison sentence.¹⁴⁶

60. The 2019 Prison Report also indicates that Kunarac maintains close telephone contact with his children and receives sporadic visits from acquaintances.¹⁴⁷ His last visit from his partner was in July 2016,¹⁴⁸ and in September 2019, Kunarac received extended visits on four consecutive days from his [REDACTED].¹⁴⁹

61. Kunarac submits that he fears for his life if he were to be returned to Bosnia and Herzegovina,¹⁵⁰ and has thus indicated that he wished to [REDACTED],¹⁵¹ [REDACTED],¹⁵² or [REDACTED].¹⁵³ After Germany rejected Kunarac’s asylum application [REDACTED],¹⁵⁴ Kunarac expressed a desire to resettle with his partner who lives in [REDACTED] even though he is concerned that this might not be permitted by the [REDACTED] authorities.¹⁵⁵ With respect to [REDACTED], although Kunarac’s 2009 request was rejected, he contacted the authorities again to request that he be permitted to reside in [REDACTED].¹⁵⁶ As of late 2017, Kunarac had not received a decision from [REDACTED] on his most recent request.¹⁵⁷ In

¹⁴¹ 2019 Prison Report, p. 5.

¹⁴² 2019 Prison Report, p. 7.

¹⁴³ 2019 Prison Report, p. 7.

¹⁴⁴ 2019 Prison Report, p. 7.

¹⁴⁵ 2019 Prison Report, p. 7.

¹⁴⁶ 2019 Prison Report, p. 8.

¹⁴⁷ 2019 Prison Report, p. 5; 2017 Prison Report, p. 3.

¹⁴⁸ 2019 Prison Report, p. 5; 2017 Prison Report, p. 3.

¹⁴⁹ 2019 Prison Report, p. 5.

¹⁵⁰ See Letter of 8 November 2017, p. 10; Application, para. 6; Submission of 31 October 2016, paras. 68, 72.

¹⁵¹ See Letter of 30 December 2017, p. 4; Application, para. 2.

¹⁵² See Letter of 30 December 2017, p. 5; Application, para. 6.

¹⁵³ See Letter of 8 November 2017, p. 10; Letter from Kunarac to the then-President, dated 14 August 2017 (confidential), pp. 1-3; Application, paras. 2, 6.

¹⁵⁴ See Letter of 24 April 2019, p. 2; Letter of 8 November 2017, p. 10; Application, paras. 2-3.

¹⁵⁵ See Letter of 30 December 2017, pp. 5-6; Application, para. 6.

¹⁵⁶ See Letter of 8 November 2017, p. 10; Application, paras. 2, 6.

¹⁵⁷ See Letter of 8 November 2017, p. 10.

April 2019, Kunarac submitted that he is “‘a person without a state’ because the matter of [his] citizenship [...] remains unresolved”.¹⁵⁸

62. Kunarac asserted in 2017 that [REDACTED].¹⁵⁹ He submits that [REDACTED].¹⁶⁰

63. With respect to his situation following his eventual release, Kunarac refers to the fact that he had been working in the library for many years and that his good performance has been rewarded with a surplus payment of between 10 to 30% over the usual salary.¹⁶¹ Kunarac submits that [REDACTED] he receives a monthly payment of approximately [REDACTED], which he considers is “more than enough for a family of three or four” in Bosnia and Herzegovina [REDACTED], as he contends that average salaries there are below €300 per month [REDACTED].¹⁶² [REDACTED].¹⁶³ Finally, Kunarac asserts that because he is a “[REDACTED] war veteran”, he has the right to adequate housing, but indicates that even if that were not the case, he could live with a family member, [REDACTED].¹⁶⁴

(d) Overall Assessment of Kunarac’s Rehabilitation

64. Over the last few years, Kunarac has had several physical or verbal confrontations with fellow inmates as well as with prison staff. Bearing in mind that the crimes for which Kunarac was convicted were committed on the discriminatory grounds of gender and ethnicity,¹⁶⁵ I find it troubling that two of the reported confrontations were with prison employees who were women [REDACTED].¹⁶⁶ Although Kunarac expresses regret for some of these incidents,¹⁶⁷ he has also said that he “was unable to avoid the conflict at the time”.¹⁶⁸ I also note with concern this continued inability to avoid conflicts,¹⁶⁹ and the fact that Kunarac consistently denies any involvement or otherwise downplays his role.¹⁷⁰ In my

¹⁵⁸ Letter of 24 April 2019, p. 1.

