



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

Case No. IT-96-23/2-ES
Date: 21 October 2011
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Patrick Robinson, President

Registrar: Mr. John Hocking

Decision: 21 October 2011

PROSECUTOR

v.

DRAGAN ZELENOVIĆ

PUBLIC

**DECISION OF PRESIDENT ON EARLY RELEASE OF
DRAGAN ZELENOVIĆ**

The Office of the Prosecutor:

Mr. Serge Brammertz

Mr. Dragan Zelenović

The Kingdom of Belgium

1. 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 (“Tribunal”) has been advised by the authorities of the Kingdom of Belgium (“Belgium”) that Mr. Dragan Zelenović is eligible for early release in accordance with Belgian law.¹

A. Background

2. On 26 August 2011, the Registry informed me of notification received from the Federal Department of Justice of Belgium, pursuant to Article 28 of the Statute of the Tribunal (“Statute”), Rules 124 and 125 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), and paragraph 1 of the Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal (“Practice Direction”),² that Mr. Zelenović will become eligible for early release under the national laws of Belgium after having served one-third of his sentence.³

3. On 27 September 2011, the Registry, pursuant to paragraph 3(b) of the Practice Direction, provided me with a letter from the Belgian authorities conveying a report regarding Mr. Zelenović’s custodial behaviour as well as a psychosocial report.⁴

4. On 27 September 2011, the Registry, pursuant to paragraph 3(c) of the Practice Direction, provided me with a memorandum from the Senior Legal Advisor to the Prosecutor regarding the extent of Mr. Zelenović’s cooperation with the Office of the Prosecutor.⁵

5. All of the above materials were furnished to Mr. Zelenović on 4 October 2011.⁶ Mr. Zelenović did not respond with comments on the materials furnished to him, as he is entitled to do under paragraph 5 of the Practice Direction.

B. Proceedings Before the Tribunal

6. Mr. Zelenović’s was initially indicted on 19 June 1996, together with seven other persons.⁷ The indictment was confirmed on 26 June 1996.⁸ An amended indictment was filed on

¹ Memorandum from the Registrar to the President, dated 26 August 2011 (“Memorandum of 26 August 2011”).

² IT/146/Rev.3, 16 September 2010.

³ Memorandum of 26 August 2011.

⁴ Memorandum from the Registrar to the President, dated 27 September 2011 (“Memorandum of 27 September 2011”).

⁵ Memorandum of 27 September 2011.

⁶ Memorandum from the Registrar to the President, dated 20 October 2011.

⁷ *Prosecutor v. Dragoljub Kunarać et al.*, Case No. IT-96-23 & 23/1, Indictment, 19 June 1996.

⁸ *Prosecutor v. Dragoljub Kunarać et al.*, Case No. IT-96-23 & 23/1, Review of Indictment Pursuant to Article 19(1) of the Statute, 26 June 1996.

7 October 1999.⁹ A further amended indictment (“indictment”) was filed on 20 April 2001.¹⁰ The indictment charged Mr. Zelenović with seven counts of torture and rape as crimes against humanity and seven counts of torture and rape as violations of the laws or customs of war.¹¹

7. Mr. Zelenović lived in hiding until he was arrested on 22 August 2005.¹² On 8 June 2006, Mr. Zelenović was transferred to Bosnia and Herzegovina.¹³ Two days later, on 10 June 2006, he was transferred to the Tribunal and detained at the United Nations Detention Unit (“UNDU”).¹⁴

8. On 14 December 2006, the Prosecution and the Defence jointly filed a motion for consideration of a plea agreement pursuant to Rule 62 *ter* of the Rules (“Plea Agreement”).¹⁵ According to the Plea Agreement, Mr. Zelenović agreed to plead guilty to seven counts of crimes against humanity, pursuant to Article 7(1) of the Statute, three of which charge torture, under Article 5(f) of the Statute, and four of which charge rape, under Article 5(g) of the Statute.¹⁶ In the Plea Agreement, the Prosecution agreed to withdraw the remaining charges against Mr. Zelenović at the time of the acceptance of the guilty plea by the Trial Chamber, and Mr. Zelenović agreed to cooperate with the Office of the Prosecutor, including testifying at any trial before the Tribunal.¹⁷ On 16 January 2007, the parties filed an annex to the Plea Agreement, consisting of a redacted and revised copy of the indictment reflecting the charges and underlying incidents to which Mr. Zelenović agreed to plead guilty.¹⁸

9. On 17 January 2007, Mr. Zelenović pleaded guilty to:

- aiding and abetting the rape of victim FWS-75 as a crime against humanity;
- committing the torture and rape of victim FWS-87 as crimes against humanity;
- co-perpetrating the rape of victim FWS-87 and two unidentified women as crimes against humanity;

⁹ *Prosecutor v. Dragoljub Kunarać et al.*, Case No. IT-96-23 & 23/1, Amended Indictment, 7 October 1999.

