

**UNITED  
NATIONS**



Mechanism for International Criminal Tribunals

Case No.: MICT-17-112-ES.1

Date: 24 April 2018

Original: English

**THE PRESIDENT OF THE MECHANISM**

**Before: Judge Theodor Meron, President**

**Registrar: Mr. Olufemi Elias**

**Decision of: 24 April 2018**

**PROSECUTOR**

**v.**

**BERISLAV PUŠIĆ**

***PUBLIC***

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**PUBLIC REDACTED VERSION OF THE 20 APRIL 2018  
DECISION OF THE PRESIDENT ON THE EARLY RELEASE  
OF BERISLAV PUŠIĆ**

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**The Office of the Prosecutor:**

Mr. Serge Brammertz  
Mr. Mathias Marcussen

**Counsel for Mr. Berislav Pušić:**

Mr. Fahrudin Ibrišimović

**I, THEODOR MERON**, President of the International Residual Mechanism for Criminal Tribunals (“Mechanism”), am seised of an application for the early release of Mr. Berislav Pušić (“Pušić”), dated 28 December 2017, filed by Counsel for Pušić, Mr. Fahrudin Ibrišimović (“Counsel”).<sup>1</sup> I am further seised of a separate application filed by Counsel on 27 February 2018, wherein Pušić submits that, according to his calculations, he has only forty-five (45) days to serve before he reaches the two-thirds point of his sentence and becomes eligible to apply for early release.<sup>2</sup> The Application and the Second Application (collectively referred to as “Applications”) will be considered together in this decision. I consider the Applications pursuant to Article 26 of the Statute of the Mechanism (“Statute” and “Mechanism”, respectively), 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>3</sup>

## **I. BACKGROUND**

1. Pušić voluntarily surrendered to the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) on 5 April 2004.<sup>4</sup> At his initial appearance on 6 April 2004, Pušić entered a plea of not guilty to all counts of the indictment against him and following this appearance he was transferred to the United Nations Detention Unit in The Hague, the Netherlands (“UNDU”).<sup>5</sup>

2. On 29 May 2013, the majority of Trial Chamber III of the ICTY (“Trial Chamber”) found Pušić guilty for his participation, under Article 7(1) of the ICTY Statute, in a Joint Criminal Enterprise (“JCE”) with “only one, single common criminal purpose – domination by the HR H-B [Croatian Republic of Herceg-Bosna] Croats through ethnic cleansing of the Muslim population. To accomplish this purpose, the members of the group, which included the various Accused, made use of the political and military apparatus of the HZ(R) H-B [Community and Republic of Herceg-Bosna, referred to jointly]”.<sup>6</sup> The Trial Chamber found that “the ultimate purpose of the HZ(R) H-B leaders and of Franjo Tuđman at all times relevant under the Indictment was to set up a Croatian entity that reconstituted, at least in part, the borders of the Banovina of 1939, and facilitated the

<sup>1</sup> Berislav Pušić’s Application for Early Release, 28 December 2017 (confidential) (“Application”).

<sup>2</sup> Berislav Pušić’s Application for Early Release, 27 February 2018 (confidential) (“Second Application”), para. 8.

<sup>3</sup> MICT/3, 5 July 2012.

<sup>4</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Judgement, 29 May 2013 (“Trial Judgement”), Vol. 4, para. 1382. All references herein are to the English translation of the Trial Judgement.

<sup>5</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Transcript, 6 April 2004, p. 47, lines 9-10; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Order on Provisional Release of Berislav Pušić, 2 August 2004, para. 3.

reunification of the Croatian people. This Croatian entity in Bosnia and Herzegovina ('BiH') was either supposed to be joined to Croatia directly subsequent to a possible dissolution of BiH, or otherwise, to be an independent state within BiH with close ties to Croatia".<sup>7</sup>

3. While the Trial Chamber held "that the evidence thus attests to the fact that a JCE was established to accomplish the political purpose at least as early as mid-January 1993",<sup>8</sup> Pušić was found guilty for his participation in the JCE, only between the period of April 1993 until April 1994,<sup>9</sup> and convicted of the following crimes: Persecutions, as a crime against humanity (Count 1); Murder, as a crime against humanity (Count 2); Wilful killing, as a grave breach of the Geneva Conventions of 1949 (Count 3); Deportation, as a crime against humanity (Count 6); Unlawful deportation of a civilian, as a grave breach of the Geneva Conventions of 1949 (Count 7); Inhumane acts (forcible transfer), as a crime against humanity (Count 8); Unlawful transfer of a civilian, as a grave breach of the Geneva Conventions of 1949 (Count 9); Imprisonment, as a crime against humanity (Count 10); Unlawful confinement of a civilian, as a grave breach of the Geneva Conventions of 1949 (Count 11); Inhumane acts (conditions of confinement), as a crime against humanity (Count 12); Inhuman treatment (conditions of confinement), as a grave breach of the Geneva Conventions of 1949 (Count 13); Inhumane acts, as a crime against humanity (Count 15); Inhuman treatment, as a grave breach of the Geneva Conventions of 1949 (Count 16); Unlawful labour, as a violation of the laws or customs of war (Count 18); Extensive destruction of property, as a grave breach of the Geneva Conventions of 1949 (Count 19); Destruction or wilful damage to institutions dedicated to religion or education, as a violation of the laws or customs of war (Count 21); Unlawful attack on civilians, as a violation of the laws or customs of war (Count 24); and Unlawful infliction of terror, as a violation of the laws or customs of war (Count 25) of the Indictment.<sup>10</sup>

4. The Trial Chamber unanimously sentenced Pušić to a single sentence of 10 years' imprisonment, subject to credit being given under Rule 101(C) of the ICTY Rules of Procedure and Evidence ("ICTY Rules") for the period that Pušić had already spent in detention pending and during trial.<sup>11</sup>

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<sup>6</sup> Trial Judgement, Vol. 4, para. 41. *See also* Trial Judgement, Vol. 5, Glossary, p. 6.