¹⁵⁹ See Letter of 30 December 2017, p. 5.

¹⁶⁰ See Letter of 30 December 2017, p. 5; Letter of 8 November 2017, p. 11.

¹⁶¹ See Submission of 31 October 2016, para. 109; Letter of 8 November 2017, p. 8.

¹⁶² See Letter of 30 December 2017, pp. 5; Letter of 8 November 2017, p. 11.

¹⁶³ Letter of 30 December 2017, p. 5.

¹⁶⁴ Letter of 30 December 2017, p. 6.

¹⁶⁵ Trial Judgement, para. 867. See *supra*, para. 36. See also Appeal Judgement, para. 357.

¹⁶⁶ See 2017 Prison Report, pp. 2, 5; 2019 Prison Report, p. 7. See also Letter of 30 December 2017, p. 3 (“It is a fact that I was behaving aggressively and inappropriately towards the female guard on that occasion”) (internal quotation omitted).

¹⁶⁷ Letter of 8 November 2017, pp. 4-5; Letter of 30 December 2017, p. 2.

¹⁶⁸ Letter of 8 November 2017, p. 4. See Letter of 30 December 2017, p. 2 (“the fact is that I tried three or four times, in a perfectly calm civilised and polite manner to avoid undesired reactions, but I did not meet with understanding so in the end I was provoked and I reacted in an inappropriate manner”).

¹⁶⁹ See also Decision Denying Early Release, paras. 26-27.

¹⁷⁰ See Letter of 24 April 2019, p. 3; Letter of 30 December 2017, p. 3; Submission of 31 October 2016, paras. 106, 108.

view, if he is to be released, Kunarac will need to find appropriate ways to deal with situations that do not proceed the way he would wish. For instance, regardless of whether the error with his groceries was a simple oversight or something more intentional,¹⁷¹ “furiously” throwing a bag at another person is never an appropriate response to such a situation. In this respect, Kunarac’s behaviour when he is working at the library is to be commended and I would encourage him to adopt the same even tempered behaviour outside the library as well.¹⁷²

65. In reading Kunarac’s many submissions, I observe that he has a tendency to see himself as a victim and avoids taking ownership for his lapses. For instance, in response to the report that he possessed [REDACTED] tablets, Kunarac states that he “really never would have bought or taken those damned tablets had [he] really not had very serious health problems” and appears to blame this on his non-referral to a doctor who in turn could have referred him to a specialist.¹⁷³ He later contends that he was self-medicating because he was denied medical treatment,¹⁷⁴ an assertion which is not supported by the information before me. This tendency is especially concerning because it continues a pattern throughout his incarceration whereby Kunarac portrays himself as a victim,¹⁷⁵ and suggests a lack of sufficient progress in his rehabilitation.

66. Turning to Kunarac’s acceptance of responsibility, his critical reflection on the crimes he committed, and his expressions of remorse or regret, I note that although he has expressed regret for one of his crimes,¹⁷⁶ recent reports [REDACTED] indicate that Kunarac continues to deny responsibility for most of the crimes for which he was convicted [REDACTED].¹⁷⁷

¹⁷¹ See Letter of 30 December 2017, pp. 2-3; Letter of 8 November 2017, pp. 4-5.

¹⁷² See *supra*, para. 50.

¹⁷³ Letter of 8 November 2017, p. 9.

¹⁷⁴ Letter of 30 December 2017, p. 6.