¹⁰ *Prosecutor v. Gojko Janković et al.*, Case No. IT-96-23/2-I, Amended Indictment, 20 April 2001 (“Indictment”).

¹¹ Indictment, paras 5.9, 6.14, 7.26, 9.3.

¹² *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-S, Sentencing Judgement, 4 April 2007 (“Sentencing Judgement”), para. 4.

¹³ Sentencing Judgement, para. 4.

¹⁴ *Id.*

¹⁵ *Id.* at para. 10; *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-PT, Joint Motion for Consideration of Plea Agreement Between Dragan Zelenović and the Office of the Prosecutor Pursuant to Rule 62 *ter*, 14 December 2006 (“Plea Agreement”).

¹⁶ Sentencing Judgement, para. 10; Plea Agreement, para. 2.

¹⁷ Sentencing Judgement, para. 10; Plea Agreement, paras 3, 9.

¹⁸ Sentencing Judgement, paras 11-12; *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-PT, Joint Submission of Annex to Plea Agreement, 16 January 2007.

- committing (three times) the rape and torture of victim FWS-75 and victim FWS-87 as crimes against humanity;
- committing the rape and torture of victim FWS-87 as crimes against humanity;
- co-perpetrating the rape of victim FWS-75 and two unidentified women as crimes against humanity; and
- committing the rape of victim FWS-87 as a crime against humanity.¹⁹

10. The Trial Chamber accepted the guilty pleas and found Mr. Zelenović guilty in accordance with his pleas.²⁰ On 4 April 2007, the Trial Chamber sentenced Mr. Zelenović to 15 years' imprisonment, with credit given for time already served since 22 August 2005, pursuant to Rule 101(C) of the Rules.²¹

11. On 27 April 2007, Mr. Zelenović filed a "Defence Notice for Leave to Appeal Sentencing Judgement".²² On 31 October 2007, the Appeals Chamber dismissed Mr. Zelenović's appeal and affirmed his sentence of 15 years' imprisonment.²³ On 27 February 2008, Mr. Zelenović was transferred to Belgium to serve the remainder of his sentence.²⁴

C. Applicable Law

12. Under Article 28 of the Statute, if, pursuant to the applicable law of the state in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the state concerned shall notify the Tribunal accordingly, and the President, in consultation with the Judges, shall decide the matter on the basis of the interests of justice and the general principles of law. Rule 123 of the Rules echoes Article 28 of the Statute, and Rule 124 of the Rules provides that the President shall, upon such notice, determine, in consultation with the members of the Bureau and any permanent Judges of the sentencing Chamber who remain Judges of the Tribunal, whether pardon or commutation is appropriate. Rule 125 of the Rules provides that, in making a determination upon pardon or commutation of sentence, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of

¹⁹ Sentencing Judgement, para. 13; *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-PT, Hearing, 17 January 2007 ("Hearing"), T. 486, 488-490.

²⁰ Sentencing Judgement, paras 13, 71; Hearing, T. 491-492.

²¹ Sentencing Judgement, paras 71-72.

²² *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-S, Defence Notice for Leave to Appeal Sentencing Judgment, 27 April 2007.

²³ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-A, Judgment on Sentencing Appeal, 31 October 2007, Disposition.

similarly-situated prisoners, the prisoner's demonstration of rehabilitation, and any substantial cooperation of the prisoner with the Prosecution.

13. Article 3(2) of the Agreement Between the United Nations and the Government of the Kingdom of Belgium on Enforcement of Sentences Handed Down by the International Criminal Tribunal for the former Yugoslavia, dated 2 May 2007 ("Enforcement Agreement"), provides that the conditions of imprisonment shall be governed by the laws of Belgium, subject to the supervision of the Tribunal. Article 8(2) provides that the President of the Tribunal shall determine, in consultation with the Judges of the Tribunal, whether pardon or commutation of sentence is appropriate, and the Registrar shall inform Belgium of the President's determination accordingly.

