Early Release, Commutation of Sentence and Pardon Before the ICTY, ICTR and IRMCT

Changed Requirements and Their Compatibility with European Human Rights Standards

Final Report

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List of abbreviations

- ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms; European Convention on Human Rights
- ECtHR: European Court of Human Rights
- ERCP: early release, commutation of sentence and/or pardon
- ICCPR: International Covenant on Civil and Political Rights
- ICTR: International Criminal Tribunal for Rwanda
- ICTY: International Criminal Tribunal for the former Yugoslavia
- IRMCT: International Residual Mechanism of Criminal Tribunals
- PD: Practice Direction
- RPE: Rules of Procedure and Evidence
- SC: Security Council
- SCSL: Special Court for Sierra Leone
- SO: Subsidiary organ
- UN: United Nations
- UNDF: United Nations Detention Facility, Arusha
- UNDU: United Nations Detention Unit, The Hague

Introduction

Rule 150 of the Rules of Procedure and Evidence (RPE) of the International Residual Mechanism of Criminal Tribunals (IRMCT), and Practice Direction (PD) MICT/3/Rev.1, provide for the possibility of early release, commutation of sentence or pardon (ERCP) for persons sentenced by the IRMCT, the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Tribunal for the former Yugoslavia (ICTY).[1] In the past, the main criteria were that the applicant had served two-thirds of their sentence, had met certain rehabilitation requirements and had demonstrated good behaviour. If an application was granted, no further conditions were imposed on the applicant. However, in several recent decisions by the IRMCT President, conditions were imposed, such as that the applicant may not have contact with witnesses. This raises the questions why the criteria used to assess applications for ERCP were applied differently, in how many cases the changed standards have been applied, and whether this change can be disputed as possibly violating the applicant's human rights as enshrined in the European Convention on Human Rights (ECHR).[2]

Thus, this report consists of two parts. The aim of part 1 is to statistically analyse how many applications (between 1999 and 2019) regarding ERCP have been granted or denied at the former ICTY, former ICTR, and the IRMCT, but also from when on the President of the IRMCT prescribed additional conditions after the release of a convicted person and how many cases since then have been affected. Additionally, the possible reasons for the changed practice of the IRMCT President will be explored, including the proposed amendment of IRMCT RPE Rule 151 and Security Council (SC) Resolution 2422.[3] The second part of the report will discuss Article 7 (no punishment without law), Article 8 (right to respect for private and family life), Article 10 (freedom of expression), Article 14 ECHR and Protocol 12 (prohibition of discrimination).

Methodology

For the statistical part of the report, we have analysed and compared the decisions on ERCP that were publicly available for each of the three Tribunals at the time of writing. We have set out which criteria were discussed by the Presidents when considering the applications and whether

[1] IRMCT 'Rules of Procedure and Evidence' (6 November 2018, amended 13 November 2018) UN Doc MICT/1/Rev.4 (RPE 2018), Rule 150; IRMCT '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' (24 May 2018) UN Doc MICT/3/Rev.1 (PD 2018).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR). The ECHR is used because many of those convicted by the IRMCT are detained in states parties to the Council of Europe (see IRMCT, 'Enforcement of Sentences' (*IRMCT*) <http://www.irmct.org/en/about/functions/enforcement-of-sentences> accessed 19 March 2019). The applicability of the ECHR will be addressed in Section 2.1.

[3] UNSC Res 2422 (27 June 2018) UN Doc S/RES/2422 (SC Res 2422).

additional requirements were imposed. Decisions which were not discussed on the merits are not considered in our analysis.

We made a spreadsheet for each Tribunal, including criteria discussed in each decision. These criteria are based on the approach in recent case-law (decisions by President Meron at the IRMCT), so especially some earlier decisions do not discuss each point specifically. In some cases, the President considers 'humanitarian considerations', however as these considerations are often redacted, we have not considered these in-depth. The spreadsheets are annexed to this report.

The second part of the report consists of legal doctrinal research. We have analysed case-law and secondary sources for each ECHR article discussed, assessing whether the imposition of conditions for ERCP could be argued to fall within the scope of any of these articles.

We have chosen not to distinguish between early release, commutation of sentence and pardon in our analysis. This is in line with the developed practice of the Tribunals. The Statutes of the former ICTY and ICTR mention that a person may be eligible for 'commutation or pardon' - there is no mention of early release.[4] However, these Statutes relied on the applicant being eligible for commutation or pardon under the domestic law of the detaining state.[5] These domestic laws contain different approaches toward commutation and pardon, as well as different terminology - early release and sentence remission, for example. In addition, the ICTR President explicitly stated in *Bagaragaza* that 'early release pursuant to the Rules is, in fact, an unconditional reduction or commutation of sentence'.[6] Thus, it seems that these differences in national terminology explain the use of 'pardon, commutation of sentence or early release' in the current IRMCT RPE Rule 150. There is, in practice, no distinction between the three categories.

[4] UNSC, *Statute Of The International Criminal Tribunal For The Former Yugoslavia* (as last amended on 7 July 2009 by SC Resolution 1877) (ICTY Statute), art. 28; UNSC, *Statute of the International Tribunal for Rwanda* (as last amended on 16 December 2009 by SC Resolution 1901) (ICTR Statute), art. 27; D van Zyl Smit, 'Determinate and Indeterminate Sentences of Imprisonment in International Criminal Justice' in R Mulgrew and D Abels (eds), *Research Handbook on the International Penal System* (Edward Elgar Publishing 2016) 91.

[5] *Research Handbook on the International Penal System* (n 4) 91.

[6] *Prosecutor v Bagaragaza* (Decision on the Early Release of Michael Bagaragaza) No. ICTR-05-86-S (24 October 2011) [9].

Part 1: Statistical Report of Decisions on Early Release, Commutation and Pardon

Part 1 of this report contains a statistical analysis of decisions on ERCP from the ICTR, ICTY and IRMCT, based on the data set in the annexed spreadsheets. The first three Sections provide an overview of the cases analysed per Tribunal.[7] Section 4 contains an analysis of possible reasons for the change in approach, including the proposed amendment of IRMCT RPE Rule 151[8] and SC Resolution 2422. Section 5 concludes.

1.1 ICTY

A total of 59 applications for ERCP in front of the ICTY were examined.[9] One of these cases was non-receivable and will not be further discussed,[10] bringing the total to 58. Of these 58 applications, 39 were granted (67.2%) and nineteen were denied (32.8%). In five of the applications granted, the date of enforcement of the order was postponed until the applicant had served two-thirds of their sentence.

Two-thirds of the original ICTY sentence had been served in 26 granted cases, two-thirds had not been served in three cases, and in three granted applications this criterion was not mentioned.[11] For the nineteen denied applications, two-thirds of the sentence had been served in one case, two-thirds had not been served in sixteen cases, and this criterion was not mentioned in two cases.

There are six Presidents who have made decisions regarding early release. The decisions made by each President will be briefly discussed below.

1.1.1 President Kirk McDonald (1997-1999)

During Gabrielle Kirk McDonald's presidency, one decision on ERCP was made, in which the President decided to release the applicant early.[12] The threshold of two-thirds had not been developed yet at the time of this decision, however it should be noted that the applicant could not

[7] The section on the ICTY has also been split per President, due to ICTY jurisprudence on ERCP being the most elaborate and due to the IRMCT President's decision to follow that jurisprudence (see Section 1.3).

[8] The first IRMCT RPE was adopted on 8 June 2012. Although there have been several amendments since then (see IRMCT, 'Rules of Procedure and Evidence' (*IRMCT*) <http://www.irmct.org/en/basic-documents/rules-procedure-and-evidence> accessed 19 March 2019), Rule 151 has not formally been amended. The Rule does seem to have been amended through practice (see Section 1.4.2). Rule 150 has; this amendment does not seem to impact the topic of this report.

[9] See Annex A: ICTY.

[10] *Prosecutor v Miroslav Kvočka* (Order of the President in Response to Miroslav Kvočka's Request for Pardon) IT-98-30/1-A (7 August 2003). This application was non-receivable because the enforcement of the judgment was not final due to pending appeal proceedings (page 3).

[11] The creation of the two-thirds requirement will be explained in Section 1.1.3.

[12] *Prosecutor v Dražen Erdemović* (Order Issuing a Public Redacted Version of Decision of the President on Early Release) IT-96-22-ES (15 July 2008).

have served two-thirds during Kirk McDonald's presidency, having been convicted to five years' imprisonment in 1998.[13]

The President instead focused on three elements. She first considered that, under Norwegian law,[14] the applicant 'is eligible for early release'.[15] Furthermore, the President assessed whether the applicant was 'remorseful'.[16] Lastly, she looked at whether there was evidence which indicated if the applicant 'will enjoy relatively positive prospects if released'.[17]

After addressing these three elements, the President concluded that the applicant had 'demonstrated that he is rehabilitated to the extent possible'[18] and that continued detention will have no useful purpose for the applicant.[19] Therefore, early release was authorised.[20]

1.1.2 President Jorda (1999–2002)

During Claude Jorda's presidency, five decisions on ERCP were made.[21] The decision regarding *Milojica Kos* is only available in the form of a press release by the ICTY.[22]

The President decided to release four of the five applicants early. In his decisions, he focused on three elements. Firstly, he considered the domestic law of the country where the sentence was served (where applicable), and whether the applicant was 'eligible for early release' under that law.[23] For cases where (part of) the sentence is served in the United Nations Detention Unit (UNDU), the President concluded that the request by applicant for early release does not need to 'be submitted by a country signatory to the agreement on the enforcement of sentences for it to be examined by the International Tribunal'.[24] Thus, during detention in the UNDU an applicant can file for earlier release himself. This approach was justified by reference to the Tribunal's inherent powers and the fact that 'no provision of the Statute or the Rules prevents it from ruling on the request for an early release of a convicted person'.[25]

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[13] ibid p 1.
[14] The Presidents examine the domestic law of the states where the convicted person is being detained.
[15] *Prosecutor v Dražen Erdemović* (n 12) 135.
[16] ibid 134.
[17] ibid.
[18] ibid.
[19] ibid.
[20] ibid.
[21] See Annex A.2.
[22] President, 'The President of the ICTY orders release of Milojica Kos' *International Criminal Tribunal for the former Yugoslavia* (The Hague, 31 July 2002) <http://www.icty.org/en/sid/8078> accessed 20 March 2019.
[23] P*rosecutor v Zlatko Aleksovski* (Order of the President for the Early Release of Zlatko Aleksovski) IT-95-14/1 (14 November 2001); *Prosecutor v Damir Došen* (Order of the President on the Early Release of Damir Došen) IT-95-8-S (28 February 2003).
[24] *Prosecutor v Dragan Kolundžija* (Order of the President for the Early Release of Dragan Kolundžija) IT-95-8-S (5 December 2001).
[25] ibid 3/10464 bis.

In *Zdravko Mucić* the request for early release failed because 'the sentence imposed on the accused is not definitive,' this being a requirement of the law in force in all the countries signatory to the Agreement.[26]

In the remaining two cases, the President considered whether the applicant had feelings of guilt and was regretful for his acts, seeming to indicate a remorse requirement. Lastly, Jorda considered several factors which may indicate whether the applicants release will open encouraging prospects.[27]

1.1.3 President Meron (2002–2005)

During Theodor Meron's first presidency, nine decisions on ERCP were made,[28] of which seven were to release the applicant early. In all seven granted requests, at least two-thirds of the sentence was served. In one denied application, two-thirds of the sentence was not served. The remaining case regarded a request for pardon which was non-receivable due to the ongoing appeal proceedings, so this request will further be disregarded.[29] In his assessments, the President did consistently consider whether applicants had served two-thirds of their sentence.