¹⁷⁵ See *e.g.* Submission of 31 October 2016, fn. 10 (“Unfortunately during my trial the truth was not established and the real culprits avoided responsibility but I was found guilty and punished draconically for everything [...]”), paras. 40 (“I was discriminated from the outset” upon his transfer to Germany), 44 (“I think [Germany] is not the only one to blame for me being in this situation [REDACTED], because while I was still in The Hague [...] I wrote a request to the ICTY for approval of provisional release, solely for an operation but my request [...] was rejected by the ICTY”), 95 (“I was ‘discriminated’ from the start” with respect to his early release proceedings) (emphasis omitted); Decision Denying Early Release, para. 37 (in an interview in 2015, Kunarac expressed “shock” that he had been accused of rape, when in reality a “woman climbed on top of [him], overpowered him and had vaginal intercourse with him. He just lay there and didn’t move. [...] Actually, he was the one who was raped”).

¹⁷⁶ See *supra*, para. 56.

¹⁷⁷ See 2019 Prison Report, [REDACTED].

67. The [REDACTED] conclusion that early release under German law could not be recommended [REDACTED] is of particular importance.¹⁷⁸ I consider that at least some of the above-mentioned deficiencies in Kunarac's rehabilitation could be ameliorated [REDACTED], and I am heartened by Kunarac's stated wish to participate in resocialisation programmes.¹⁷⁹ In this respect I note that, although Kunarac's refusal to acknowledge his crimes, coupled with his poor German language skills, were previously barriers to his rehabilitation,¹⁸⁰ [REDACTED].¹⁸¹ I would therefore encourage Kunarac to work with [REDACTED] to help him develop the necessary skills for his successful reintegration into society when he is eventually released.¹⁸² I would also encourage German prison authorities to find ways to provide Kunarac with the assistance needed to work towards these objectives, notwithstanding his limited German language skills.

68. With respect to Kunarac's post-release plans, I note that he has maintained relationships with loved ones, with whom he has indicated he could live if necessary. I also note that if Kunarac can access the stated pension and disability allowance, or if he were to find employment and dedicate himself the way he has in the library, he may have sufficient financial resources to allow him to reintegrate into society [REDACTED].¹⁸³ However, I note uncertainty remains as to where he will reside. Although Kunarac does not want to return to Bosnia and Herzegovina, he has no clear plan where he will go. In this respect, I note that Kunarac has been informed that an indictment has been filed against him in Bosnia and Herzegovina for crimes he is alleged to have committed there during the war.¹⁸⁴

69. In light of the above, on balance, I am not persuaded that Kunarac's positive behaviour in the prison library and his limited expressions of regret demonstrate sufficient rehabilitation to warrant early release. I encourage Kunarac to work with the [REDACTED], and German authorities more generally, to develop the skills and make the necessary preparations that will allow him to successfully reintegrate into society when he is eventually released.

¹⁷⁸ 2019 Prison Report, [REDACTED].

¹⁷⁹ See *supra*, para. 57.

¹⁸⁰ See Submission of 31 October 2016, Attachment 2; 2019 Prison Report, p. 5 (in November 2018, the social service found that Kunarac's poor German skills made planning impossible).

¹⁸¹ 2019 Prison Report, [REDACTED].

¹⁸² 2019 Prison Report, [REDACTED].

¹⁸³ 2019 Prison Report, [REDACTED].

¹⁸⁴ Letter of 28 October 2020, pp. 1-2; Letter of 28 May 2020, p. 1; Letter from Kunarac to the then-President, dated 16 July 2018 (confidential), p. 1.

4. Substantial Cooperation with the Prosecution

70. The Trial Chamber considered the fact that Kunarac voluntarily surrendered to the ICTY to be a factor in mitigation of his sentence.¹⁸⁵ It also took into account Kunarac's "substantial cooperation with the Prosecutor in giving two statements" as a mitigating factor.¹⁸⁶ The fact that Kunarac initially pleaded guilty to one count of rape as a crime against humanity, which he withdrew a few days later,¹⁸⁷ was not considered by the Trial Chamber as a mitigating factor or as amounting to "substantial co-operation" with the Prosecution.¹⁸⁸

71. According to the Prosecution, Kunarac's cooperation is not relevant at the early release stage as it was already taken into account as mitigation in sentencing.¹⁸⁹ It also submits that Kunarac has not cooperated any further since then.¹⁹⁰