<sup>7</sup> Trial Judgement, Vol. 4, para. 24.

<sup>8</sup> Trial Judgement, Vol. 4, para. 44.

<sup>9</sup> Trial Judgement, Vol. 4, para. 1229. *See also* Trial Judgement, Vol. 4, para. 43.

<sup>10</sup> Trial Judgement, Vol. 4, Disposition, p. 431. *See also* Trial Judgement, Vol. 4, paras. 1202-1212; *Prosecutor v. Jadranko Prlić et al.*, Second Amended Indictment, 11 June 2008 ("Indictment").

<sup>11</sup> Trial Judgement, Disposition, p. 431.

5. On 29 November 2017, the majority of the Appeals Chamber reversed in part Pušić's convictions for Counts 1 to 3, 19 and 25 of the Indictment.<sup>12</sup> The Appeals Chamber, by majority, affirmed Pušić's convictions for his participation in the JCE under Counts 6 to 13, 15 to 16, 18, 21, and 24 of the Indictment.<sup>13</sup> Pušić's sentence of 10 years was upheld by the Appeals Chamber, subject to credit being given under Rule 101(C) of the ICTY Rules.<sup>14</sup>

6. Prior to issuance of the Appeal Judgement Pušić had been granted provisional release on medical grounds by the Appeals Chamber.<sup>15</sup> [REDACTED].<sup>16</sup>

7. In the Appeal Judgement, the Appeals Chamber ordered Pušić's arrest or surrender to the UNDU, to be facilitated as early as practicable.<sup>17</sup> Pušić returned to the UNDU on 6 December 2017.<sup>18</sup>

## II. THE APPLICATIONS

8. On 28 December 2017, I received the Application, which includes, *inter alia*, the following annexes: (i) a medical report from Dr. Petrana Brečić, dated 30 November 2017, concerning Pušić's [REDACTED];<sup>19</sup> (ii) correspondence between Counsel and the Acting Commanding Officer of the UNDU ("Correspondence");<sup>20</sup> and (iii) a letter from the Acting Commander of the UNDU to Pušić, dated 21 December 2017 ("Letter").<sup>21</sup> In the Application, Pušić requests early release on exceptional humanitarian grounds shortly before he will have served two-thirds of his sentence.<sup>22</sup> Pušić submits that the Application is primarily based on the same medical reasons that were considered sufficient humanitarian grounds for the Appeals Chamber to order Pušić's provisional release,<sup>23</sup> including, *inter alia*, that: (i) [REDACTED];<sup>24</sup> (ii) [REDACTED];<sup>25</sup> (iii) [REDACTED];<sup>26</sup> and (iv) [REDACTED].<sup>27</sup>

<sup>12</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Judgement, 29 November 2017 ("Appeal Judgement"), Vol. III, p. 1408.

<sup>13</sup> Appeal Judgement, Volume III, p. 1408.

<sup>14</sup> Appeal Judgement, Volume III, p. 1409.

<sup>15</sup> [REDACTED].

<sup>16</sup> [REDACTED].

<sup>17</sup> Appeal Judgement, Volume III, p. 1409 & Annex A, para. 18. *See also* [REDACTED].

<sup>18</sup> Application, para. 5.

<sup>19</sup> Application, para. 25 & Annex A, pp. 16-17 (Registry pagination).

<sup>20</sup> Application, para. 31 & Annex B, pp. 8-11 (Registry pagination).

<sup>21</sup> Application, para. 31 & Annex B, pp. 6-7 (Registry pagination).

<sup>22</sup> Application, paras. 10, 17, 33.

<sup>23</sup> Application, para. 17.

<sup>24</sup> Application, paras. 19-24.

<sup>25</sup> Application, para. 30.

<sup>26</sup> Application, paras. 25-29.

<sup>27</sup> *See* Application, para. 29. *See generally* Application, Annex B.