In the first decision, *Mucić*, the President explicitly referred to the two-thirds requirement, in which he reasoned 'that eligibility for early release in Signatory States starts at two-thirds of the sentence served'.[30] Thus, this seems to be attempt by the President to streamline this eligibility criterion. This is further supported by the fact that the PD's do not reflect the requirement of a two-thirds threshold.

Seven of the eight requests regarded applicants serving their sentence in the UNDU. These cases required two-thirds of the sentence to be fulfilled, following the previously discussed decision in *Mucić*. The remaining case fell under Finnish law, which also required two-thirds of the sentence to be served.[31]

In *Miroslav Tadić*, which concerned an application for commutation or pardon and which fell within the scope of the UNDU regime, the two-thirds requirement was not fulfilled.[32] The President did entertain the possibility of 'special circumstances' which 'warrant a departure from the Tribunal's normal rules of pardon or commutation eligibility' which would undercut the two-

[26] *Prosecutor v Zdravko Mucić, Hazim Delić and Esad Landžo* (Decision of the President on the Early Release of Zdravko Mucić) *IT-96-21-Abis (30 May 2002)* 2/907 Bis.
[27] *Aleksovski* (n 23) [3-4].
[28] See Annex A.3.
[29] *Prosecutor v Miroslav Kvočka* (n 10) [3].
[30] *Prosecutor v Zdravko Mucić, Hazim Delić and Esad Landžo* (Order of the President in Response to Zdravko Mucić's Request for Early Release) IT-96-21-Abis (9 July 2003).
[31] *Prosecutor v Anto Furundžija* (Order of the President on the Application for the Early Release of Anto Furundžija) IT-95-17/1 (29 July 2004).
[32] *Prosecutor v Miroslav Tadić* (Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić) IT-95-9-T (21 January 2004).

thirds rule.[33] He concluded that the applicant's 'poor health' argument was not substantiated to a level which would grant him release prior to two-thirds of the sentence passing and thus denied the request.[34]

In the seven remaining cases, the President, after considering whether the two-thirds requirement was met, addressed the elements of Rule 125 of the PD. From this Rule the President concluded that he must consider the 'gravity of the offence committed', documents which prove rehabilitation, 'any substantial cooperation of the prisoner with the Prosecutor', 'treatment of similarly treated prisoners', as well as the 'further criteria enunciated in prior Orders pertaining to early release petitions'.[35]

1.1.4 President Pocar (2005–2008)

During Fausto Pocar's presidency, six decisions on ERCP were made.[36] In one of these cases, the President did not grant early release; in the other five, he decided to release the applicant early. In all five decisions granting the application, the President discussed whether the applicants had served two-thirds of their sentence.

The President made several decisions which are noteworthy. First, in one case, Spanish law dictated that a detainee is eligible for early release once three-quarters of the sentence had passed unless 'exceptional circumstances' existed.[37] The applicant's argument was that an exceptional circumstance existed because other convicted persons by the ICTY 'become eligible for early release after serving two-thirds of their sentence'.[38] In the first communication with Spain, the appropriate Spanish authorities stated that this was not an exceptional circumstance.[39] However, after subsequent communications with the Spanish Ministry of the Interior, it was concluded that the applicant was eligible for conditional release under Spanish law.[40]

Secondly, in another case, no explicit mention of the two-thirds requirement was made; however, under French Law, the applicant would be eligible for a sentence reduction of 51 months. Even counting this reduction, it does not seem that the applicant would have met the two-thirds

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[33] ibid [6].
[34] ibid [5].
[35] *Mucić* (2003) (n 30) [2]; *Prosecutor v Milan Simić* (Order of the President on the Application for the Early Release of Milan Simić) IT-95-9/2 (27 October 2003) [2]; *Prosecutor v Simo Zarić* (Order of the President on the Application for the Early Release of Simo Zarić) IT-95-9 (21 January 2004) 14800; *Prosecutor v Tihomir Blaškić* (Order of the President on the Application for the Early Release of Tihomir Blaškić) IT-95-14-A (29 July 2004) [9]; *Anto Furundžija* (n 31) [2]; *Prosecutor v Miroslav Tadić* (Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić) IT-95-9-T (3 November 2004) [10]; *Miroslav Kvočka* (Decision on Application for Pardon or Commutation of Sentence) IT-98-30/1-A (30 March 2005) [6].
[36] See Annex A.4.
[37] *Prosecutor v Drago Josipović* (Decision of the President on the Application for Pardon or Commutation of Sentence of Drago Josipović) IT-95-16-ES (30 January 2006) [4].
[38] ibid.
[39] ibid [6].
[40] ibid.

requirement.[41] The President concluded against granting early release based on the elements found in Rule 125, mainly noticing that 'his behaviour in detention has generally been good' yet due to 'his denial of having committed rape and sexual assault' his behaviour was outweighed by the non-fulfilment of the remorse element.[42]

Thirdly, in one application, the applicant would be eligible for early release under German law if he filed a request for early release.[43] However, this request was not filed and thus no consent was given by the applicant for the early release under the domestic two-thirds rule. The applicant aimed for an early release by deportation pursuant under German law, which allowed him to be deported to Serbia. This request was denied by the German prosecutor and the domestic law procedures had been concluded.[44] However, Pocar concluded that there were no barriers for his deportation to Serbia under German law.[45]

1.1.5 President Robinson (2008–2011)

During the second year of Patrick Robinson's presidency, a change in assessing applications for early release is noticeable. Rule 125 requires the President to consider 'the gravity of the crimes'.[46] All previous Presidents had briefly summarised the crimes which the Tribunal convicted the applicant of, or only mentioned that the gravity had been considered. From *Vasiljević* onwards, it became practice of the President, and future Presidents, to label the gravity of the crimes as: high, very high, serious nature, extremely high.[47] Furthermore, from this case onwards, the President weighed the elements of Rule 125 and the two-thirds rule: in favour, neutral, not in favour or against.

During Robinson's presidency, 24 decisions regarding early release were made.[48] Eleven applications were granted. Notably only eleven requests for early release fulfilled the two-thirds requirement, but it must be stressed that not all applications granted also met the two-thirds threshold.

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[41] *Prosecutor v Mlado Radić* (Decision of the President on Commutation of Sentence) IT-98-30/1-ES (22 June 2007) [9].
[42] ibid [15].
[43] *Prosecutor v Duško Tadić* (Decision of the President on the Application for Pardon or Commutation of Sentence of Duško Tadić) IT-94-1-ES (17 July 2008) [2].
[44] ibid [3].
[45] ibid [14].
[46] ICTY 'Rules of Procedure and Evidence' (28 February 2008) UN Doc IT/32/Rev. 41 (ICTY RPE 28 February 2008), Rule 125.
[47] *Prosecutor v Mitar Vasiljević* (Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Mitar Vasiljević) IT-98-32-ES (12 March 2010); See Annex A.5, *Vasiljević* and later.
[48] See Annex A.5.

In several cases the application was granted prior to two-thirds of the sentence having been served.[49] However, the date by which the application was granted was postponed until after the applicant passed the two-thirds threshold. An exception can be found in *Ivica Rajić*, where postponement was not possible.[50] Under Spanish law, the applicant did not fulfil the two-thirds requirement; he was approximately three months short.[51] The President concluded that this factor did not weigh in favour of early release and thus did not grant the request; there were no other negative weighing factors.[52] This seems to suggest that an request for early release can be submitted 'too early', leading to no (postponed) early release and thus requiring a new request on a later date. There is another notable case where the applicant had served more than half of the sentence but did not fulfil the two-thirds threshold, which was not in favour of his early release.[53] However, the President concluded that the application should be granted, but redacted the release date.[54] This redaction bars further analysis of the case.

In *Kabashi*, the President noted that the applicant had served two-thirds of his sentence, an argument in favour of early release, yet he decided to not grant the application.[55] The President made this decision due to the 'serious nature' of the crimes committed.[56] This is the first case in which the two-thirds requirement was overruled by Rule 125 elements to deny early release.

1.1.6 President Meron (2011–2015)

During Theodor Meron's second presidency, fourteen decisions regarding ERCP were made.[57] Eleven applications were granted. In four of those granted applications, release was postponed, following practice by former President Robinson. In one of the fourteen applications, postponed early release was not granted because both the two-thirds requirement and the evidence of rehabilitation was not in favour of early release.[58]

Meron was the first President to label the gravity of crimes committed 'extremely high', which he did in two decisions.[59] However, his methodology in attaching consequences to this label is

[49] *Prosecutor v Duško Sikirica* (Decision of President on Early Release of Duško Sikirica) IT-95-8-ES (21 June 2010); *Prosecutor v Blagoje Simić* (Decision of President on Early Release of Blagoje Simić) IT-95-9-ES (15 February 2011).
[50] *Prosecutor v Ivica Rajić* (Decision of President on Early Release of Ivica Rajić) IT-95-12-ES (22 August 2011).
[51] ibid [13].
[52] ibid [16].
[53] *Prosecutor v Dragan Obrenović* (Decision of President on Early Release of Dragan Obrenović) IT-02-60/2-ES (21 September 2011) [16].
[54] ibid [30].
[55] *Prosecutor v Shefqet Kabashi* (Decision of President on Early Release of Shefqet Kabashi) IT-04-84-R77.1-ES (28 September 2011).
[56] ibid [15] and [20].
[57] See Annex A.6.
[58] *Prosecutor v Dragan Zelenović* (Decision of the President on Early Release of Dragan Zelenović) IT-96-23/2-ES (30 November 2012) [22].
[59] *Prosecutor v Vidoje Blagojević* (Decision of the President on Early Release of Vidoje Blagojević) IT-02-60-ES (3 February 2012); *Zelenović* (2012) (n 58).

somewhat ambiguous. In *Blagojević*, 'the gravity of the crimes (…) is nevertheless extremely high',[60] and the President concluded that this 'weighs against his early release'.[61] In the *Zelenović* decision, the President labelled the 'extremely high gravity' of 'offences' as a factor which 'weighs heavily against his early release'.[62] The different use of language, specifically 'weighs against' and 'weighs heavily against', seem to indicate that the label 'extremely high gravity' has at least two subcategories of weight that can be attached to the label. This creates uncertainty what effect the word 'heavily' adds to the weight of the 'extremely high gravity'. In the earlier case, the President concluded that the application could be granted even though the gravity of the crime is 'extremely high'.[63] However, though the two-thirds threshold had been met almost six months prior to the decision, the President decided to postpone the release by eleven months.[64] This seems to indicate that the President tried to take into account the gravity of the crimes by granting this release but postponing its effect to 31 December 2012.[65] In the latter case, with the sub-label 'weighs heavily against', the President denied early release based on the fact that the two-thirds threshold was not met.[66] Due to this assessment it becomes impossible to further analyse whether the President intended to create two sub categories within the 'extremely high gravity' category.

There are no substantial arguments given for why 31 December 2012 was chosen in *Blagojević*. In earlier cases we assessed, the early release date was often not on the precise date the two-thirds threshold. However, this case specifically seems to be of a more arbitrary nature than the normal practice of the Tribunal, when considering that the label extremely high gravity is used, the decision is made five months after the two-thirds threshold is met and the applicant must wait almost eleven months extra for his early release.