D. Discussion

14. In coming to my decision upon whether it is appropriate to grant early release, I have consulted with the Judges of the Bureau and the permanent Judges of the sentencing Chambers who remain Judges of the Tribunal, pursuant to Rule 124 of the Rules.

1. Treatment of Similarly-situated Prisoners

15. As of 21 August 2010, Mr. Zelenović has served one-third of his sentence and is thus eligible for early release under Belgian law.²⁵ It is the practice of the Tribunal, however, to consider convicted persons to be eligible for early release only when they have served at least two-thirds of their sentence.²⁶ I note that Mr. Zelenović will have served two-thirds of his sentence on approximately 21 August 2015.

²⁴ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-ES, Order Designating the State in which Dragan Zelenović Is to Serve His Prison Sentence, 7 December 2007.

²⁵ Memorandum of 26 August 2011 (Letter from Federal Department of Justice of Belgium to the President, dated 25 August 2011).

²⁶ *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1-ES, Decision of President on Early Release of Shefqet Kabashi, 28 September 2011, para. 13; *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-ES, confidential Decision of President on Early Release of Dragan Obrenović, 21 September 2011, para. 16; *Prosecutor v. Ivica Rajić*, Decision of President on Early Release of Ivica Rajić, 22 August 2011, para. 12; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-ES, Decision of President on Early Release of Milomir Stakić, 15 July 2011, para. 22; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-ES, Decision of President on Early Release of Momčilo Krajišnik, 11 July 2011, para. 21; *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-ES.1, Decision of President on Early Release of Veselin Šljivančanin, 5 July 2011, para. 20; *Prosecutor v. Johan Tarčulovski*, Case No. IT-04-82-ES, Decision of President on Early Release of Johan Tarčulovski, 23 June 2011; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-ES, Decision of President on Early Release of Blagoje Simić, 15 February 2011, para. 20; *Prosecutor v. Darko Mrda*, Case No. IT-02-59-ES, Decision of President on Early Release of Darko Mrda, 1 February 2011, para. 15; *Prosecutor v. Ivica Rajić*, Case No. IT-95-12-ES, Decision of President on Early Release of Ivica Rajić, 31 January 2011, para. 14; *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-ES, Decision of President on Early Release of Zoran Žigić, 8 November 2010, para. 12; *Prosecutor v. Haradin Bala*, Case No. IT-03-66-ES, Decision on Application of Haradin Bala for Sentence Remission, 15 October 2010, para. 14; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-ES, Decision of President on Early Release of Momčilo Krajišnik, 26 July 2010, para. 14; *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010, para. 8; *Prosecutor v. Duško Sikirica*, Case No. IT-95-8-ES, Decision of President on

16. Taking into account the treatment of similarly-situated prisoners, I am of the view that the amount of time that Mr. Zelenović has served for his crimes does not militate in favour of his early release.

2. Gravity of the Crimes

17. The crimes for which Mr. Zelenović has been convicted are of a high gravity. Mr. Zelenović pleaded guilty to seven counts of torture and rape as crimes against humanity. In its Sentencing Judgement, the Trial Chamber pointed out that “[t]orture is among the most serious crimes in international criminal law [...]. Moreover, torture by means of rape is a particularly grave form of torture.”²⁷

18. I also find it instructive to quote the Sentencing Judgement (footnotes omitted):

38. The crimes which Mr. Zelenović has pleaded guilty to were part of a pattern of sexual assaults that took place over a period of several months, and in four different locations, and involved multiple victims. Mr. Zelenović took direct part in the sexual abuse of victims in a number of detention facilities, including the multiple rape of victims FWS-75 and FWS-87. Mr. Zelenović has been found guilty of personally committing nine rapes, eight of which were qualified as both torture and rape. He has also been found guilty of two instances of rape through co-perpetratorship, one of which was qualified as both torture and rape, and one instance of torture and rape through aiding and abetting. Four of the instances of sexual abuse were gang rapes, committed together with three or more other perpetrators. In one of those instances he participated as an aider and abettor in the rape of FWS-75 by at least ten soldiers, which was so violent that the victim lost consciousness. He participated as co-perpetrator in an incident during which the victim was threatened with a gun to her head while being sexually abused. The Trial Chamber finds that the scale of the crimes committed was large and that Mr. Zelenović’s participation in the crimes was substantial.²⁸

19. The Trial Chamber also considered both the vulnerability of the victims and the impact of the crimes on the victims. In this regard, I again find it instructive to quote the Sentencing Judgement (footnotes omitted):