9. On 3 January 2018, I requested the Registrar of the Mechanism (“Registrar”) to undertake the steps prescribed in paragraphs 3, 4, and 5 of the Practice Direction.<sup>28</sup>

10. On 8 January 2018, the Office of the Prosecutor (“Prosecution”) filed its “Prosecution Motion Opposing Berislav Pušić’s Request for Early Release” (confidential with confidential *ex parte* annex) (“Prosecution Motion”), arguing, *inter alia*, that Pušić has failed to demonstrate “exceptional circumstances” as necessary to warrant early release before two-thirds of his sentence is served.<sup>29</sup>

11. In accordance with paragraph 4 of the Practice Direction, on 18 January 2018, the Registry of the Mechanism (“Registry”) provided me with the following documents: (i) Behaviour report for Pušić, dated 16 January 2018, prepared by Mr. Fraser Gilmour, Commanding Officer of the UNDU (“Behaviour Report” and “Commanding Officer”, respectively); (ii) [REDACTED].; and (iii) Memorandum of the Prosecution regarding Pušić’s cooperation with the Prosecution, dated 10 January 2018 (“Prosecution Memorandum”).<sup>30</sup>

12. On 23 January 2018, the Registry resubmitted the First Medical Report and requested that the First Medical Report be replaced with a version dated 19 January 2018 (“Amended Medical Report”).<sup>31</sup> While the contents of the First Medical Report and the Amended Medical Report are identical, Dr. Ernst-Jan van Gellicum, Deputy Medical Officer of the UNDU (“Deputy Medical Officer”) had requested that a new version be issued in his name rather than that of the Medical Officer during the latter’s absence.<sup>32</sup> Notwithstanding the later date of the Amended Medical Report, it is apparent that this medical report therein still pertains to Pušić’s medical condition as of 8 January 2018.<sup>33</sup> As a result of the date change to the Medical Report, the Commanding Officer adjusted the date of his report to 19 January 2018 (“19 January 2018 Behaviour Report”).<sup>34</sup>

<sup>28</sup> Memorandum from Judge Theodor Meron, President, to Mr. Olufemi Elias, Registrar, *Prosecutor v. Berislav Pušić – Request for Early Release*, dated 3 January 2018, para. 2.

<sup>29</sup> Prosecution Motion, para. 1.

<sup>30</sup> Memorandum from Ms. Ása Rydberg van der Sluis, *Acting* Registry Officer in Charge, The Hague branch, to Judge Theodor Meron, President, entitled “Berislav Pušić – Application for early release”, 18 January 2018 (“18 January 2018 Memorandum”).

<sup>31</sup> Memorandum from Ms. Ása Rydberg van der Sluis, *Acting* Registry Officer in Charge, The Hague branch, to Judge Theodor Meron, President, entitled “Berislav Pušić – Application for early release”, 23 January 2018 (“23 January 2018 Memorandum”).

<sup>32</sup> 23 January 2018 Memorandum, paras. 1-2.

<sup>33</sup> Interim Order on Berislav Pušić’s Application for Early Release, 12 February 2018 (confidential and *ex parte*) (“Interim Order”), p. 2. The Interim Order related specifically to Pušić’s mental and physical health and, therefore, it was filed confidentially and *ex parte* to the Prosecution.

<sup>34</sup> 23 January 2018 Memorandum, para. 3.

13. The Registry conveyed the collected information to Pušić pursuant to paragraph 5 of the Practice Direction.<sup>35</sup> On 5 February 2018, the Registry conveyed to me Pušić’s response thereto.<sup>36</sup>
14. On 12 February 2018, I ordered the Registry to provide, within 14 days: [REDACTED].<sup>37</sup>
15. In compliance with the Interim Order, the Registry submitted [REDACTED].<sup>38</sup>
16. On 27 February 2018, Pušić filed the Second Application, in which it is submitted that, according to Pušić’s calculations, he has only forty-five (45) days to serve before he reaches the two-thirds point of his sentence and becomes eligible to apply for early release.<sup>39</sup> Pušić requests that the Second Application be factored into the consultation process with the Judges of the sentencing Chamber who are Judges of the Mechanism pursuant to paragraph 7 of the Practice Direction.<sup>40</sup>
17. On 8 March 2018, the Registry forwarded me [REDACTED].<sup>41</sup>
18. On 9 April 2018, I wrote to Pušić to inform him that I was in the process of considering his Applications and that I would render a decision as soon as I am able.<sup>42</sup>
19. On 9 April 2018, the Judges of the Mechanism adopted amendments to the Rules, including an amendment to Rule 150 of the Rules.<sup>43</sup> The amendment of Rule 150 of the Rules added the requirement that “[i]f none of the Judges who imposed the sentence are Judges of the Mechanism, the President shall consult with at least two other Judges”. Noting that four Judges of the sentencing Chamber are currently Judges of the Mechanism, this amendment does not impact on my consideration of the Applications.

### III. DISCUSSION

20. As of the date of this decision, Pušić remains in custody at the UNDU pending designation of an enforcement State. I have previously held, following the approach taken by both the

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<sup>35</sup> Memorandum from Ms. Åsa Rydberg van der Sluis, *Acting* Registry Officer in Charge, The Hague branch, to Judge Theodor Meron, President, entitled “Berislav Pušić – Application for early release”, 5 February 2018 (“5 February 2018 Memorandum”), para 2.

<sup>36</sup> 5 February 2018 Memorandum, *transmitting* Pušić’s response to the information provided by the Registry relevant to his Application (“Response”).

<sup>37</sup> Interim Order, p. 3.

<sup>38</sup> [REDACTED].

<sup>39</sup> Second Application, para. 8.

<sup>40</sup> Second Application, para. 8.

<sup>41</sup> Memorandum from Mr. Olufemi Elias, Registrar, to Judge Theodor Meron, President, entitled “Berislav Pušić – Application for Early Release”, 8 March 2018, para. 2, [REDACTED].