1.2 ICTR

Six applications for ERCP in front of the ICTR between 2005 and 2012 were examined.[67] One of the six decisions was appealed, but this appeal was not granted as no legal basis existed for an appeal of a decision on early release. A third request in the same case included a reconsideration

[60] *Blagojević* (n 59) [21].
[61] ibid.
[62] *Zelenović* (2012) (n 58) [13].
[63] *Blagojević* (n 59) [25].
[64] ibid [15].
[65] ibid [26].
[66] *Zelenović* (2012) (n 58) [14].
[67] See Annex B: ICTR.

of the previous decision on early release but this was also denied as none of the three different criteria[68] for reconsideration were applicable.[69]

Two applications were decided upon President Mose, one by President Pocar (the decision about the appeal), two by President Byron (including the decision about the reconsideration of early release), two by President Khan and one by President Joensen. President Khan introduced a three-fourths threshold in *Bagaragaza*, and while he explicitly stated that this was not intended to serve as precedent,[70] subsequent decisions on ERCP also considered whether the applicant had served three-quarters of their sentence. This higher threshold applied by the ICTR reportedly 'stemmed from the perceived greater severity of crimes before the ICTR', as that tribunal primarily tried genocide.[71]

Of the six substantive decisions, three applications were granted (50%) as the applicants had all served three-fourths of their sentence (some even more),[72] pleaded guilty and cooperated with the prosecution.[73] In three cases the application was denied (50%) due to the gravity of crimes (genocide and crimes against humanity)[74] and because three-fourths of their sentence had not yet been served on the date of the decision.[75]

To conclude, eight cases of the ICTR were examined while six of them included an application on early release: three were granted (50%) and three denied (50%) and none of these decisions imposed any conditions upon early release.

[68] *Prosecutor v Rutaganira* (Decision on the Motion for Reconsideration of the Denial of Early Release) ICTR-1995-IC-R73 (13 February 2008) [5]: "i. A new fact has been discovered that was not known at the time of the original decision; ii. There has been a material change in circumstances since the original decision; or iii. There is reason to believe that the original decision was erroneous or constituted an abuse of power, resulting in an injustice".
[69] *Prosecutor v Rutaganira* (Decision on Request for Early Release) ICTR-95-IC-T (2 June 2006); *Prosecutor v Rutaganira* (Decision on Appeal of a Decision of the President on Early Release) ICTR-95-IC-AR (24 August 2006).
[70] *Bagaragaza* (n 6) [10], [17].
[71] ibid [10]; Jonathan H. Choi, 'Early Release in International Criminal Law' (2014) 123 Yale Law Journal 1784, 1793.
[72] *Prosecutor v Muvunyi* (Decision on Tharcisse Muvunyi's Application for Early Release) ICTR-00-055A-T (6 March 2012); *Prosecutor v Rugambarara* (Decision on the Early Release Request of Juvenal Rugambarara) ICTR-00-59 (8 February 2012).
[73] *Bagaragaza* (n 6); *Rugambarara* (n 72).
[74] *Prosecutor v Ruggiu* (Decision of the President on the Application for Early Release of Georges Ruggiu) ICTR-97-32-S (12 May 2005); *Prosecutor v Imanishimwe* (Decision on Samuel Imanishimwe's Application for Early Release) ICTR-99-46-S (30 August 2007); see also: Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 450-451.
[75] *Ruggiu* (n 74); *Rutaganira* (June 2006) (n 69).

1.3 IRMCT

A total of 39 applications for ERCP in front of the IRMCT were examined.[76] Each application was decided upon by former President of the IRMCT, Theodor Meron. We have not found any decisions by the current President, Carmel Agius, which were publicly available at the time of writing.[77]

In the first early release application before the IRMCT, *Bisengimana*,[78] President Meron discussed how he would assess such applications, since the ICTY and ICTR had diverging approaches. He stressed that prisoners have the right to be treated equally, and that it is 'fair and just to deem early release applicants "similarly-situated" to all prisoners whose sentences will [be] supervised by the Mechanism, irrespective of whether they were convicted or sentenced by the ICTR, the ICTY, or the Mechanism itself.'[79] Meron decided that he would apply the two-thirds threshold used by the ICTY, arguing that the ICTR's practice regarding early release had come about by reference to the ICTY's approach,[80] and that the *lex mitior* principle called for application of the more lenient law.[81] Therefore, all subsequent applications were assessed against the two-thirds benchmark, though meeting that threshold did not automatically mean that the application was granted; it is an eligibility threshold.

The following subsections contain a statistical analysis of the decisions taken prior to and after the change in approach, respectively.

[76] See Annex C: IRMCT.

[77] In the last decision on ERCP by former President Meron (*Prosecutor v Valentin Ćorić* (Further Redacted Public Redacted Version of the Decision of the President on the Early Release of Valentin Ćorić and Related Motions) MICT-17-112-ES.4 (16 January 2019)), several communications by current President Agius are discussed which give some insight into his views. First, Agius is stated to have been strongly against granting the motion to strike the Prosecution's submissions on Ćorić's request, considering that not accepting such information would not be in the interest of justice (see *Ćorić* [18]). Second, Agius notified Meron that he was strongly against granting the Submission on Non-Party Letters, which would dismiss the victim's submissions (see *Ćorić* [24]). Third, Agius noted that 'although he respects the two-thirds standard for early release and the requirement to treat similarly-situated prisoners equally, based on the information received (...) he does not consider that Ćorić has demonstrated "an acceptable indication of a measure of rehabilitation for the purposes of early release of a war criminal"', in particular noting that Ćorić must 'convince Judge Agius that "he deserves to be so released"', suggesting that the weight accorded to demonstration of rehabilitation by Agius may have significant effect on future applications (see *Ćorić* [61]).

[78] *Prosecutor v Paul Bisengimana* (Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application) MICT-12-07 (11 December 2012).

[79] ibid [17].

[80] ibid [20].

[81] ibid.

1.3.1 Before the change in approach

We examined a total of 35 applications for ERCP from between July 2012, when the IRMCT began functioning, and April 2018.[82] Twelve of these applications were in cases originating from the ICTR,[83] while the other 23 were from cases originating from the ICTY.[84]

For the twelve applications originating from the ICTR, eight were granted (66.7%),[85] while four were denied (33.3%).[86] In all eight applications granted, the applicant had either served two-thirds of their sentence,[87] or the effect of the decision was delayed until such time.[88] None of these decisions imposed further conditions upon the early release. In all four denied applications, the applicant had not yet served two-thirds of their sentence.[89]

Of the 23 applications originating from the ICTY, one was dismissed due to lack of jurisdiction[90] and will be further disregarded. Of the remaining 22 applications, fifteen were granted (68.2%)[91]

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[82] See Annex C: IRMCT.
[83] See Annex C.1.
[84] See Annex C.2.
[85] *Bisengimana* (n 78); *Prosecutor v Omar Serushago* (Public Redacted Version of Decision of the President on the Early Release of Omar Serushago) MICT-12-28-ES (13 December 2012); *Prosecutor v Obed Ruzindana* (Decision of the President on the Early Release of Obed Ruzindana) MICT-12-10-ES (13 March 2014); *Prosecutor v Gérard Ntakirutimana* (Public Redacted Version of the 26 March 2014 Decision of the President on the Early Release of Gérard Ntakirutimana) MICT-12-17-ES (24 April 2014); *Prosecutor v Innocent Sagahutu* (Public Redacted Version of the 9 May 2014 Decision of the President on the Early Release of Innocent Sagahutu) MICT-13-43-ES (13 May 2014); *Prosecutor v Alphonse Nteziryayo* (Decision of the President on the Early Release of Alphonse Nteziryayo) MICT-15-90 (9 March 2016); *Prosecutor v Emmanuel Rukundo* (Public Redacted Version of the 19 July 2016 Decision of the President on the Early Release of Emmanuel Rukundo) MICT-13-35-ES (5 December 2016); *Prosecutor v Ferdinand Nahimana* (Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana) MICT-13-37-ES.1 (5 December 2016).
[86] *Prosecutor v Youssouf Munyakazi* (Public Redacted Version of the 22 July 2015 Decision of the President on the Early Release of Youssouf Munyakazi) MICT-12-18-ES.1 (22 July 2015); *Prosecutor v Aloys Simba* (Decision of the President on the Early Release of Aloys Simba) MICT-14-62-ES.1 (2 February 2016); *Prosecutor v Laurent Semanza* (Decision of the President on the Early Release of Laurent Semanza) MICT-13-36-ES (9 June 2016); *Prosecutor v Dominique Ntawukulilyayo* (Decision of the President on the Early Release of Dominique Ntawukulilyayo) MICT-13-43-ES (8 July 2016).
[87] *Bisengimana* (n 78); *Serushago* (n 85); *Ruzindana* (n 85); *Ntakirutimana* (n 85); *Sagahutu* (n 85); *Nteziryayo* (n 85); *Nahimana* (n 85).
[88] *Rukundo* (n 85).
[89] See n 76.
[90] *Prosecutor v Sreten Lukić* (Decision on Sreten Lukić's Request for Determination by the President of Time Served) MICT-14-67-ES.4 (29 May 2015).
[91] *Prosecutor v Milomir Stakić* (Decision of the President on Sentence Remission of Milomir Stakić) MICT-13-60-ES (17 March 2014); *Prosecutor v Ranko Češić* (Public Redacted Version of the 30 April 2014 Decision of the President on the Early Release of Ranko Češić) MICT-14-66-ES (28 May 2014); *Prosecutor v Dario Kordić* (Public Redacted Version of the 21 May 2014 Decision of the President on the Early Release of Dario Kordić) MICT-14-68-ES (6 June 2014); *Prosecutor v Zoran Žigić* (Public Redacted Version of the 10 November 2014 Decision of the President on the Early Release of Zoran Žigić) MICT-14-81-ES.1 (23 December 2014); *Prosecutor v Vinko Pandurević* (Public Redacted Version of the 9 April 2015 Decision of the President on the Early Release of Vinko Pandurević) MICT-15-85-ES.1 (10 April 2015); *Prosecutor v Vladimir Lazarević* (Public Redacted Version of the 7 September 2015 Decision of the President on the Early Release of Vladimir Lazarević) MICT-14-67-ES.3 (3 December 2015); *Prosecutor v Dragan Zelenović* (Public Redacted Version of the 28 August 2015 Decision of the President on the Early Release of Dragan Zelenović) MICT-15-89-ES (15 September 2015); *Prosecutor v Nikola Šainović* (Public

and seven were denied (31.8%).[92] Of the fifteen applications granted, the applicant had served two-thirds of their sentence in eight of them (53.3%),[93] whereas in a further two the effect of the decision was postponed until that such time (13.3%).[94] In five granted applications, the applicant had not served two-thirds of their sentence (33.3%); two of these applications were for sentence remission,[95] while in the other three, the application was granted due to e.g. humanitarian considerations.[96] In the seven denied applications, the applicant had not served two-thirds of their sentence in six of them (85.7%).[97] Conditions were imposed in two cases (9.1%);[98] both concerned release prior to two-thirds of the sentence having been served. The conditions for the applicants relate to travel, surveillance, travel documents, contact with victims or (potential) witnesses, discussion of the case, and compliance with orders by the national authorities and the IRMCT President.[99] Conditions were also imposed on the state where the applicant will be released to.