72. Kunarac states that he cooperated with the Prosecution, including initially pleading guilty on one count of the indictment.¹⁹¹ He asserts that he voluntarily surrendered and testified against himself, even though he was not obliged to cooperate.¹⁹² Kunarac submits that he was not asked to cooperate further,¹⁹³ and so his lack of further cooperation cannot be held against him.¹⁹⁴

73. I find no merit in the Prosecution's submission that Kunarac's substantial cooperation should not be considered in support of the Application, because it was already taken into account as a mitigating factor. As discussed above, the Mechanism's legal framework and practice explicitly allow for factors taken into account at the sentencing stage to also be considered when determining whether early release is appropriate.¹⁹⁵ Some factors, such as substantial cooperation with the Prosecutor or expressions of genuine remorse or regret, may be in the convicted person's favour, while gravity of the crimes may be to the convicted person's detriment.¹⁹⁶ Moreover, Rule 151 of the Rules provides that the President "shall take into account [...] any substantial cooperation of the prisoner with the Prosecutor" when making an early release determination.

¹⁸⁵ Trial Judgement, para. 868.

¹⁸⁶ Trial Judgement, para. 868.

¹⁸⁷ Trial Judgement, para. 892.

¹⁸⁸ See Trial Judgement, paras. 868-870.

¹⁸⁹ Prosecution Memorandum on Cooperation, para. 2.

¹⁹⁰ Prosecution Memorandum on Cooperation, para. 2.

¹⁹¹ See Submission of 31 October 2016, para. 6. See also Submission of 31 October 2016, paras. 7, 112.

¹⁹² See Submission of 31 October 2016, paras. 3-5, 111-113.

¹⁹³ See Submission of 31 October 2016, para. 112.

¹⁹⁴ See Submission of 31 October 2016, para. 113.

¹⁹⁵ See *supra*, para. 38.

¹⁹⁶ See *supra*, para. 38.

74. Accordingly, I will attach some weight to the fact that Kunarac gave two statements to the Prosecution, as well as the fact that he voluntarily surrendered to the ICTY.

C. Other Considerations

1. Views of the Prosecutor

75. At the outset, I note that the Prosecution seeks leave to file the Prosecution Submission.¹⁹⁷ Kunarac responds that neither the Statute nor the Rules allow the Prosecution or a third-party to provide submissions other than in relation to cooperation, and he therefore requests that I dismiss the Prosecution Submission in its entirety.¹⁹⁸

76. As I have previously explained, I will use my discretion to receive and consider general comments from the Prosecution with regard to early release applications.¹⁹⁹ In doing so, I will exercise caution to avoid any unreasonable imbalance to the detriment of the convicted person, and will carefully assess on a case-by-case basis which submissions are of actual relevance in a given case, mindful of the rights of the convicted person.²⁰⁰

77. The Prosecution submits, *inter alia*, that I should deny the Application based on the totality of circumstances.²⁰¹ It opposes Kunarac's early release based on the gravity of his crimes,²⁰² Kunarac's denial of the crimes during the trial and more recently,²⁰³ the absence of remorse,²⁰⁴ and his lack of demonstrated rehabilitation.²⁰⁵ The Prosecution also submits that in this case, there is a heightened need to consult the affected States, victims, and witnesses before issuing any early release decision.²⁰⁶

78. In considering the Application, I have taken note of the Prosecution's submissions and opposition to Kunarac's early release.

¹⁹⁷ Prosecution Submission, para. 1.

¹⁹⁸ Letter of 28 October 2020, p. 1.

¹⁹⁹ *Semanza* Decision, para. 75; *Brđanin* Decision, para. 83; *Bralo* Decision, para. 69.

²⁰⁰ *Semanza* Decision, para. 75; *Brđanin* Decision, para. 83; *Bralo* Decision, para. 69.

²⁰¹ Prosecution Submission, para. 2.

²⁰² Prosecution Submission, paras. 2, 11-12, 16.

²⁰³ Prosecution Submission, paras. 2, 12-13.