<sup>42</sup> Letter from Judge Theodor Meron, President, to Mr. Berislav Pušić, dated 9 April 2018.

International Criminal Tribunal for Rwanda (“ICTR”) and the ICTY in this respect, that in the situation where there is no appeal pending and a convicted person is still detained at the UNDU, a request for early release may be entertained by the President of the Mechanism and the eligibility of individuals serving their sentence at the UNDU must be determined by reference to the equivalent conditions for eligibility by the enforcement states.<sup>44</sup>

21. In coming to my decision on whether it is appropriate to grant Pušić early release, I have consulted the Judges of the sentencing Chamber who are Judges of the Mechanism, pursuant to Rule 150 of the Rules.

#### **A. Preliminary matter**

22. I note that, pursuant to Rule 151 of the Rules, the Prosecution is consulted with respect to the substantial cooperation, if any, of the convicted person during the pre-trial, trial or appeal of his or her case.

23. Nevertheless, the Prosecution in its motion submits that “Pušić fails to demonstrate ‘exceptional circumstances’ as necessary to warrant early release before two-thirds of his sentence is served” and that his Application is “premised on the same medical grounds as previous requests for provisional release”.<sup>45</sup> The Prosecution further reports that Pušić did not cooperate with the ICTY Prosecution in the course of his trial or appeal, nor at any point while serving his sentence.<sup>46</sup>

24. Neither the Rules nor the Practice Direction provides the Prosecution, a party to the proceedings, standing to make submissions on whether an application for early release should be granted, beyond with respect to whether the convicted person has provided substantial cooperation to the Prosecution.<sup>47</sup> As a result, the further submissions of the Prosecution related to, *inter alia*, whether or not exceptional circumstances exist to warrant early release before two-thirds of Pušić’s sentence will not be considered in my determination of the Applications. Accordingly, and in the circumstances of this case, I have considered the Prosecution Motion and Prosecution

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<sup>43</sup> See Mechanism Press Release, “Mechanism Judges Conclude Remote Plenary and Adopt Disciplinary Mechanism for Judges”, dated 13 April 2018, available at <http://www.unmict.org/en/news/mechanism-judges-conclude-remote-plenary-and-adopt-disciplinary-mechanism-judges>.

<sup>44</sup> See *Prosecutor v. Innocent Sagahutu*, Case No. MICT-13-43-ES, Public Redacted Version of the 9 May 2014 Decision of the President on the Early Release of Innocent Sagahutu, 13 May 2014, paras. 11-12. See also Second Application, para. 13.

<sup>45</sup> Prosecution Motion, paras. 1, 4.

<sup>46</sup> Prosecution Memorandum, para. 2. See also Prosecution Motion, para. 4.

<sup>47</sup> See *Prosecution v. Sreten Lukić*, Case No. MICT-14-67-ES.4, Public Redacted Version of 30 May 2017 Decision of the President on the Early Release of Sreten Lukić, 11 August 2017 (“*Lukić* Decision”), para 17. See also *Prosecutor v. Stanislav Galić*, Case No. MICT-14-83-ES, Reasons for the President’s Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion, 23 June 2015 (public redacted), para. 8.

Memorandum insofar as the information provided related to Pušić's cooperation with the Prosecution and the significance thereof.<sup>48</sup>

### **B. Applicable Law**

25. Under Article 26 of the Statute, if, pursuant to the applicable law of the State in which the person convicted by the ICTY, the ICTR, or the Mechanism is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. Pursuant to Article 26, 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.

26. Rule 150 of the Rules provides that “[t]he President shall, upon such notice or upon receipt of a direct petition from the convicted person, determine, in consultation with any Judges of the sentencing Chamber who are Judges of the Mechanism, whether pardon, commutation of sentence, or early release is appropriate. If none of the Judges who imposed the sentence are Judges of the Mechanism, the President shall consult with at least two other Judges”. Rule 151 of the Rules 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.

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

### **C. Gravity of Crimes**

28. Rule 151 of the Rules provides that, in making a determination on early release, the President shall take into account the gravity of the crime or crimes for which the prisoner was convicted.

29. The Trial Chamber considered that Pušić significantly contributed to the implementation of the JCE and played a key role in the commission of crimes by virtue of his functions and powers within the Military Police and the Exchange Commission.<sup>49</sup> Between April 1993 and April 1994, as a military policeman and subsequently head of the Exchange Service and the President of the

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<sup>48</sup> Prosecution Memorandum, para. 2; Prosecution Motion, para. 4.

<sup>49</sup> Trial Judgement, Vol. 4, paras. 1379, 1381.