39. An important factor when assessing the gravity of a crime is the vulnerability of the victims. The victims in this case were arrested and detained under brutal conditions for long periods of time. They were unarmed and defenceless. The victims were therefore in a particularly vulnerable situation at the time of the commission of the crime. In addition, victim FWS-87, who was raped by Mr. Zelenović on numerous occasions, was about 15 years old at the time of the

Early Release of Duško Sikirica, 21 June 2010, para. 13; *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-ES, Decision of President on Application for Pardon or Commutation of Sentence of Dragan Zelenović, 10 June 2010, para. 13; *Prosecutor v. Dario Kordić*, Case No. IT-95-14/2-ES, Decision of President on Application for Pardon or Commutation of Sentence of Dario Kordić, 13 May 2010, para. 13; *Prosecutor v. Mlado Radić*, Case No. IT-98-30/1-ES, Decision of President on Application for Pardon or Commutation of Sentence of Mlado Radić, 23 April 2010, paras 12-13; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-ES, Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Mitar Vasiljević, 12 March 2010, para. 14; *Prosecutor v. Dragan Jokić*, Case No. IT-02-60-ES & IT-05-88-R.77.1-ES, Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Dragan Jokić of 8 December 2009, 13 January 2010, para. 14; *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39 & 40/1-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić, 14 September 2009, para. 10.

²⁷ Sentencing Judgement, para. 36 (footnotes omitted).

²⁸ *Id.* at para. 38.

commission of the crimes. This further increases the gravity of the crimes committed against her. Mr. Zelenović was aware, and took advantage of, this vulnerability of the victims.

40. Another important factor is the physical and mental trauma suffered by the victims, even long after the commission of the crime. In 1992, FWS-75 and FWS-87 were 25 and 15 years old, respectively. After their initial arrest, they were taken from one detention centre to another where they were repeatedly sexually abused by Mr. Zelenović and others. The victims of sexual abuse in the detention centres in Foča suffered the unspeakable pain, indignity, and humiliation of being repeatedly violated, without knowing whether they would survive the ordeal. As a result of the violent sexual assaults, the physical and psychological health of many of the victims was seriously damaged. The women and girls in the detention centres lived in constant fear of repeated rapes and sexual assaults. Some became suicidal and others became indifferent to what happened to them. The scars left from the crimes committed against them were deep and might never heal. This, perhaps more than anything, speaks about the gravity of the crimes in this case.²⁹

20. Based upon the foregoing, I am of the view that the high gravity of Mr. Zelenović’s offences is a factor that weighs against his early release.

3. Demonstration of Rehabilitation

21. Paragraph 3(b) of the Practice Direction states that the Registry shall request reports and observations from the relevant authorities in the enforcement state as to the behaviour of the convicted person during his or her period of incarceration and the general conditions under which he or she was imprisoned.

22. A report from the Belgian prison authorities indicates that Mr. Zelenović regularly takes part in open-air activities on his wing and seems completely integrated.³⁰ Mr. Zelenović is employed in the prison’s workshops and seems content with his job.³¹ The report also notes that Mr. Zelenović has not been the subject of any serious disciplinary action.³²

23. A psychosocial report from the Belgian prison authorities also speaks to Mr. Zelenović’s custodial behaviour, noting that his behaviour in detention has been positive.³³ He is described as “a calm detainee who respects the rules, the prison staff and his peers.”³⁴ The report also notes that there has only been one disciplinary report about Mr. Zelenović, approximately three and a half years ago, concerning his refusal to work in the dustiest of workshops due to his respiratory problems.³⁵

24. Paragraph 3(b) of the Practice Direction also envisages reports from the enforcement state regarding the psychological condition of the convicted person during his incarceration, and

²⁹ *Id.* at paras 39, 40.

³⁰ Memorandum of 27 September 2011 (Report from Assistant Prison Warden Regarding Custodial Behaviour, dated 7 September 2011).

³¹ *Id.*

³² *Id.*

³³ Memorandum of 27 September 2011 (Psychosocial Report, dated 19 August 2011).

³⁴ *Id.*

paragraph 8 of the Practice Direction provides that the President may consider any other information that he or she believes to be relevant to supplement the criteria specified in Rule 125 of the Rules.