²⁰⁴ Prosecution Submission, paras. 2, 12-13, 16.

²⁰⁵ Prosecution Submission, paras. 2, 11-13, 16.

²⁰⁶ Prosecution Submission, paras. 14-16.

2. Health of Convicted Person

79. Previous decisions on early release have determined that other considerations, such as the state of the convicted person's health, may be taken into account in the context of an application for early release, especially when the seriousness of the condition makes it inappropriate for the convicted person to remain in prison any longer.²⁰⁷

80. I note that a significant part of Kunarac's submissions concern longstanding problems he had with [REDACTED].²⁰⁸ In particular, Kunarac requested that I allow [REDACTED],²⁰⁹ [REDACTED].²¹⁰ Since those submissions, however, Kunarac [REDACTED].²¹¹ On 20 February 2018, Kunarac [REDACTED].²¹² In April 2019, Kunarac indicated that [REDACTED].²¹³ Notwithstanding the resolution of this issue, I note that Kunarac continues to experience some issues [REDACTED].²¹⁴

81. Based on the information before me, I understand that Kunarac [REDACTED] has caused him significant pain and distress for many years, but that the situation has ameliorated since [REDACTED] February 2018. I am satisfied that he has been receiving necessary and appropriate medical treatment [REDACTED].

82. Kunarac also raises [REDACTED] health complaints, including [REDACTED].²¹⁵ In the 2019 Prison Report, the [REDACTED].²¹⁶ [REDACTED].²¹⁷

83. With respect to other aspects of Kunarac's [REDACTED] health, I note that the medical reports before me suggest that his medical condition has been stable. According to medical reports prepared by the UNDU Medical Officer in 2018, [REDACTED], no serious

²⁰⁷ *Semanza*, para. 90; *Brđanin* Decision, para. 92; *Bralo* Decision, para. 77.

²⁰⁸ See Application, paras. 4, 8; Submission of 31 October 2016, paras. 44-68.

²⁰⁹ Application, para. 4 (emphasis omitted).

²¹⁰ Submission of 31 October 2016, para. 68.

²¹¹ See *supra*, para. 22; First Medical Report, p. 3.

²¹² First Medical Report, p. 3.

²¹³ Letter of 24 April 2019, p. 3.

²¹⁴ See Letter from Kunarac to the Registrar, dated 28 October 2020 (confidential), p. 1.

²¹⁵ Submission of 31 October 2016 paras. 66-67, 69-71, 117, 117*bis* (In the Submission of 31 October 2016, there are two paragraphs numbered 107, and I refer to the second paragraph as 107*bis*); Letter of 8 November 2017, pp. 4, 9.

²¹⁶ 2019 Prison Report, [REDACTED].

²¹⁷ See [REDACTED].

[REDACTED] ailments have been reported in the medical file or by the Bochum prison doctor.²¹⁸

84. In light of the above, I do not find that there are compelling humanitarian grounds which would warrant granting early release notwithstanding the overall negative assessment.

3. Consultation

85. As set out above, I consulted Judge Meron and Judge Muthoga who both consider that the Application should be denied. I am grateful for my Colleagues' views on these matters, and have taken them into account in my ultimate assessment of the Application.

VI. CONCLUSION

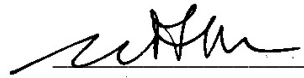
86. I am of the opinion that the Application should be denied. Although Kunarac is eligible to be considered for early release, as discussed above, a number of factors militate against early release. In particular, Kunarac's failure to sufficiently demonstrate rehabilitation and the high gravity of his crimes both weigh heavily against his early release. Finally there is no evidence before me that demonstrates the existence of compelling humanitarian grounds which would warrant overriding this negative assessment.

VII. DISPOSITION

87. For the foregoing reasons and pursuant to Article 26 of the Statute, Rules 150 and 151 of the Rules, and paragraph 19 of the Practice Direction, 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]

²¹⁸ First Medical Report, p. 3; Second Medical Report, p. 1. *See also* Letter of 2 June 2018, pp. 1-6; Letter of 17 July 2018, pp. 2-3.



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