Commission for the Croatian Defence Council (“HVO”) Prisoners and Detention Centers, the Trial Chamber found that Pušić had substantial power to keep Muslim HVO detainees in detention or to release them, power over the conditions in which they were held, and power to represent the HVO before the international community and also before the leadership in Croatia and BiH in negotiations regarding exchanges and the movement of people.<sup>50</sup> The Trial Chamber further found that Pušić participated in and facilitated the system of detention of the Muslims by approving their transfer from one centre to another and their use for forced labour, by tolerating the deploring conditions of confinement and mistreatment, and by accepting the death of detainees sent to work on the front line. It further found that Pušić organized and facilitated the system by which HVO detainees were released or exchanged in order to be sent to Republic of Bosnia and Herzegovina (“ABiH”) territories or third countries.<sup>51</sup>

30. In sentencing Pušić, the Trial Chamber considered that Pušić abused his authority as the head of the Exchange Service and President of the Commission for Prisons and Detention Centers of the HVO in order to facilitate the crimes by using resources at his disposal for the implementation of those crimes.<sup>52</sup> Furthermore, the Trial Chamber held that Pušić knew that these crimes were being committed against Muslims with the sole goal of forcing them to leave the territory of Croatian Republic of Herceg-Bosna and he made no serious effort to end the crimes committed in the detention centers, or those committed during the arrests of Muslims, or to condemn them, and gave vague, even false, information to representatives of the international community and the press, thereby seeking to deny or minimize the crimes committed by HVO members against Muslims.<sup>53</sup>

31. On appeal, the majority of the Appeals Chamber reversed in part convictions for Counts 1 to 3, 19 and 25 of the Indictment, however, all other convictions were upheld.<sup>54</sup> The Appeals Chamber held: “Pusic, however, remains convicted of very serious crimes. In these circumstances, considering the limited nature of these reversals, the Appeals Chamber finds that no reduction of sentence is warranted”.<sup>55</sup> Pušić’s sentence of 10 years was affirmed by the Appeals Chamber, subject to credit being given under Rule 101(C) of the Rules.<sup>56</sup>

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<sup>50</sup> Trial Judgement, Vol. 4, para. 1379.

<sup>51</sup> Trial Judgement, Vol. 4, para. 1379. *See also* Trial Judgement, Vol. 4, paras. 1202-1212.

<sup>52</sup> Trial Judgement, Vol. 4, para. 1381.

<sup>53</sup> Trial Judgement, Vol. 4, para. 1380. *See also*, Trial Judgement, Vol. 4, paras. 1202-1212; Appeal Judgement, Vol. III, para. 3256.

<sup>54</sup> Appeal Judgement, Vol. III, p. 1408.

<sup>55</sup> Appeal Judgement, Vol. III, para. 3365.

<sup>56</sup> Appeal Judgement, Vol. III, p. 1409.

32. In these circumstances, I am of the view that the high gravity of Pušić's offences weigh against his early release as requested in the Applications.

#### **D. Treatment of Similarly-Situated Prisoners**

33. Rule 151 of the Rules requires the President to consider, as a separate factor, the need for equal treatment of similarly-situated prisoners when deciding early release applications.

34. In this respect, I recall that persons sentenced by the ICTY, like Pušić, are considered "similarly-situated" to all other prisoners under the Mechanism's supervision and that 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.<sup>57</sup> Nevertheless, I note that a convicted person may apply for early release even before the completion of the two-thirds of his or her sentence. In such circumstances, the President would consider a convicted person's application or eligibility for early release in exceptional cases, such as cases involving extraordinary cooperation with the Prosecution or humanitarian emergencies, and where other factors also weigh in favour of early release.<sup>58</sup> I recall that in his Application, Pušić had requested early release in exceptional circumstances prior to having served two-thirds of his sentence. Based on the calculation provided by the Registry, Pušić had served two-thirds of his 10-year sentence on 12 April 2018.<sup>59</sup> Accordingly, his Application, with respect to exceptional circumstances warranting early release prior to having served two-thirds of his sentence, is moot.

35. However, I note that a convicted person having served two-thirds of his or her sentence shall be merely eligible to apply for early release and is 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

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<sup>57</sup> See *Lukić* Decision, para. 30; *Prosecutor v. Radivoje Miletić*, Case No. MICT-15-85-ES.5, Public Redacted Version of the 26 July 2017 Decision of the President on the Early Release of Radivoje Miletić, 27 July 2017 ("*Miletić* Decision"), para. 20; *Prosecutor v. Ljubiša Beara*, Case No. MICT-15-85-ES.3, Public Redacted Version of 7 February 2017 Decision of the President on the Early Release of Ljubiša Beara, 16 June 2017 ("*Beara* Decision"), para. 23; *Prosecutor v. Stanislav Galić*, Case No. MICT-14-83-ES, Decision of the President on the Early Release of Stanislav Galić, 18 January 2017 (public redacted) ("*Galić* Decision"), para. 20; *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 version) ("*Bisengimana* Decision"), paras. 17, 20.

<sup>58</sup> See, e.g., *Miletić* Decision, para. 20; *Prosecutor v. Drago Nikolić*, Case No. MICT-15-85-ES.4, Public Redacted Version of the 20 July 2015 Decision of the President on the Application for Early Release or other Relief of Drago Nikolić, 13 October 2015, para. 21; *Prosecutor v. Mladen Naletilić*, Case No. IT-98-34-ES, Public Redacted Version of the 29 November 2012 Decision of the President on Early Release of Mladen Naletilić, 26 March 2013 ("*Naletilić* Decision"), paras. 32-35; *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-ES, Decision of President on Early Release of Dragan Obrenović (public redacted version), 29 February 2012, paras. 25-28.