In conclusion, we examined 35 applications, of which one was dismissed due to lack of jurisdiction. Of the remaining 34 applications, 23 were granted (67.6%), while eleven were denied (32.4%), and conditions were imposed in two (5.8%).[100]

Redacted Version of the 10 July 2015 Decision of the President on the Early Release of Nikola Šainović) MICT-14-67-ES.1 (27 August 2015); *Prosecutor v Drago Nikolić* (Public Redacted Version of the 20 July 2015 Decision of the President on the Application for Early Release or Other Relief of Drago Nikolić) MICT-15-85-ES.4 (13 October 2015); *Prosecutor v Momir Nikolić* (Public Redacted Version of the 14 March 2014 Decision on Early Release of Momir Nikolić) MICT-14-65-ES (12 October 2015); *In the Case Against Florence Hartmann* (Decision of the President on the Early Release of Florence Hartmann) MICT-15-87-ES (29 March 2016); *Prosecutor v Ljubomir Borovčanin* (Public Redacted Version of the 14 July 2016 Decision of the President on the Early Release of Ljubomir Borovčanin) MICT-15-85-ES.6 (2 August 2016); *Prosecutor v Ljubiša Beara* (Public Redacted Version of the 7 February 2017 Decision of the President on the Early Release of Ljubiša Beara) MICT-15-85-ES.3 (16 June 2017); *Prosecutor v Milomir Stakić* (Decision of the President on Sentence Remission of Milomir Stakić) MICT-13-60-ES (6 October 2017); *Prosecutor v Berislav Pušić* (Public Redacted Version of the 20 April 2018 Decision of the President on the Early Release of Berislav Pušić) MICT-17-112-ES.1 (24 April 2018).

[92] *Prosecutor v Stanislav Galić* (Public Version of the 5 December 2014 Decision with Reasons to Follow on the Early Release of Stanislav Galić) MICT-14-83-ES (23 June 2015) and *Prosecutor v Stanislav Galić* (Reasons for the President's Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion) MICT-14-83-ES (23 June 2015); *Prosecutor v Radislav Krstić* (Decision of the President on the Early Release of Radislav Krstić) MICT-13-46-ES.1 (13 December 2016); *Prosecutor v Stanislav Galić* (Decision of the President on the Early Release of Stanislav Galić) MICT-14-83-ES (18 January 2017); *Prosecutor v Dragoljub Kunarac* (Decision of the President on the Early Release of Dragoljub Kunarac) MICT-15-88-ES.1 (2 February 2017); *Prosecutor v Radivoje Miletić* (Public Redacted Version of the 26 July 2017 Decision of the President on the Early Release of Radivoje Miletić) MICT-15-85-ES.5 (27 July 2017); *Prosecutor v Goran Jelisić* (Public Redacted Version of 22 May 2017 Decision of the President on Recognition of Commutation of Sentence, Remission of Sentence, and Early Release of Goran Jelisić) MICT-14-63-ES (11 August 2017); *Prosecutor v Sreten Lukić* (Public Redacted Version of the 30 May 2017 Decision of the President on the Early Release of Sreten Lukić) MICT-14-67-ES.4 (11 August 2017).

[93] *Češić* (n 91); *Kordić* (n 91); *Pandurević* (n 91); *Zelenović* (2015) (n 91); *Šainović* (n 91); *Hartmann* (n 91); *Borovčanin* (n 91); *Pušić* (n 91).

[94] *Žigić* (n 91); *Lazarević* (n 91).

[95] *Stakić* 2014 and 2017 (n 91).

[96] *D Nikolić* (n 91); *M Nikolić* (n 91); *Beara* (n 91).

[97] *Galić* 2015 (n 92); *Krstić* (n 92); *Galić* 2017 (n 92); *Miletić* 2017 (n 92); *Jelisić* (n 92); *Lukić* 2017 (n 92).

[98] *D Nikolić* (n 91); *Beara* (n 91).

[99] See *D Nikolić* (n 91) 11-12; *Beara* (n 91) 13-14.

[100] *D Nikolić* (n 91); *Beara* (n 91).

1.3.2 After the change in approach

Four decisions show a changed approach to applications for ERCP, namely *Miletić (2018), Lukić (2018), Simba* and *Ćorić*.[101] These applications were all decided upon after the SC adopted Resolution 2422 (discussed in Section 1.4.3).

The application in *Miletić* was denied due to the high gravity of his crimes and the strong objections of the judges of the sentencing chamber, who were also judges of the IRMCT. This is the first IRMCT application we examined in which the gravity of crimes was invoked as a reason to deny the application.

Lukić was denied due to the applicant not yet having served two-thirds of the sentence imposed by the ICTY and the lack of any exceptional circumstances justifying early release before the two-thirds threshold. This case appears to be in line with the President's approach to earlier cases in which the applicant had not yet served two-thirds of their sentence.

In *Simba* and *Ćorić*, the applicants had served two-thirds of their sentence, and the application was granted. However, the grant was subjected to several conditions, to apply after the early release takes effect. These are the first Decisions we examined in which conditions were imposed on the applicant despite them having served two-thirds of their sentence. Conditions had been imposed in two earlier applications,[102] but in both cases serious humanitarian considerations constituted exceptional circumstances warranting release before two-thirds of the sentence had been served.

In sum, we examined 39 applications for ERCP before the IRMCT. Lack of jurisdiction was found for one application, leaving 38 substantive decisions. Of those 38, 25 were granted (65.8%), while thirteen were denied (34.2%). Conditions were imposed in four cases (10.5%).

1.4 Reasons for the changed approach (conditional early release)

1.4.1 An attempt to amend Rule 151

In the Assessment and Progress Report for the period for 16 November 2017 to 15 May 2018, Rule 151 is discussed.[103]

[101] *Prosecutor v Sreten Lukić* (Decision of the President on the Early Release of Sreten Lukić) MICT-14-67-ES.4 (17 September 2018); *Prosecutor v Radivoje Miletić* (Decision of the President on the Early Release of Radivoje Miletić) MICT-15-85-ES.5 (23 October 2018); *Prosecutor v Aloys Simba* (Public Redacted Version of the President's 7 January 2019 Decision of the President on the Early Release of Aloys Simba) MICT-14-62-ES.1 (7 January 2019); *Ćorić* (n 77).

[102] *D Nikolić* (n 91); *Beara* (n 91).

[103] IRMCT 'Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2017 to 15 May 2018' (17 May 2018) UN Doc S/2018/471.

The Office of the Prosecutor brought forward an amendment in 2016 regarding the creation of a conditional release program: [104]

> As reported in the tenth and eleventh progress reports, the Office proposed in early 2016 to amend rule 151 of the Rules of Procedure and Evidence of the Mechanism to establish a programme for conditional early release. The Office is gravely concerned that nearly all convicted persons continue to be released unconditionally after serving only two thirds of their sentences. It is also deeply distressing, particularly to the victims, that those granted early release often deny the crimes and their criminal responsibility immediately upon release. The amendments proposed by the Office would have addressed those legitimate concerns by creating a conditional early release programme, which would have aligned the Mechanism's rules with best practices and established sentencing principles.

However, '[i]n April 2018, the Office was informed that the plenary of the judges had refused to adopt the Office's proposal, to make any amendments to the existing regime for early release or to continue its consideration of the matter'.[105] The Office addressed this issue by stating that it 'will be mindful of every opportunity in specific cases to bring its views and concerns to the attention of the President and register its opposition, where warranted, to the unconditional early release of persons convicted of genocide, crimes against humanity or war crimes'.[106]

1.4.2 SC debate on 6 June 2018 prior to SC Resolution 2422

During a SC debate two months after the failed amendment of Rule 151, many States showed their support of the IRMCT; however, some states did note the inconsistent application of Rule 151.[107]

Ethiopia and Rwanda made the strong point that lessons could be learned from the Residual Special Court for Sierra Leone, which has its own *Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone* (SCSL)[108] This PD sets out rules for the consideration and application for conditional early release. Rwanda uses this as an example of how the Mechanism could become more consistent and transparent in the application of its rules.[109] While the PD specifically regards conditional early release, Rwanda also mentioned the existence of other 'best practices' in the SCSL.[110]

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[104] ibid [72].
[105] ibid [73].
[106] ibid [74].
[107] UNSC '8278th meeting' (6 June 2018) UN Doc S/PV.8278; Equatorial Guinea: S/PV.8278 12-13; Plurinational State of Bolivia: S/PV.8278 13-14; Rwanda S/PV.8278 23-24.
[108] Ethiopia: S/PV.8278 14-15; Rwanda: S/PV.8278 24; SCSL 'Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone' (1 October 2013).
[109] S/PV.8278 (n 107) 24.
[110] ibid.

Furthermore, Bolivia, the United States of America and Rwanda all noted that some individuals enjoying the right of early release had denied the crimes they were convicted of after their early release.[111]

1.4.3 SC Resolution 2422

The President of the IRMCT has used SC Resolution 2422 as a legal justification for the creation of the conditional early release program, as seen in *Simba* and *Ćorić.*[112]

In this Resolution, in which it acts under Chapter VII of the UN Charter, the SC 'notes' that 'the views and concerns expressed by some Member States during the SC debate on 6 June 2018 about the current approach of the Mechanism to early release of persons convicted by the ICTR, and encourages the Mechanism to consider an appropriate solution, including by considering putting in place conditions on early release in appropriate cases'.[113] The resolution seems to imply that the SC acts under Articles 41 and 39 UN Charter even though it does not explicitly 'determine the existence of any threat to the peace, breach of the peace, or act of aggression', which gives it the power to act 'in accordance with Articles 41 and 42' of the UN Charter.[114]

The language used in SC Res 2422 is noteworthy, as stating that it 'notes' something and 'encourages' the Mechanism to act in a certain way cannot be deemed to be a binding decision ex Articles 41 and 39 UN Charter. In contrast, Paragraph 1 of the Resolution, by which the SC 'decides' to appoint Mr. Serge Brammertz as Prosecutor of the Mechanism, can be seen as a binding decision due to the language used by the SC.[115]

Based on the above assessment of the justification used by the President, which presumably would create a legal argument to create a conditional early release programme, no legal basis can be found in SC Resolution 2422. The encouragement element of the SC Resolution can be seen as an incentive for the proposed amendment of Rule 151 in April 2018 which was not adopted.

1.5 Conclusion

Part 1 of this report set out to statistically analyse how many applications regarding ERCP have been granted or denied at the former ICTY, ICTR and the IRMCT, from when on the President of the IRMCT prescribed additional conditions after the release of a convicted person, and how many

[111] The Plurinational State of Bolivia S/PV.8278 13-14; The United States of America S/PV.8278 15-16; Rwanda S/PV.8278 24.
[112] *Simba* (2019) (n 101); *Ćorić* (n 77); SC Res 2422 (n 3).
[113] SC Res 2422 (n 3) preamble [11], operative [10].
[114] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter), Articles 39, 41 and 42.
[115] SC Res 2422 (n 3) [1].

cases since then have been affected, followed by the possible reasons for the changed practice of the ICRMT President.

The table below shows the total number of applications granted and denied per Tribunal. It shows that the ICTY and ICTR have a roughly equal percentage of grants versus denials, while the ICTR shows a different trend (but also has substantially less practice).