25. A psychosocial report was drafted by the Belgian prison authorities for the purpose of determining whether Mr. Zelenović should be granted provisional release outside Belgium.³⁶ The report concludes that such provisional release should not be granted.³⁷ I note, however, that Mr. Zelenović did not request provisional release outside of Belgium.³⁸

26. According to the report, Mr. Zelenović does not receive any visits from relatives; however, he is in contact, through letters and phone calls, with his wife.³⁹ Mr. Zelenović does receive “more regular visits” from an Orthodox chaplain and hopes to spend a possible prison leave at the chaplain’s home during the upcoming Orthodox New Year.⁴⁰

27. In relation to his crimes, the psychosocial report describes Mr. Zelenović’s attitude as ambivalent.⁴¹ According to the report, Mr. Zelenović asserts that the charges against him were subject to many negotiations, pursuant to which he admitted full participation in the crimes, but which he also claims to have assumed partial responsibility for acts committed by his subordinates, acts which he regrets.⁴² The report cautions that, as communication was conducted through an intermediary and understanding requires specific socio-cultural elements, “there are many misunderstandings.”⁴³

28. In terms of prospects for reintegration, the report concludes that such prospects cannot be evaluated because Mr. Zelenović has not requested any measures to work towards social reintegration.⁴⁴ As to the risk of recidivism, the report concludes that the risk is “relative given that the [crimes] occurred in a specific socio-political context,” but the report notes that this context no longer affects the region and the “specific framework of various military and paramilitary functions

³⁵ *Id.*

³⁶ Memorandum of 27 September 2011 (Psychosocial Report, dated 19 August 2011).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴⁰ *Id.*

⁴¹ Memorandum of 27 September 2011 (Psychosocial Report, dated 19 August 2011).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

of which [Mr. Zelenović] was part of no longer appear to exist.”⁴⁵ In relation to any risk to victims posed by Mr. Zelenović’s release, the report concludes that such risk is difficult to adjudge.⁴⁶

29. Based on the foregoing, I consider that Mr. Zelenović’s good behaviour during his detention demonstrates some—albeit very limited—rehabilitation, and while the psychosocial report raises some concerns, such as Mr. Zelenović’s ambivalent attitude toward his crimes, the ultimate assessment of the Belgian prison authorities with respect to these concerns is inconclusive. I am therefore of the view that Mr. Zelenović has demonstrated some—albeit very limited—rehabilitation.

4. Substantial Cooperation with the Prosecution

30. Paragraph 3(c) of the Practice Direction states that the Registry shall request the Prosecutor to submit a detailed report of any cooperation that the convicted person has provided to the Office of the Prosecutor and the significance thereof. According to the Office of the Prosecutor, “Mr. Zelenović’s cooperation with the OTP has been in good faith. However, he has not provided any cooperation over and above that required to fulfil the Plea Agreement.”⁴⁷

31. Based upon the foregoing, I consider that Mr. Zelenović’s cooperation militates in favour of his early release, although the fact that he was obligated to provide some of his cooperation pursuant to his plea agreement somewhat diminishes the strength of this factor.

5. Conclusion

32. Taking all the foregoing into account and having considered those factors identified in Rule 125 of the Rules, I consider that, while Mr. Zelenović has demonstrated some—albeit very limited—rehabilitation and some cooperation with the Prosecution, I am of the view that there remain significant factors that weigh against granting him early release. Mr. Zelenović’s crimes are of a high gravity and were committed against particularly vulnerable victims. Further, he has not yet served two-thirds of his sentence. I am therefore of the view that Mr. Zelenović should be denied early release.

33. I note that my colleagues unanimously share my view that Mr. Zelenović should be denied early release.

⁴⁵ *Id.*

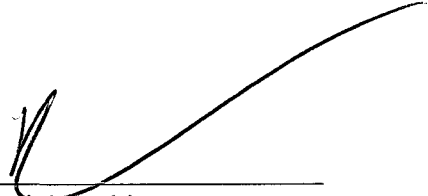
⁴⁶ *Id.*

⁴⁷ Memorandum of 27 September 2011 (Memorandum from the Office of the Prosecutor, dated 26 September 2011), para. 3.

E. Disposition

34. For the foregoing reasons and pursuant to Article 28 of the Statute, Rules 124 and 125 of the Rules, paragraph 8 of the Practice Direction, and Article 8(2) of the Enforcement Agreement, Mr. Dragan Zelenović is hereby DENIED early release.

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



Judge Patrick Robinson
President

Dated this twenty-first day of October 2011,
At The Hague,
The Netherlands.

[Seal of the Tribunal]