

***THE PROSECUTOR V. MOMIR NIKOLIĆ, CASE NO. MICT-14-65-ES PUBLIC REDACTED VERSION OF THE 14 MARCH 2014 DECISION ON EARLY RELEASE OF MOMIR NIKOLIĆ, 12 OCTOBER 2015***

The President of the Mechanism Theodor Meron concerning this case submitted to the United Nations International Criminal Mechanism on 02<sup>nd</sup> of September 2013 pursuant to Article 26 of the Statute of the International Criminal Mechanism ("Statute"), Rules 150 and 151 of the Rules of Procedure and Evidence of the Mechanism ("Rules"), and paragraph 3 of the Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism ("Practice Direction").<sup>1</sup> To appreciate this decision, it worthwhile to give a brief account of the procedural history.

**A. Procedural History**

On the 26 of March 2002, Judge Wolfgang Schomburg confirmed the charges against Momir Nikolić initiated by the Office of the Prosecutor of the ICTY Tribunal<sup>2</sup>. The Tribunal arrested and detained Momir Nikolić on 1 April 2002, and eventually transferred him to the custody of the Tribunal the following day.<sup>3</sup> At his initial appearance, held on 3 April 2002, he pursuant to Rule 62 of the Rules of Procedure and Evidence of the Tribunal, entered a plea of "not guilty" to all charges in the Initial Indictment.<sup>4</sup> On 6 and 7 of May 2003, the Prosecution and Momir Nikolić filed a "Joint Motion for Consideration of Amended Plea Agreement between Momir Nikolić and the Office of the Prosecutor, and on the Second Joint Motion, the Trial Chamber that had declined to amend the plea in the First Joint Motion, accepted to amend the plea, as a result he was found guilty of the charge of persecutions and crimes against humanity, punishable under

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<sup>1</sup> *Prosecutor v. Momir Nikolić*, Case No. MICT-14-65-ES, Public Redacted Version of the 14 March 2014 Decision on Early Release of Momir Nikolić ("Decision on Early Release of Momir Nikolić"), 12 October 2015, para. 1.

<sup>2</sup> *Prosecutor v. Momir Nikolić*, Case No. IT-02-56-I, Indictment, dated 26 March 2002 and filed on 28 March 2002; *Prosecutor v. Momir Nikolic*, Case No JT-02-60/1-S, Sentencing Judgement, 2 December 2003 ("Sentencing Judgement"), para. 3. Available at: <http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf>, [16 October 2015].

<sup>3</sup> Decision on Early Release of Momir Nikolić, para. 6.

<sup>4</sup> Sentencing Judgement, para. 5; *Prosecutor v. Momir Nikolić*, Case No. IT-02-56-I, Initial Appearance Hearing, T. para. 47-48.

Article 5(h) of the Statute<sup>5</sup>, while the remaining charges were disallowed.<sup>6</sup> The Trial Chamber on 09 May 2003 ordered for the separation of the case of Vidoje Blagojević, Dragan Obrenović and Dragan Joki from that Momir Nikolić.<sup>7</sup> Following a sentencing hearing from 27 to 29 October 2003, the Trial Chamber sentenced Momir Nikolić to a single term of imprisonment of 27 years, with credit for 610 days spent in detention on 3 December 2003, on appeal, it was reduced to 20 years with time spent in detention<sup>8</sup>. He was transferred to Finland on 11 April 2007 where he will serve his sentence.<sup>9</sup>

## **B. Grounds for Release**

### **1. Early Release Cases**

Following the application from Mr. Momir to the President of the Mechanism regarding his position for early release, and considering the circumstances of his application, Meron submit that:

#### **(a) Applicable Law for Release**

8. Under Article 26 of the Statute, if, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. Article 26 of the Statute further provides that 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.

9. Rule 149 of the Rules echoes Article 26 of the Statute and provides that the enforcing State shall notify the Mechanism of a convicted person's eligibility for pardon, commutation of sentence, or early release under the enforcing State's laws. Rule 150 of the Rules provides that the President of the Mechanism shall, upon such notice, determine, in consultation with any Judges of the sentencing Chamber who are Judges of the Mechanism, whether pardon, commutation of sentence, or early release is appropriate. Pursuant to Rule 151 of the Rules, in making a determination on pardon, commutation of sentence, or early release, the President shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly situated prisoners, the prisoner's demonstration of rehabilitation, and any substantial cooperation of the prisoner with the Prosecution.

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<sup>5</sup> Sentencing Judgement, para. 11 – 12; Decision on Early Release of Momir Nikolić, para. 3.

<sup>6</sup> Decision on Motion to Dismiss Charges Against Accused Momir Nikolić, 12 May 2003; Sentencing Judgement, para. 13.

<sup>7</sup> *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, Separation of Proceedings and Scheduling Order, 9 May 2003; Sentencing Judgement, para. 14.