	ICTY	ICTR	IRMCT total	IRMCT originated from ICTR	IRMCT originated from ICTY
Applications granted	39 (67.2%)	3 (50%)	25 (65.8%)	9 (69.2%)	16 (64%)
Applications denied	19 (32.8%)	3 (50%)	13 (34.2%)	4 (30.8%)	9 (36%)
Applications not discussed on the merits	1	0	1	0	1
Conditions imposed	0	0	4 (10.5%)	1 (8.33%)	3 (13.6%)
Total applications examined	59	6	39	13	25

The President of the IRMCT first imposed conditions upon early release in 2015 and again in 2017; however, both cases concerned applicants who were released prior to having served two-thirds of their sentence. Two cases from 2019 contain conditions (See Annex F) even though two-thirds had been served, thus showing a change in approach. Possible reasons for this change in approach include the attempted amendment of RPE Rule 151 and the adoption of SC Resolution 2242, though neither seem to provide a legal basis for the change.

Part 2: Analytical Report of the Compatibility of Additional Conditions with the ECHR

The second part of this report focuses on possible human rights violations regarding the early release conditions.[116] First, we will discuss the applicability of the ECHR to the IRMCT. Sections 2.2 through 2.5 analyse whether a violation of Articles 7, 8, 10 or 14 ECHR and Protocol 12 to the ECHR could be argued.

Several ECHR articles state that interference with the rights protected in them can be considered justified on various grounds; for example, article 8(2) and 10(2) ECHR. We will not assess whether such justifications are present, as these are strongly related to exercise of state functions which are difficult to assess in the context of the criminal tribunals.

2.1 Applicability of the ECHR to the IRMCT

An important caveat to the application of the ECHR to the IRMCT must be discussed at the outset. While many states have signed and ratified the ECHR, the IRMCT, as a subsidiary organ (SO) of the UN, is not and cannot become a party to the treaty.[117] The UN itself has also not acceded to the ECHR. Therefore, neither the IRMCT nor the UN are directly bound by it.

Besides the right for a fair trial, no human rights are explicitly ensured by the IRMCT Statute.[118] Some argue that 'this could be explained by the fact that the Tribunals were created in "conditions of relative urgency", as a result of which their procedural rules were quite limited, an issue which was envisaged to be remedied by the creation of RPEs by the Judges'.[119]

In *Blagojević* and *Galić*,[120] the ECtHR discussed the applicability of the ECHR to the ICTY and the question whether The Netherlands could be held responsible for alleged human rights violations committed by that Tribunal. The Court elaborated upon its jurisprudence in *Behrami and Behrami* and *Saramati* concerning attribution of actions to the UN,[121] finding that the ICTY

[116] See Annex F: Conditions for Conditional Early Release.

[117] The IRMCT is a SO of the UN (art. 29 UN Charter), established through a SC Resolution (UNSC Res 1966 (22 December 2010) UN Doc S/Res/1966). Such SOs lack independent international legal personality (C Walter, 'Subjects of International Law', The Max Planck Encyclopedia of Public International Law (May 2007) <opil.ouplaw.com/home/EPIL> accessed 19 March 2019, [13]). Instead, it is the UN which has this personality, and thus can enter into international legal obligations. The IRMCT could therefore not become a party to a treaty, even one which allowed accession by a non-state actor/international organisation.

[118] UNSC, *Statute of the International Residual Mechanism for Criminal Tribunals* (as Annex 1 of SC Resolution 1996 (22 December 2010)) (IRMCT Statute), article 19.

[119] Krit Zeegers, *International Criminal Tribunals and Human Rights Law - Adherence and Contextualization - International Criminal Justice Series* (1st edition, T.M.C. Asser Press 2016) 56; see also, as cited by Krit Zeegers: Frédéric Mégret, 'The Sources of International Criminal Procedure' in Göran Sluiter and others (eds), *International Criminal Procedure - Principles and Rules* (Oxford University Press 2013), 68.

[120] *Blagojević v The Netherlands* App no 49032/07 (ECtHR, 9 June 2009); *Galić v The Netherlands* App no 22617/07 (ECtHR, 9 June 2009).

[121] *Behrami and Behrami v France* App no 71412/01 (ECtHR, 2 May 2007); *Saramati v France, Germany and Norway* App no 78166/01 (ECtHR, 2 May 2007) [GC].

is a SO of the UN SC and that 'acts and omissions imputable to the ICTY are (...) attributable in principle to the [UN]'.[122] The Court justified this conclusion by reference to the 'manner of the ICTY's creation' and the fact that the Headquarters Agreement describes it as a SO.[123] This reasoning is also applicable to the IRMCT, which was likewise created by a SC Resolution, in which the SC acted under Chapter VII UN Charter, and to which the Headquarters Agreement remains applicable.[124] Therefore, as the Court also concluded in *Behrami/Saramati* with respect to the ICTY, it 'lacks jurisdiction ratione personae to examine complaints directed' against both the IRMCT and the UN.[125]

As for the alleged responsibility of The Netherlands in *Galić* and *Blagojević*, the ECtHR drew a comparison between these cases and *Berić*, in which it had stated that its reasoning in *Behrami/Saramati* also applies to 'the acceptance of an international civil administration in its territory by a respondent State'.[126] The ECtHR 'takes the view that the same reasoning can also be applied to the acceptance by a respondent State in its territory of an international criminal tribunal pursuant to a resolution of the SC under Chapter VII of the United Nations Charter'.[127] As regards The Netherlands' jurisdiction over those detained by the ICTY, the Court noted that it 'cannot find the sole fact that the ICTY has its seat and premises in The Hague sufficient ground to attribute the matters complained of to the Kingdom of the Netherlands'.[128]

Generally, the Statutes of the ICTY, ICTR and IRMCT indirectly mention human rights obligations in the sense that, for example, one of their functions is to 'fully respect the rights of the suspects and accused, but also to ensure fair and expeditious trials and to protect the victims and witnesses'.[129] These provisions show some similarities to Article 5 ('Right to liberty and security') and 6 ('Right to a fair trial') of the ECHR; the latter was confirmed by the ICTY in one of its judgments.[130] Additionally, the Secretary-General clearly stated in a report regarding

[122] *Blagojević v The Netherlands* (n 120) [35]; *Galić v The Netherlands* (n 120) [35].
[123] ibid; see Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, New York, 29 July 1994, *Trb*. 1994, 189 (Headquarters Agreement).
[124] UNSC Res 1966 (n 117). Though the name of the Headquarters Agreement seems to indicate that it only regards the ICTY, the Kingdom of the Netherlands has made it clear that this agreement will cover the IRMCT until another agreement takes its place.
[125] *Blagojević v The Netherlands* (n 120) [36]; *Galić v The Netherlands* (n 120) [36].
[126] *Berić and others v Bosnia and Herzegovina* App nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 (ECtHR, 16 October 2007) [30]; *Blagojević v The Netherlands* (n 120) [38]; *Galić v The Netherlands* (n 120) [38].
[127] *Blagojević v The Netherlands* (n 120) [39]; *Galić v The Netherlands* (n 120) [39].
[128] ibid, both [46].
[129] ICTY Statute (n 4) art. 20; ICTR Statute (n 4) art. 21; IRMCT Statute (n 118), articles 19-21.
[130] *Prosecutor v Prlić et al* (Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence) IT-04-74-AR73.6 (23 November 2007) [51]; Antonio Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks' in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden* (Martinus Nijhoff Publishers 2003) 24.

paragraph 2 of SC Resolution 808[131] that international tribunals have to 'respect internationally recognized standards regarding the rights of the accused at all stages of the proceedings' by referring specifically to the International Covenant on Civil and Political Rights (ICCPR).[132] Thus, a 'legislative influence'[133] of, *inter alia*, the ECHR and ICCPR to the interpretation of the tribunal's statutes cannot be denied, nor can the general recognition of human rights.[134]

Although the ECHR does not apply to international criminal tribunals, which the ICTY also underlined in several decisions by stating that it is not bound by the jurisprudence of the ECtHR,[135] the Tribunal still refers to the ECHR and its case-law in some of their judgements which underpins a 'judicial influence' of human rights conventions.[136] For example, in *Aleksovski*, the tribunal made references to the ECtHR's case-law regarding 'the right of a fair trial'.[137] In *Mrksić, Dokmanović et al* the Trial Chamber referred to the ECHR to clarify and define 'the concept of 'arrest which must be made with a procedure prescribed by law',[138] and in *Prlić* the Appeals Chamber of the ICTY noted that the ECtHR gives a guideline in relation to the principles 'on admissibility and evaluation of evidence'.[139]

Based on the foregoing, the former ICTY gave the impression that it used its discretionary power when referring to the ECHR. Either it mentioned the ECHR and its jurisprudence for underlining an argument or concerning how to interpret principles/rules/concepts in international law, or it clearly stated that it is not bound by its jurisprudence when it has an opposite view about material facts.

2.2 Article 7 ECHR – No punishment without law

Article 7(1) ECHR states that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law

[131] UNSC Res 808 (22 February 1993) UN Doc S/Res/1993.
[132] UNSC, 'Report of the Secretary-General Pursuant to Paragraph 2 of SC Resolution 808 (1993) [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991]' (3 May 1993) UN Doc S/25704 [106]; *Prosecutor v Delalić et al* (Judgement) IT-96-21-A (20 February 2001) [604]; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[133] Erik Møse, 'Impact of Human Rights Conventions on the Two *Ad Hoc* Tribunals' in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden* (Marinus Nijhoff Publishers 2003) 207.
[134] ibid 184.
[135] See for example: *Prosecutor v Hartmann* (Judgement) IT-02-54-R77.5-A (19 July 2011) [159].
[136] Møse (n 133) 207.
[137] *Prosecutor v Aleksovski* (Decision on Prosecutor's Appeal on Admissibility of Evidence) IT-95-14/1 (16 February 1999) [24].
[138] *Prosecutor v Mrksić, Dokmanović et al* (Decision on the Motion for Release by the Accused Slavko Dokmanović) IT-95-13a-PT (22 October 1997) [59-60; 67]; see also: Cassese (n 130) [31-32].
[139] *Prosecutor v Prlić* (n 130) [51].

at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

It could theoretically be argued that the imposition of conditions for ERCP by the IRMCT President constitutes a heavier penalty and thus would violate article 7 ECHR. However, the ECtHR has stated in a multitude of cases that there is a:[140]

> distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7[.]

Considering this general principle, it seems highly unlikely that the imposition of conditions for early release by the IRMCT could be challenged by reference to art. 7 ECHR. This situation falls squarely within the notion of measures concerning execution and enforcement, which the Court has excluded from the scope of Article 7. Furthermore, as ERCP fall outside the scope of this Article, no argument can be made regarding the requirement of accessibility and foreseeability of the law under Article 7.[141]

However, the principle of *lex mitior* is relevant here. The ICTY interprets this principle as follows:[142]

> [I]f the law relevant to the offence of the accused has been amended, the less severe law should be applied. It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them.

Further, the principle is 'only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide'.[143] It clarifies that the ICTY is 'clearly bound by its own Statute and Rules'.[144] Further, the Tribunal establishes that in *Dragan Nikolić* 'there has not been a change in the laws of the International Tribunal regarding sentencing ranges',[145] concluding that 'if ever the sentencing

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[140] *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) [GC] [142]; *Scoppola v Italy (no. 2)* App no 10249/03 (ECtHR, 17 September 2009) [GC] [98]; *M v Germany* App no 19359/04 (ECtHR, 17 December 2009) [21]; *K v Germany* App no 61827/09 (ECtHR, 7 June 2012) [78]; *G v Germany* App no 65210/09 (ECtHR, 7 June 2012) [69]; *Del Río Prada v Spain* App no 42750/09 (ECtHR, 21 October 2013) [GC] [83]. More generally also: *Hogben v United Kingdom* App no 11653/85 (European Commission of Human Rights, 3 March 1986); *Hosein v United Kingdom* App no 26293/95 (European Commission of Human Rights, 28 February 1996); *L.-G.R. v Sweden* App no 27032/95 (European Commission of Human Rights, 15 January 1997); *Uttley v UK (Admissibility)* App no 36946/03 (ECtHR, 29 November 2005), [31].