<sup>59</sup> The Registry calculation is reached after having deducted the time spent on provisional release. See Appeal Judgement, Vol. III, para. 3335-3336.

in each case.<sup>60</sup> I am therefore of the view that the fact that he has served two-thirds of his 10-year sentence as of 12 April 2018 weighs in favour of his release.

### **E. Demonstration of Rehabilitation**

36. Rule 151 of the Rules provides that the President shall take into account a “prisoner’s demonstration of rehabilitation” in determining whether early release is appropriate. In addressing the convicted person’s rehabilitation, paragraph 4(b) of the Practice Direction states that the Registrar shall,

[r]equest reports and observations from the relevant authorities in the enforcing State as to the behavior of the convicted person during his or her period of incarceration and the general conditions under which he or she was imprisoned, and request from such authorities any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration[.]

37. Pušić submits that at all times prior, during, and after his trial, he instructed his defence to show respect to all participants including victims and witnesses.<sup>61</sup> He further argues that he exhibited remorse in various interventions in person and through his Counsel during his trial and that some witnesses also expressed their gratitude to Pušić.<sup>62</sup> In his Application, Pušić states that he voluntarily surrendered to the ICTY in 2004, was in the custody of the UNDU for a substantial period of time during the trial and appeal process, and has behaved in an exemplary manner, including by complying with all the rules of detention and providing assistance to UNDU staff and other detainees.<sup>63</sup> Pušić goes on to posit that he “has demonstrated his rehabilitation through his conduct and his record of compliance with onerous conditions imposed by the ICTY [during his provisional release]”.<sup>64</sup> In support of his submissions concerning his rehabilitation, Pušić states [REDACTED].<sup>65</sup> In light of the above, Pušić argues that he has shown he is capable of full integration into the community, also given the length of time he has spent on provisional release.<sup>66</sup> In his Second Application, Pušić relies and adopts the same arguments as to his demonstration of rehabilitation as provided for in his Application.<sup>67</sup>

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<sup>60</sup> *Miletić* Decision, para. 21; *Beara* Decision, para. 25; *Naletilić* Decision, para. 20; *Bisengimana* Decision, paras. 21, 35.

<sup>61</sup> Application, para. 13 (footnotes omitted).

<sup>62</sup> Application, para. 13 (footnotes omitted).

<sup>63</sup> Application, para. 14.

<sup>64</sup> Application, para. 14.

<sup>65</sup> Application, para. 15; Brečić Medical Report, p. 17 (Registry pagination).

<sup>66</sup> Application, para. 15.

<sup>67</sup> Second Application, para. 12.

38. I note that the 19 January 2018 Behaviour Report sets forth the seventeen (17) separate periods that Pušić was in the custody of the UNDU; at other times he was on provisional release.<sup>68</sup> The 19 January 2018 Behaviour Report acknowledges that during his periods of detention at the UNDU, Pušić has shown respect for the management and staff of the UNDU and complied with the ICTY Rules of Detention<sup>69</sup> and the instructions of the Detention Officers.<sup>70</sup> It was reported that Pušić has consistently maintained good relations with his fellow detainees and on each occasion when he has returned to the UNDU from provisional release he has integrated into the routine pattern of life in custody whilst participating in “the programme as permitted by his level of health and fitness”.<sup>71</sup> The Commanding Officer explains that Pušić has largely followed a normal regime within the UNDU, [REDACTED].<sup>72</sup>

39. Having carefully reviewed the information before me, I am of the opinion that Pušić has demonstrated some signs of rehabilitation, and I am therefore inclined to count this factor as weighing in favour of his early release.<sup>73</sup> Pušić has complied with past decisions and orders of the ICTY, returned to the UNDU on some 16 occasions after being granted provisional release, maintained good relations with fellow detainees, and, despite facing [REDACTED], has largely followed a normal regime within the UNDU each time he has returned from provisional release.<sup>74</sup> Notably, Pušić’s behaviour while on provisional release in the past is a further indication of his ability to integrate back into society and maintain meaningful ties with the outside world.

#### **F. Substantial Cooperation with the Prosecution**

40. Rule 151 of the Rules states that the President shall take into account any “substantial cooperation” of the prisoner with the Prosecution. Paragraph 4(c) of the Practice Direction states that the Registrar shall request the Prosecution “to submit a detailed report of any co-operation that the convicted person has provided to the Office of the Prosecutor and the significance thereof”.

<sup>68</sup> 19 January 2018 Behaviour Report, p. 1.

<sup>69</sup> Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, IT/38/Rev. 10, 15 November 2016, applicable *mutatis mutandis* to the Mechanism.

<sup>70</sup> 19 January 2018 Behaviour Report, p. 1.

<sup>71</sup> 19 January 2018 Behaviour Report, p. 1; *See also* Application, Annex B, p. 6 (Registry pagination).

<sup>72</sup> 19 January 2018 Behaviour Report, p. 1 (Registry pagination).

<sup>73</sup> *Cf. Prosecutor v. Dragan Zelenović*, Case No. MICT-15-89-ES, Public Redacted Version of the 28 August 2015 Decision of the President on the Early Release of Dragan Zelenović, 15 September 2015, paras. 18-20.