<sup>8</sup> See Decision on Early Release of Momir Nikolić, note 5, *supra*.

<sup>9</sup> *Ibid*, para. 4.

10. Paragraph 3 of the Practice Direction provides that a convicted person may directly petition the President of the Mechanism for pardon, commutation of sentence, or early release, if he or she believes that he or she is eligible therefor.

11. Article 3 of the Agreement between the International Criminal Tribunal for the former Yugoslavia and the Government of Finland on the Enforcement of Sentences of the International Tribunal, dated 7 May 1997 ("Enforcement Agreement"), provides that in enforcing a sentence imposed by the ICTY, the Finnish authorities shall be bound by the duration of the sentence<sup>10</sup> and that the conditions of imprisonment shall be governed by Finnish law, subject to the supervision of the ICTY (and now the Mechanism).<sup>21</sup> Article 8 of the Enforcement Agreement, applied mutatis mutandis to the Mechanism, provides, inter alia, that, following notification of eligibility for pardon, amnesty or commutation of sentence under Finnish law, the President of the Mechanism shall determine, in consultation with the Judges of the Mechanism, whether pardon or amnesty or commutation of the sentence is appropriate and the Registrar shall inform the Finnish authorities of the President's determination accordingly.<sup>11</sup>

Pursuant to Article 26 of the Statute, Rules 150 and 151 of the Rules, and Article 8(2) of the Enforcement Agreement, the President of the Mechanism can use his discretion to grant early release of persons convicted by ICTY. To this end, Meron Theodore with regards to the case of Momir Nikolić who has served half of his sentence and have throughout this period shown remorse by demonstrating that he will not engaged in horrendous atrocities or post a threat to victims and witnesses based on the reports of the competent authorities during his period of imprisonment in Finland. The President considering other circumstances granted the early release of Momir Nikolić.

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<sup>10</sup> See Article 3(I) of the Enforcement Agreement. The Mechanism is bound by the Enforcement Agreement, because the Mechanism's founding document, Security Council Resolution 1966 (2010), provides that all existing agreements still in force as of the commencement date of the Mechanism shall apply mutatis mutandis to the Mechanism. See U.N. Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010, para. 4 ("the Mechanism shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR, respectively, subject to the provisions of this resolution and the Statute of the Mechanism, and all contracts and international agreements concluded by the United Nations in relation to the ICTY and the ICTR, and still in force as of the relevant commencement date, shall continue in force mutatis mutandis in relation to the Mechanism"). According to Article 25(2) of the Statute, "[t]he Mechanism shall have the power to supervise the enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States"

<sup>11</sup> Decision on Early Release of Momir Nikolić, para. 8 – 11.

## 2. Treatment of Similar-Situated Prisoners

Meron in the case of Momir further argues with regards to early release that Rule 151 of the Rules requires the President of the Mechanism to consider as a separate factor the need for equal treatment of similarly-situated prisoners. In this vain, he said:

18. In this respect, I recall that persons sentenced by the ICTY, like Nikolic, are "similarly situated" to all other prisoners under the Mechanism's supervision and thus, are to be considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the tribunal that convicted them.<sup>12</sup> Although the two-thirds practice originates from the ICTY, it applies to all prisoners within the jurisdiction of the Mechanism, given the need for equal treatment of all convicted persons supervised by the Mechanism and the need for a uniform eligibility threshold applicable to both of the Mechanism's branches.<sup>13</sup> 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 of the Mechanism as a matter of discretion, after considering the totality of the circumstances in each case.<sup>14</sup>

19. According to the Finnish authorities and based on my own calculation, Nikolic has completed, as of the date of this Decision, more than half, but less than two-thirds of his 20-year sentence, given that he has been in custody since 1 April 2002.<sup>15</sup> The fact that Nikolic has not yet completed two-thirds of his sentence counsels against his early release.

Building on the above grounds, the President of the Mechanism granted the release of Momir based on his discretion and the law applicable in such cases as highlighted above.

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<sup>12</sup> See *Prosecutor v. Ohed Ruzindana*, Case No. MICT-12-10-ES, Public Redacted Version of Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014 ("Ruzindana Decision"), para. 14; *Prosecutor v. Omar Serushago*, Case No. MICT-12-28, Public Redacted Version of Decision of the President on the Early Release of Omar Serushago, 13 December 2012 ("Serushago Decision"), para. 16-17; *Prosecutor v. Paul BisenKimana*, Case No. MICT -12-07, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012 (public redacted version) ("Bisengimana Decision"), para. 17, 20.

<sup>13</sup> See *Ruzindana* Decision, para. 14; *Serushago* Decision, para. 17; *Bisengimana* Decision, para. 20.

<sup>14</sup> *Ruzindana* Decision, para. 14; *Serushago* Decision, para. 18, 34; *Bisengimana* Decision, para. 21, 35.

<sup>15</sup> Sentencing Judgement, note 4, *supra*.