[141] See for example *Del Río Prada* (n 140) [91]; D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018) 492-493.

[142] *Prosecutor v Dragan Nikolić* (Judgement of Sentencing Appeal) IT-94-2-A (4 February 2005) [81].

[143] ibid.

[144] ibid [82].

[145] ibid.

powers conferred by the Statute were to be amended, the International Tribunal would have to apply the less severe penalty'.[146]

As concluded in part 1 of this report, the legal basis invoked by former President Meron to introduce the imposition of conditions for ERCP, SC Resolution 2422, is not a convincing argument. Furthermore, this practice seems to breach the principle of *lex mitior* as understood by the ICTY from a grammatical interpretive point of view. Nonetheless, by looking at the object and purpose of the statement that the tribunal sees itself 'clearly bound by its own Statute and Rules',[147] we conclude that this does not indicate that the judges and President at the time, Theodor Meron, meant that the principle of *lex mitior* only regards acts of amendment and can be circumvented, after the failed amendment of Rule 151, by creating new practice for the IRMCT. It is implied that the change of practice also falls within the scope the *lex mitior* principle. This argument finds strength in the fact that any Tribunal or Court should not be required to mention all possible logical loopholes within its decision. It is for that reason implied within the object and purpose of the decision of the ICTY that the inability of the creation of a new practice can be regarded as one of these logical loopholes.

It can thus be concluded that the creation of the conditional early release program can be considered a breach of the principle of *lex mitior* as interpreted by the ICTY. This is because the creation of the conditional early release program uses a more severe practice that limits freedoms of potential applicants that are granted an early release.

The principle of *lex mitior* has also been recognised by the ECtHR. In *Scoppola v. Italy (no. 2)*, the Court states that 'Article 7 § 1 of the Convention guarantees (...) implicitly, the principle of retrospectiveness of the more lenient criminal law.'[148] However, as Article 7 does not apply to the execution or enforcement of a penalty, the ECtHR's interpretation of *lex mitior* as falling within Article 7 would not normally be applicable to ERCP.[149] Nevertheless, the Court has made an observation concerning *lex mitior* which could provide a relevant argument, at least in the context of the ICTY's interpretation of *lex mitior*. In *Del Río Prada v. Spain*, the ECtHR held that 'a judicial re-interpretation of the law governing remission had resulted in a "re-definition" of the penalty, so that Article 7 applied'.[150] There seems to be room to argue that the same has happened concerning conditions for ERCP - that the 'outcome of the re-interpretation [is] a new penalty for the applicant, not a change in the execution of the original one'.[151] If so, this situation may fall within the scope of Article 7 after all.

[146] ibid [85].
[147] ibid [82].
[148] *Scoppola v Italy (no. 2)* (n 140) [109].
[149] *Harris, O'Boyle and Warbrick* (n 141) 498.
[150] ibid 499.
[151] ibid. The authors do note that this case seems exceptional due to its set of facts, and that the approach in *Kafkaris* (n 140) will likely remain intact.

2.3 Article 8 ECHR – Right to respect for private and family life

Article 8(1) ECHR determines that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. The scope of Article 8 ECHR is broad but not limitless.[152] Its main purpose is to protect from arbitrary interference by public authorities[153] in private and family life, home and correspondence.[154] Regarding private life, the ECtHR has stated that 'everyone can freely pursue the development and fulfilment of his or her personality and establish end develop relationships with other persons and the outside world'.[155]

Thus, it can be reasoned that the condition imposed by the President of the IRMCT in the cases *Simba* and *Ćorić* that the convicted persons 'shall have no contact whatsoever, directly or indirectly try to harm, intimidate or otherwise interfere, with victims or witnesses who testified at his trial or the trial of other ICTY-convicted persons, or otherwise interfere in any way with the proceedings of the Mechanism, or the administration of justice'[156] is an interference with the right to respect for private and family life, as it affects the development of relations with other individuals, especially if one of the witnesses whom the applicant may not contact is, for example, a family member. However, the Court has held that criminal procedures which lead to certain consequences for the private life of the convicted person is consistent with Article 8 ECHR if they do not overstep 'the normal and inevitable' results of such a situation.[157]

2.4 Article 10 ECHR – Freedom of expression

Article 10(1) ECHR states '[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.

Generally speaking, the right to freedom of expression is 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.[158] Article 10(1) ECHR covers, *inter alia*, the freedom to hold opinions and also to impart information and ideas which includes the right to write a book or to talk to the media to

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[152] ECtHR, 'Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence' (31 August 2018) 7 <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 7 March 2019.
[153] *P and S v Poland* App no 57375/08 (ECtHR, 30 October 2012) [53]; *Nunez v Norway* App no 55597/09 (ECtHR, 28 June 2011) [68].
[154] ECtHR, 'Guide on Article 8' (n 152) 8.
[155] See for example: *Jehovah's Witnesses of Moscow v Russia* App no 302/02 (ECtHR, 22 November 2012) [117]; *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992) [29]; *Pretty v the United Kingdom* (n 10) [61]; see also: William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 369.
[156] *Ćorić* (n 77) [78.a]; *Simba* (2019) (n 101).
[157] *Jankauskas v Lithuania* (no 2) App no 50446/09 (ECtHR, 27 June 2017) [76].
[158] *Palomo Sánchez and Others v Spain* App nos 28955/06, 28957/06, 28959/06 and 28964/06 (ECtHR, 12 September 2011) [GC] [53]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [41].

express an opinion.[159] As an example, the prohibition or ban of a publication of a book has been held to constitute interference with freedom of expression.[160] We have not found a case before the ECtHR in which freedom of expression was assessed in relation to conditional release; however, the Court's general principles can be extrapolated and applied by analogy.

A clear interference in the freedom of expression of the convicted persons can be found in the condition in the case of *Ćorić* that 'he shall not discuss his case, including any aspect of the events in the former Yugoslavia that were the subject of his trial, with anyone, including the media, other than pro bono counsel, if any'.[161]

A similar interference is found in *Simba's* condition, stating 'that he shall not discuss [his] case, including any aspect of the 1994 Genocide against the Tutsi in Rwanda, with anyone, including the media, other than pro bono counsel, if any, nor will [he] make any statement denying the 1994 Genocide against the Tutsi in Rwanda'.[162] Thus, both Simba and Ćorić are restricted in expressing their opinion freely. In addition, and as a broader example, if a convicted person wants to write and publish a book about the crime he committed, or in general about the international crime of genocide, the mentioned conditions would also interfere with Article 10(1) ECHR.

2.5 Prohibition of discrimination

2.5.1 Article 14 ECHR

Article 14 ECHR states that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground', naming examples including race and religion.

Article 14 applies in conjunction with the substantive articles in the ECHR. However, the ECtHR does not require that this substantive right is actually violated.[163] Furthermore, the Court 'has held that it was possible for a complaint of discrimination to fall within the scope of a particular right, even if the issue in question did not relate to a specific entitlement granted by the ECHR'.[164] The ECtHR further states that 'in such cases, it was sufficient that the facts of the case broadly relate to issues that are protected under the ECHR'.[165] Claiming that an amendment, or more precisely

[159] See Article 10 (1) ECHR.
[160] See for example: *The Sunday Times v the United Kingdom* (no 1) App no 6538/74 (ECtHR, 26 April 1979) [38;45]; *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [43].
[161] *Ćorić* (n 77) [78.c].
[162] *Simba* (2019) (n 101).
[163] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law* (2018 edn, Publications Office of the European Union 2018) 30; See for example: *Sommerfeld v. Germany* App no 31871/96 (ECtHR, 8 July 2003) [GC] as mentioned by the Handbook.
[164] *Handbook on European Non-Discrimination Law* (n 163) 30; See for example *A.H. and Others v Russia* App nos 6033/13, 8927/13, 10549/13, 12275/13, 23890/13, 26309/13, 27161/13, 29197/13, 32224/13, 32331/13, 32351/13, 32368/13, 37173/13, 38490/13, 42340/13 and 42403/13 (ECtHR, 17 January 2017) [380f] as mentioned by the handbook.
[165] ibid.

the change in practice, affecting all new applicants of early release, can be regarded as discriminatory within the meaning of Article 14 is problematic, because no strong argument can be made that this disadvantage can be linked to a substantive right within the ECHR, which would be necessary for an argument under Article 14.

2.5.2 Protocol No. 12 to the ECHR

With the introduction of Protocol No. 12 to the ECHR,[166] 'the prohibition of discrimination became a free-standing right'.[167] The ECtHR has stated 'that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of 'the rights and freedoms set forth in [the] Convention', Article 1 of Protocol No. 12 extends the scope of protection to 'any right set forth by law'. It thus introduces a general prohibition of discrimination'.[168] It furthermore adds that '[n]o one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1'.[169]

The Council of Europe's explanatory report regarding Protocol No. 12 explicitly mentions that Article 1 is intended to broaden the scope of the prohibition of discrimination. This regards in particular 'cases where a person is discriminated against':[170]

1. In the enjoyment of any right specifically granted to an individual under national law;
2. In the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
3. By a public authority in the exercise of discretionary power (for example, granting certain subsidies);
4. By any other act or omission by a public authority (...).

For the new conditional early release requirements to fall within the scope of Protocol No. 12, they must fit within one of the four above categories. Although early release finds its roots in national law, the Court merely uses this as a guideline by which it has formed its own customary rules, thus it cannot be considered a right granted under national law.

With regards to the second category, the IRMCT is not a public authority under national law. The Kingdom of The Netherlands, as a member of the UN, has ratified a Headquarters Agreement

[166] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 October 2000, entered into force 1 April 2004) ETS 177.
[167] *Handbook on European Non-Discrimination Law* (n 163) 28.
[168] *Sejdić and Finci v Bosnia and Herzegovina* App nos. 27996/06 and 34836/06 (ECtHR, 22 December 2009) [GC] [53].
[169] Protocol No. 12 (n 166), Article 1(2).
[170] Council of Europe 'Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights And Fundamental Freedoms' Rome 4.XI.2000 (Explanatory Report Protocol 12) [22].

between itself and the UN,[171] the purpose of which 'is to regulate all matters relating to the proper functioning of the Tribunal'.[172] Nothing within this agreement seems to indicate that the IRMCT can be regarded as a public authority under the law of The Kingdom of The Netherlands nor the country of The Netherlands. Article VI(4) of the Agreement states 'No law or regulation of the host country which is inconsistent with a regulation of the Tribunal shall, to the extent of such inconsistency, be applicable within the premises of the Tribunal'.[173] Due to the fact that the IRMCT cannot be regarded as a public authority within the Kingdom of The Netherlands nor The Netherlands, category three and four require no further discussion.

It can be concluded that the broadening effect that Protocol No. 12 has on the prohibition of discrimination, while effective for states, does not change the substantive effects of human rights protected in the current case and thus does not broaden the scope of its application.

2.6 Conclusion

The examination in this second part of the report showed that the ECHR does not apply to the IRMCT as it is has not acceded to the treaty. However, substantial rights were discussed, since ECtHR practice could still potentially influence the IRMCT's future decision-making.