<sup>74</sup> *Cf. Prosecutor v. Dragoljub Kunarac*, Case No. MICT-15-88-ES.1, Decision of the President on the Early Release of Dragoljub Kunarac (public redacted), 2 February 2017 (“*Kunarac Decision*”), paras. 25-55. In the *Kunarac Decision*, I determined that, given Kunarac’s continued denial of responsibility for the crimes of which he was convicted, that he had been a demanding prisoner, and that, as a general matter, Kunarac had not used his time in prison in a fully positive manner, these factors weighed against his early release even though he had served two-thirds of his sentence. *See also Kunarac Decision*, paras. 68-70.

41. According to the Prosecution, Pušić did not cooperate with the ICTY Prosecution in the course of his trial or appeal, nor at any point while serving his sentence.<sup>75</sup> Pušić acknowledges that he did not cooperate with the ICTY Prosecution and “exercised his right to silence and did not testify in his defence”.<sup>76</sup> In the Response, Pušić reiterates that cooperation with the Prosecution, or lack thereof, should be deemed a neutral factor.<sup>77</sup> In his Second Application, Pušić relies and adopts the same arguments as to his cooperation with the Prosecution as provided for in his Application.<sup>78</sup>

42. I note that an accused person is under no obligation to plead guilty or, in the absence of a plea agreement, to cooperate with the Prosecution.<sup>79</sup> I therefore consider that Pušić’s lack of cooperation with the Prosecution is a neutral factor in determining whether or not to grant him early release.

### **G. Other Factors: Humanitarian Concerns**

43. Paragraph 9 of the Practice Direction provides that the President may consider “any other information” that the President considers “relevant” to supplement the criteria specified in Rule 151 of the Rules. Previous decisions on early release have determined that the condition of a 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 person to remain in prison any longer.<sup>80</sup>

#### **1. The Application**

44. [REDACTED].<sup>81</sup> [REDACTED].<sup>82</sup>

45. [REDACTED].<sup>83</sup> [REDACTED].<sup>84</sup> [REDACTED].<sup>85</sup>

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<sup>75</sup> Prosecution Memorandum, para. 2.

<sup>76</sup> Application, para. 12.

<sup>77</sup> Response, p. 2.

<sup>78</sup> Second Application, para. 12.

<sup>79</sup> See *Miletić* Decision, para. 34; *Lukić* Decision, para. 49; *Beara* Decision, para. 32; *Galić* Decision, para. 34; *Prosecutor v. Dominique Ntawukulilyayo*, Case No. MICT-13-34-ES, Decision of the President on the Early Release of Dominique Ntawukulilyayo, 8 July 2016 (public redacted version), para. 31; *Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-ES, Public Redacted Version of the 26 March 2014 Decision of the President on the Early Release of Gérard Ntakirutimana, 24 April 2014 (“*Ntakirutimana* Decision”), para. 20.

<sup>80</sup> See, e.g., *Lukić* Decision, para. 50; *Beara* Decision, paras. 33, 46; *Prosecutor v. Ferdinand Nahimana*, Case No. MICT-13-37-ES.1, Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana, 5 December 2016, para. 31; *Ntakirutimana* Decision, para. 21; *Prosecutor v. Obed Ruzindana*, Case No. MICT-12-10-ES, Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014 (public redacted version), para. 22.

<sup>81</sup> [REDACTED].

<sup>82</sup> [REDACTED].

<sup>83</sup> [REDACTED].

46. [REDACTED].<sup>86</sup> [REDACTED].<sup>87</sup>

47. [REDACTED].<sup>88</sup> [REDACTED].<sup>89</sup> [REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>90</sup>

48. [REDACTED].<sup>91</sup> [REDACTED].<sup>92</sup>

49. [REDACTED].<sup>93</sup> [REDACTED].<sup>94</sup> [REDACTED].<sup>95</sup> [REDACTED].<sup>96</sup> [REDACTED].<sup>97</sup>  
[REDACTED].<sup>98</sup>

50. [REDACTED].<sup>99</sup> [REDACTED].<sup>100</sup> [REDACTED].<sup>101</sup>

## 2. The Amended Medical Report and the 19 January 2018 Behaviour Report

51. [REDACTED].<sup>102</sup> [REDACTED].<sup>103</sup>

52. [REDACTED].<sup>104</sup> [REDACTED].<sup>105</sup> [REDACTED].<sup>106</sup>

53. [REDACTED].<sup>107</sup> [REDACTED].<sup>108</sup> [REDACTED].<sup>109</sup> [REDACTED].<sup>110</sup>  
[REDACTED].<sup>111</sup>

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<sup>84</sup> [REDACTED].

<sup>85</sup> [REDACTED].

<sup>86</sup> [REDACTED].

<sup>87</sup> [REDACTED].

<sup>88</sup> [REDACTED].

<sup>89</sup> [REDACTED].

<sup>90</sup> [REDACTED].

<sup>91</sup> [REDACTED].

<sup>92</sup> [REDACTED].

<sup>93</sup> [REDACTED].

<sup>94</sup> [REDACTED].

<sup>95</sup> [REDACTED].

<sup>96</sup> [REDACTED].

<sup>97</sup> [REDACTED].

<sup>98</sup> [REDACTED].

<sup>99</sup> [REDACTED].

<sup>100</sup> [REDACTED].

<sup>101</sup> [REDACTED].