No violation of Article 7 was found, due to the difference between the substance and execution of the penalty. However, an argument is made that the principle of *lex mitior* is violated. The condition regarding, *inter alia*, not talking to witnesses after the early release causes an interference with Article 8 ECHR, and the requirement not to discuss the case with the media results in an interference with Article 10 ECHR. Whether this amounts to a violation depends on the existence or absence of legitimate restrictions found in articles 8(2) and 10(2) ECHR; however, this falls outside the scope of this report. Furthermore, no violation of Article 14 ECHR nor Protocol 12 to the ECHR is found.

[171] Headquarters Agreement (n 123). Though the name of this agreement seems to indicate that it only regards the ICTY, the Kingdom of the Netherlands has made it clear that this agreement will cover the IRMCT until another agreement takes its place.
[172] Frits Kalshoven 'The International Humanitarian Fact-finding Commission: its Birth and Early Years' in Erik Denters and Nico Schrijver (eds), *Reflections on International Law from the Low Countries in Honor of Paul de Waart* (Martinus Nijhoff Publishers 1998) 201, 240.
[173] Article VI(4) Headquarters Agreement (n 123).

Conclusion

In the first part of this report, the developing practice in the ICTY, ICTR and IRMCT regarding applications for ERCP was discussed. While there seems to be a 'red line' guiding the Presidents in their decision-making process, it is notable that each President further developed the practice of this process. From a transparency point of view, this can be deemed unsatisfactory, as mentioned by several countries during the SC meeting. While it is notable that the process as a whole has become more systematic, and more reasoning is given why a President makes a certain decision, the constant changes in the way new Presidents form their decisions is arguably problematic since new additions are made to the decision-making process. The latest addition is the newly created conditional early release program. The main issue we found regarding this change is the fact that this change was not adopted by an amendment to the RPE, which failed, but by the creation of a new practice. The legal basis cited by President Meron for the change in practice, thus circumventing the failed amendment, is questionable.

In the second part of this report several substantive human rights are discussed within the ECHR framework. While we established that the IRMCT is not bound by the ECHR, assessing the compatibility of its practice with these standards can be useful for future applications. While Articles 8 and 10 ECHR seem to be breached by the current conditional release program, Articles 7 and 14 do not seem to be violated. However, the argument is made that the principle of *lex mitior* is violated.

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Annex A: ICTY

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A.4 Under President Fausto Pocar (2005–2008)

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Prosecutor v Vinko Martinović (Decision of the President on the Application for Pardon or Commutation of Sentence of Vinko Martinović) IT-98-34-ES (22 January 2010)

Prosecutor v Mitar Vasiljević (Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Mitar Vasiljević) IT-98-32-ES (12 March 2010)

Prosecutor v Mlado Radić (Decision of President on Application for Pardon or Commutation of Sentence of Mlado Radić) IT-98-30/1-ES (23 April 2010)

Prosecutor v Dario Kordić (Decision of President on Application for Pardon or Commutation of Sentence of Dario Kordić) IT-95-14/2-ES (13 May 2010)

Prosecutor v Dragan Zelenović (Decision of President on Application for Pardon or Commutation of Sentence of Dragan Zelenović) IT-96-23/2-ES (10 June 2010)

Prosecutor v Duško Sikirica (Decision of President on Early Release of Duško Sikirica) IT-95-8-ES (21 June 2010)

Prosecutor v Milan Gvero (Decision of President on Early Release of Milan Gvero) IT-05-88-ES (28 June 2010)

Prosecutor v Momčilo Krajišnik (Decision of President on Early Release of Momčilo Krajišnik) IT-00-39-ES (26 July 2010)

Prosecutor v Zoran Žigić (Decision of President on Early Release of Zoran Žigić) IT-98-30/1-ES (8 November 2010)

Prosecutor v Ivica Rajić (Decision of President on Early Release of Ivica Rajić) IT-95-12-ES (31 January 2011)

Prosecutor v Darko Mrda (Decision of President on Early Release of Darko Mrda) IT-02-59-ES (1 February 2011)

*Prosecutor v Blagoje Simić (*Decision of President on Early Release of Blagoje Simić) IT-95-9-ES (15 February 2011)

Prosecutor v Johan Tarčulovski (Decision of President on Early Release of Johan Tarčulovski) IT-04-82-ES (23 June 2011)

Prosecutor v Veselin Šljivančanin (Decision of President on Early Release of Veselin Šljivančanin) IT-95-13/1-ES (5 July 2011)

Prosecutor v Momčilo Krajišnik (Decision of President on Early Release of Momčilo Krajišnik) IT-00-39-ES (11 July 2011)

Prosecutor v Milomir Stakić (Decision of President on Early Release of Milomir Stakić) IT-97-24-ES (15 July 2011)

Prosecutor v Ivica Rajić (Decision of President on Early Release of Ivica Rajić) IT-95-12-ES (22 August 2011)

Prosecutor v Dragan Obrenović (Decision of President on Early Release of Dragan Obrenović) IT-02-60/2-ES (21 September 2011)

Prosecutor v Shefqet Kabashi (Decision of President on Early Release of Shefqet Kabashi) IT-04-84-R77.1-ES (28 September 2011)

Prosecutor v Dragan Zelenović (Decision of President on Early Release of Dragan Zelenović) IT-96-23/2-ES (21 October 2011)

A.6 Under President Theodor Meron (2011–2015)

Prosecutor v Vinko Martinović (Decision of the President on Early Release of Vinko Martinović) IT-98-34-ES (12 December 2011)

Prosecutor v Vidoje Blagojević (Decision of the President on Early Release of Vidoje Blagojević) IT-02-60-ES (3 February 2012)

Prosecutor v Momčilo Krajišnik (Decision of the President on Early Release of Momčilo Krajišnik) IT-00-39-ES (8 November 2012)

Prosecutor v Dragan Zelenović (Decision of the President on Early Release of Dragan Zelenović) IT-96-23/2-ES (30 November 2012)

Prosecutor v Haradin Bala (Public Redacted Version of the 28 June 2012 Decision of the President on Early Release of Haradin Bala) IT-03-66-ES (9 January 2013)

Prosecutor v Mlado Rajić (Public Redacted Version of 13 February 2012 Decision of the PResident on Early Release of Mlado Rajić) IT-98-30/1-ES (9 January 2013)

Prosecutor v Mladen Naletilić (Public Redacted Version of the 29 November 2012 Decision of the President on Early Release of Mladen Naletilić) IT-98-34-ES (26 March 2013)

Prosecutor v Radomir Kovač (Public and Redacted Version of the 27 March 2013 Decision of President on Early Release of Radomir Kovač) IT-96-23&23/l-ES (3 July 2013)

Prosecutor v Johan Tarčulovsk (Decision of the President on Early Release of Johan Tarčulovski) IT-04-82-ES (23 June 2011)

Prosecutor v Momčilo Krajišnik (Decision of the President on Early Release of Momčilo Krajišnik) IT-OO-39-ES (2 July 2013)

Prosecutor v Momčilo Krajišnik (Public Redacted Version of the 10 July 2013 Decision of the President on Early Release of Dragoljub Ojdanić) IT-05-87-ES.1 (29 August 2013)

Prosecutor v Mile Mrkšić (Decision of the President on the Early Release of Mile Mrkšić) IT-95-13/1-ES.2 (13 December 2013)

Prosecutor v Darko Mrda (Decision of President on Early Release of Darko Mrda) IT-02-59-ES (18 December 2013)

Prosecutor v Dragan Nikolić (Decision of President on Early Release of Dragan Nikolić) IT-94-2-ES (16 January 2014)

Annex B: ICTR

Prosecutor v Ruggiu (Decision of the President on the Application for Early Release of Georges Ruggiu) No. ICTR-97-32-S (12 May 2005)

Prosecutor v Rutaganira (Decision on Request for Early Release) No. ICTR-95-IC-T (2 June 2006)

Prosecutor v Rutaganira (Decision on Appeal of a Decision of the President on Early Release) No. ICTR-95-IC-AR (24 August 2006)

Prosecutor v Imanishimwe (Decision on Samuel Imanishimwe's Application for Early Release) No. ICTR-99-46-S (30 August 2007)

Prosecutor v Rutaganira (Decision on the Motion for Reconsideration of the Denial of Early Release) No. ICTR-1995-IC-R73 (13 February 2008)

Prosecutor v Bagaragaza (Decision on the Early Release of Michael Bagaragaza) No. ICTR-05-86-S (24 October 2011)

Prosecutor v Rugambarara (Decision on the Early Release Request of Juvenal Rugambarara) No. ICTR-00-59 (8 February 2012)

Prosecutor v Muvunyi (Decision on Tharcisse Muvunyi's Application for Early Release) No. ICTR-00-055A-T (6 March 2012)

Annex C: IRMCT

C.1 Originating from ICTR

Prosecutor v Paul Bisengimana (Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application) MICT-12-07 (11 December 2012)

Prosecutor v Omar Serushago (Public Redacted Version of Decision of the President on the Early Release of Omar Serushago) MICT-12-28-ES (13 December 2012)

Prosecutor v Obed Ruzindana (Decision of the President on the Early Release of Obed Ruzindana) MICT-12-10-ES (13 March 2014)

Prosecutor v Gérard Ntakirutimana (Public Redacted Version of the 26 March 2014 Decision of the President on the Early Release of Gérard Ntakirutimana) MICT-12-17-ES (24 April 2014)

Prosecutor v Innocent Sagahutu (Public Redacted Version of the 9 May 2014 Decision of the President on the Early Release of Innocent Sagahutu) MICT-13-43-ES (13 May 2014)

Prosecutor v Youssouf Munyakazi (Public Redacted Version of the 22 July 2015 Decision of the President on the Early Release of Youssouf Munyakazi) MICT-12-18-ES.1 (22 July 2015)

Prosecutor v Aloys Simba (Decision of the President on the Early Release of Aloys Simba) MICT-14-62-ES.1 (2 February 2016)

Prosecutor v Alphonse Nteziryayo (Decision of the President on the Early Release of Alphonse Nteziryayo) MICT-15-90 (9 March 2016)

Prosecutor v Laurent Semanza (Decision of the President on the Early Release of Laurent Semanza) MICT-13-36-ES (9 June 2016)

Prosecutor v Dominique Ntawukulilyayo (Decision of the President on the Early Release of Dominique Ntawukulilyayo) MICT-13-43-ES (8 July 2016)

Prosecutor v Emmanuel Rukundo (Public Redacted Version of the 19 July 2016 Decision of the President on the Early Release of Emmanuel Rukundo) MICT-13-35-ES (5 December 2016)

Prosecutor v Ferdinand Nahimana (Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana) MICT-13-37-ES.1 (5 December 2016)

Prosecutor v Aloys Simba (Public Redacted Version of the President's 7 January 2019 Decision of the President on the Early Release of Aloys Simba) MICT-14-62-ES.1 (7 January 2019)

C.2 Originating from ICTY

Prosecutor v Milomir Stakić (Decision of the President on Sentence Remission of Milomir Stakić) MICT-13-60-ES (17 March 2014)

Prosecutor v Ranko Češić (Public Redacted Version of the 30 April 2014 Decision of the President on the Early Release of Ranko Češić) MICT-14-66-ES (28 May 2014)

Prosecutor v Dario Kordić (Public Redacted Version of the 21 May 2014 Decision of the President on the Early Release of Dario Kordić) MICT-14-68-ES (6 June 2014)

Prosecutor v Zoran Žigić (Public Redacted Version of the 10 November 2014 Decision of the President on the Early Release of Zoran Žigić) MICT-14-81-ES.1 (23 December 2014)

Prosecutor v Vinko Pandurević (Public Redacted Version of the 9 April 2015 Decision of the President on the Early Release of Vinko Pandurević) MICT-15-85-ES.1 (10 April 2015)

Prosecutor v Sreten Lukić (Decision on Sreten Lukić's Request for Determination by the President of Time Served) MICT-14-67-ES.4 (29 May 2015)

Prosecutor v Stanislav Galić (Public Version of the 5 December 2014 Decision with Reasons to Follow on the Early Release of Stanislav Galić) MICT-14-83-ES (23 June 2015)

Prosecutor v Stanislav Galić (Reasons for the President's Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion) MICT-14-83-ES (23 June 2015)

Prosecutor v Nikola Šainović (Public Redacted Version of the 10 July 2015 Decision of the President on the Early Release of Nikola Šainović) MICT-14-67-ES.1 (27 August 2015)

Prosecutor v Dragan Zelenović (Public Redacted Version of the 28 August 2015 Decision of the President on the Early Release of Dragan Zelenović) MICT-15-89-ES (15 September 2015)

Prosecutor v Momir Nikolić (Public Redacted Version of the 14 March 2014 Decision on Early Release of Momir Nikolić) MICT-14-65-ES (12 October 2015)

Prosecutor v Drago Nikolić (Public Redacted Version of the 20 July 2015 Decision of the President on the Application for Early Release or Other Relief of Drago Nikolić) MICT-15-85-ES.4 (13 October 2015)

Prosecutor v Vladimir Lazarević (Public Redacted Version of the 7 September 2015 Decision of the President on the Early Release of Vladimir Lazarević) MICT-14-67-ES.3 (3 December 2015)

In the Case Against Florence Hartmann (Decision of the President on the Early Release of Florence Hartmann) MICT-15-87-ES (29 March 2016)

Prosecutor v Ljubomir Borovčanin (Public Redacted Version of the 14 July 2016 Decision of the President on the Early Release of Ljubomir Borovčanin) MICT-15-85-ES.6 (2 August 2016)

Prosecutor v Radislav Krstić (Decision of the President on the Early Release of Radislav Krstić) MICT-13-46-ES.1 (13 December 2016)

Prosecutor v Stanislav Galić (Decision of the President on the Early Release of Stanislav Galić) MICT-14-83-ES (18 January 2017)

Prosecutor v Dragoljub Kunarac (Decision of the President on the Early Release of Dragoljub Kunarac) MICT-15-88-ES.1 (2 February 2017)

Prosecutor v Ljubiša Beara (Public Redacted Version of the 7 February 2017 Decision of the President on the Early Release of Ljubiša Beara) MICT-15-85-ES.3 (16 June 2017)

Prosecutor v Radivoje Miletić (Public Redacted Version of the 26 July 2017 Decision of the President on the Early Release of Radivoje Miletić) MICT-15-85-ES.5 (27 July 2017)

Prosecutor v Goran Jelisić (Public Redacted Version of 22 May 2017 Decision of the President on Recognition of Commutation of Sentence, Remission of Sentence, and Early Release of Goran Jelisić) MICT-14-63-ES (11 August 2017)

Prosecutor v Sreten Lukić (Public Redacted Version of the 30 May 2017 Decision of the President on the Early Release of Sreten Lukić) MICT-14-67-ES.4 (11 August 2017)

Prosecutor v Milomir Stakić (Decision of the President on Sentence Remission of Milomir Stakić) MICT-13-60-ES (6 October 2017)

Prosecutor v Berislav Pušić (Public Redacted Version of the 20 April 2018 Decision of the President on the Early Release of Berislav Pušić) MICT-17-112-ES.1 (24 April 2018)

Prosecutor v Sreten Lukić (Decision of the President on the Early Release of Sreten Lukić) MICT-14-67-ES.4 (17 September 2018)

Prosecutor v Radivoje Miletić (Decision of the President on the Early Release of Radivoje Miletić) MICT-15-85-ES.5 (23 October 2018)

Prosecutor v Valentin Ćorić (Further Redacted Public Redacted Version of the Decision of the President on the Early Release of Valentin Ćorić and Related Motions) MICT-17-112-ES.4 (16 January 2019)

Annex D: ICTY (general case-law)

Prosecutor v Mrksić, Dokmanović et al (Decision on the Motion for Release by the Accused Slavko Dokmanović) IT-95-13a-PT (22 October 1997)

Prosecutor v Aleksovski (Decision on Prosecutor's Appeal on Admissibility of Evidence) IT-95-14/1 (16 February 1999)

Prosecutor v Delalić et al (Judgement) IT-96-21-A (20 February 2001)

Prosecutor v Prlić et al (Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence) IT-04-74-AR73.6 (23 November 2007)

Prosecutor v Hartmann (Judgement) IT-02-54-R77.5-A (19 July 2011)

Annex E: European Commission and Court of Human Rights

E.1 European Commission of Human Rights

Hogben v United Kingdom App no 11653/85 (European Commission of Human Rights, 3 March 1986)

Hosein v United Kingdom App no 26293/95 (European Commission of Human Rights, 28 February 1996)

L.-G.R. v Sweden App no 27032/95 (European Commission of Human Rights, 15 January 1997)

E.2 ECtHR

Handyside v the United Kingdom App no 5493/72 (ECtHR, 7 December 1976)

Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986)

The Sunday Times v the United Kingdom (no 1) App no 6538/74 (ECtHR, 26 April 1979)

Niemietz v Germany App no 13710/88 (ECtHR, 16 December 1992)

Guerra and Others v Italy App no 14967/89 (ECtHR, 19 February 1998)

Pretty v UK App no 2364/02 (ECtHR, 29 April 2002)

Sommerfeld v. Germany App no 31871/96 (ECtHR, 8 July 2003) [GC]

Uttley v UK (Admissibility) App no 36946/03 (ECtHR, 29 November 2005)

Jalloh v Germany App no 54810/00 (ECtHR, 11 July 2006) [GC]

Behrami and Behrami v. France App no 71412/01 (ECtHR, 2 May 2007); *Saramati v. France, Germany and Norway* App no 78166/01 (ECtHR, 2 May 2007) [GC]

Berić and others v. Bosnia and Herzegovina App nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 (ECtHR, 16 October 2007)

Kafkaris v Cyprus App no 21906/04 (ECtHR, 12 February 2008) [GC]

Blagojević v The Netherlands App no 49032/07 (ECtHR, 9 June 2009)

Galić v The Netherlands App no 22617/07 (ECtHR, 9 June 2009)

Enea v Italy App no 74912/01 (ECtHR, 17 September 2009) [GC]

Scoppola v Italy (no. 2) App no 10249/03 (ECtHR, 17 September 2009) [GC]

M v Germany App no 19359/04 (ECtHR, 17 December 2009)

Sejdić and Finci v Bosnia and Herzegovina App nos. 27996/06 and 34836/06 (ECtHR, 22 December 2009) [GC]

Nunez v Norway App no 55597/09 (ECtHR, 28 June 2011)

Palomo Sánchez and Others v Spain App nos 28955/06, 28957/06, 28959/06 and 28964/06 (ECtHR, 12 September 2011) [GC]

G v Germany App no 65210/09 (ECtHR, 7 June 2012)

K v Germany App no 61827/09 (ECtHR, 7 June 2012)

Giza v Poland Ap no 1997/11 (ECtHR, 23 October 2012)

P and S v Poland App no 57375/08 (ECtHR, 30 October 2012)

Jehovah's Witnesses of Moscow v Russia App no 302/02 (ECtHR, 22 November 2012)

Vinter and others v United Kingdom App nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013) [GC]

Del Río Prada v Spain App no 42750/09 (ECtHR, 21 October 2013) [GC]

A.H. and Others v Russia App nos 6033/13, 8927/13, 10549/13, 12275/13, 23890/13, 26309/13, 27161/13, 29197/13, 32224/13, 32331/13, 32351/13, 32368/13, 37173/13, 38490/13, 42340/13 and 42403/13 (ECtHR, 17 January 2017)

Jankauskas v Lithuania (no 2) App no 50446/09 (ECtHR, 27 June 2017)

Annex F: Conditions for Conditional Early Release

F.1 Conditions in *Simba*

I. I have read and understood the following applicable conditions on my early release, as set forth in the present agreement ("Agreement");

II. I agree to fully comply with the conditions of this Agreement as set forth below:

a. I shall have no contact whatsoever, directly or indirectly try to harm, intimidate or otherwise interfere, with victims or witnesses who testified at my trial or the trial of other ICTR-convicted persons, or otherwise interfere in any way with the proceedings of the Mechanism, or the administration of justice;

b. I shall conduct myself honourably and peacefully in the community to which I am released, and shall not engage in secret meetings intended to plan civil unrest or engage in any political activities;

c. I shall not discuss my case, including any aspect of the 1994 Genocide against the Tutsi in Rwanda, with anyone, including the media, other than pro bono counsel, if any, nor will I make any statement denying the 1994 Genocide against the Tutsi in Rwanda;

d. I shall not purchase, possess, use or handle any weapons; and

e. I shall not commit any offence.

III. I understand and agree that if I violate any of the conditions of this Agreement, I will be held in contempt of court, .pursuant to Rule 90 of the Rules of Procedure and Evidence of the Mechanism ("Rules"), and I understand that this Agreement and the decision granting my conditional release will be revoked, and that my conditional release will be terminated;

IV. I understand that under the terms of this Agreement, the State that is willing to accept me into its territory for the purpose of relocation and family reunification, will be obligated to comply with the conditions as set forth herein, pursuant to Article 28 of the Statute of the Mechanism, and I agree that if the State concerned has reason to believe that 1 have failed to comply with any requirement of this Agreement or if I pose a risk of harm to any person, I shall be detained and transferred to the Mechanism without need for any further order of the Mechanism and that the President may, after consideration of my alleged violation, hold me in contempt of court, pursuant to Rule 90 of the Rules;

V. V. I understand and agree that unless this Agreement is revoked or modified, I will be subject to the terms and conditions of this Agreement until the expiration of my sentence on 27 November 2026.

VI. I agree that any change in the foregoing conditions can only be authorised by the President of the International Residual Mechanism for Criminal Tribunals;

F.2 Conditions in *Ćorić*

a. Ćorić shall have no contact whatsoever, directly or indirectly try to harm, intimidate or otherwise interfere, with victims or witnesses who testified at his trial or the trial of other ICTY-convicted persons, or otherwise interfere in any way with the proceedings of the Mechanism, or the administration of justice;

b. Ćorić shall conduct himself honourably and peacefully in the community to which he is released, and shall not engage in secret meetings intended to plan civil unrest or engage in any political activities;

c. Ćorić shall not discuss his case, including any aspect of the events in the former Yugoslavia that were the subject of his trial, with anyone, including the media, other than pro bono counsel, if any;

d. Ćorić shall not purchase, possess, use or handle any weapons;

e. Ćorić shall not commit any offence;

f. Ćorić shall be held in contempt of court, pursuant to Rule 90 of the Rules, if he violates any of the conditions as stated herein;

g. The decision granting Ćorić conditional release shall be revoked if he violates any of the conditions as stated herein, and his conditional release will be terminated;

h. Ćorić shall be subject to the terms of the conditions as stated herein, unless these conditions are revoked or modified, until the expiration of his sentence; and

i. Any change in the foregoing conditions can only be authorised by the President.