<sup>102</sup> [REDACTED].

<sup>103</sup> [REDACTED].

<sup>104</sup> [REDACTED].

<sup>105</sup> [REDACTED].

<sup>106</sup> [REDACTED].

54. [REDACTED].<sup>112</sup>

### 3. The Second Medical Report

55. [REDACTED],<sup>113</sup> I requested a further report from the Registry with regard to [REDACTED] to assist me in determining whether exceptional humanitarian grounds existed that may warrant his early release prior to having served two-thirds of his sentence.<sup>114</sup> While I recognize that Pušić has now served two-thirds of his sentence, and therefore his Application is moot, Pušić's health condition may be taken into account in the context of his Application for early release and, therefore, the information contained in the [REDACTED] is relevant to this decision.

56. In the Interim Order I requested: (i) [REDACTED].<sup>115</sup>

57. [REDACTED].<sup>116</sup> [REDACTED].<sup>117</sup> [REDACTED].<sup>118</sup> [REDACTED].<sup>119</sup>

58. [REDACTED].<sup>120</sup> [REDACTED].<sup>121</sup> [REDACTED].<sup>122</sup> [REDACTED].<sup>123</sup>

59. [REDACTED].<sup>124</sup> [REDACTED].<sup>125</sup>

60. [REDACTED].<sup>126</sup> [REDACTED].<sup>127</sup>

61. [REDACTED].<sup>128</sup> [REDACTED].<sup>129</sup> [REDACTED].<sup>130</sup> [REDACTED].<sup>131</sup>  
[REDACTED].<sup>132</sup>

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<sup>107</sup> [REDACTED].

<sup>108</sup> [REDACTED].

<sup>109</sup> [REDACTED].

<sup>110</sup> [REDACTED].

<sup>111</sup> [REDACTED].

<sup>112</sup> [REDACTED].

<sup>113</sup> [REDACTED].

<sup>114</sup> Interim Order, pp. 2-3.

<sup>115</sup> Interim Order, p. 3.

<sup>116</sup> [REDACTED].

<sup>117</sup> [REDACTED].

<sup>118</sup> [REDACTED].

<sup>119</sup> [REDACTED].

<sup>120</sup> [REDACTED].

<sup>121</sup> [REDACTED].

<sup>122</sup> [REDACTED].

<sup>123</sup> [REDACTED].

<sup>124</sup> [REDACTED].

<sup>125</sup> [REDACTED].

<sup>126</sup> [REDACTED].

<sup>127</sup> [REDACTED].

<sup>128</sup> [REDACTED].

<sup>129</sup> [REDACTED].

<sup>130</sup> [REDACTED].

62. [REDACTED].<sup>133</sup> [REDACTED].<sup>134</sup> [REDACTED].<sup>135</sup> [REDACTED].<sup>136</sup>

63. [REDACTED].<sup>137</sup>

#### 4. Second Application

64. [REDACTED].<sup>138</sup> [REDACTED].<sup>139</sup> [REDACTED].<sup>140</sup>

#### 5. Discussion

65. It is evident based on the medical information discussed above that Pušić has a serious [REDACTED]. Accordingly, I consider that his health condition is a factor generally weighing in favour of his early release.<sup>141</sup>

### IV. CONCLUSION

66. While I have given due consideration to the particular gravity of the crimes for which Pušić was convicted, I have also taken note that Pušić appears to have accepted some responsibility for his crimes and I am satisfied that he has demonstrated signs of rehabilitation, including through his compliance with ICTY decisions and orders in the past. I further note that as of 12 April 2018, Pušić had served two-thirds of his 10-year sentence.

67. I am further of the opinion that the severity of his [REDACTED], weigh strongly in favour of his early release effective as soon as practicable. The view that Pušić should be granted early release is shared by all the Judges of the sentencing Chamber who are Judges of the Mechanism.

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<sup>131</sup> [REDACTED].

<sup>132</sup> [REDACTED].

<sup>133</sup> Interim Order, p. 2.

<sup>134</sup> [REDACTED].

<sup>135</sup> [REDACTED].

<sup>136</sup> [REDACTED].

<sup>137</sup> [REDACTED].

<sup>138</sup> Second Application, para. 14.

<sup>139</sup> Second Application, para. 15.

<sup>140</sup> Second Application, para. 15.

<sup>141</sup> See *Prosecutor v. Omar Serushago*, Public Redacted Version of the Decision of the President on the Early Release of Omar Serushago, 13 December 2012, para. 33.

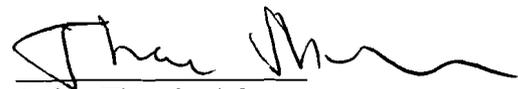
## V. DISPOSITION

68. For the foregoing reasons and pursuant to Article 26 of the Statute, Rules 150 and 151 of the Rules, paragraph 9 of the Practice Direction, I hereby **DISMISS AS MOOT** the Application and **GRANT** the Second Application.

69. The Registrar is hereby **DIRECTED** to implement this decision as soon as practicable, as prescribed in paragraph 13 of the Practice Direction.

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

Done this 24<sup>th</sup> day of April 2018,  
At The Hague,  
The Netherlands.

  
Judge Theodor Meron  
President

**Seal of the Mechanism**



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