

UNITED
NATIONS



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-94-2-ES
Date: 16 January 2014
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Theodor Meron, President
Registrar: Mr. John Hocking
Decision: 16 January 2014

PROSECUTOR

v.

DRAGAN NIKOLIĆ

PUBLIC REDACTED VERSION

DECISION OF PRESIDENT ON EARLY RELEASE OF DRAGAN NIKOLIĆ

Office of the Prosecutor:

Mr. Serge Brammertz

Counsel for Mr. Dragan Nikolić:

Mrs. Jelena Nikolić

The Italian Republic

1. I, Theodor Meron, President 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 (“Tribunal”), am seized of: (i) a request for early release submitted by Dragan Nikolić (“Nikolić”) on 12 April 2013 (“Request for Early Release”);¹ and (ii) a note verbale from the Embassy of Italy to the Netherlands, dated 11 December 2012, notifying me that Nikolić is eligible for a reduction of his sentence by 1125 days under the national law of Italy (“Note Verbale”).² I consider the Request for Early Release and the Note Verbale 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 paragraphs 1, 2, and 6 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”).³

A. Background

2. Nikolić was arrested on 20 April 2000 and was transferred to the United Nations Detention Unit in The Hague on 21 April 2000.⁴

3. Nikolić was charged with individual criminal responsibility for crimes against humanity committed against Bosnian Muslim and other non-Serb civilians in the Sušica detention camp in the Vlasenica Municipality of Bosnia and Herzegovina, where he served as camp commander from June until late September 1992.⁵ On 4 September 2003, Nikolić pleaded guilty to committing persecutions on political, racial and religious grounds, murder, and torture as crimes against humanity, and to aiding and abetting rape as a crime against humanity.⁶

4. On 18 December 2003, Trial Chamber III of the Tribunal (“Trial Chamber”), satisfied that Nikolić’s guilty plea was voluntary, informed, and unequivocal, found Nikolić guilty of the crimes he pled guilty to.⁷ The Trial Chamber sentenced Nikolić to 23 years of imprisonment with credit for time already served since 20 April 2000,⁸ and imposed a minimum term of 15 years to be served.⁹ In determining Nikolić’s sentence, the Trial Chamber noted, *inter alia*, that Nikolić’s acts exhibited

¹ See Request on Behalf of Dragan Nikolić for Early Release, 12 April 2013 (confidential).

² See Internal Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 28 December 2012, transmitting, *inter alia*, Note Verbale.

³ IT/146/Rev.3, 16 September 2010.

⁴ See *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003 (“Trial Judgement”), paras 10-11.

⁵ Trial Judgement, paras 2, 56.

⁶ Trial Judgement, paras 35-36, p. 73.

⁷ Trial Judgement, para. 49.

⁸ Trial Judgement, p. 73.

⁹ Trial Judgement, para. 282.

“systematic sadism”¹⁰ but also considered Nikolić’s admission of guilt and expression of remorse, as well as his cooperation with the Prosecution’s investigation, as mitigating factors.¹¹

5. On 4 February 2005, the Appeals Chamber reduced the sentence imposed by the Trial Chamber to 20 years of imprisonment, with credit given for the time served since 20 April 2000.¹² The Appeals Chamber invalidated the minimum term of 15 years imposed by the Trial Chamber, although it recognized the Trial Chamber’s power to determine whether an accused should serve a minimum term of imprisonment.¹³

6. On 31 May 2006, Italy was designated as the State in which Nikolić was to serve the remainder of his sentence,¹⁴ and on 21 June 2006, Nikolić was transferred to Italy.¹⁵

B. The Request for Early Release

7. On 28 December 2012, the Registrar of the Tribunal (“Registrar”) transmitted to me a Note Verbale from the Embassy of Italy to the Netherlands, informing me that Nikolić has earned a reduction of his sentence by 1125 days in accordance with Italian law, due to his participation in the rehabilitation programmes offered to persons detained in Italy.¹⁶ On 27 March 2013, the Registrar provided me with a series of orders issued by the Italian authorities granting Nikolić partial sentence remissions for the period from 21 June 2006 to 21 October 2012, which, in aggregate, amount to 1125 days.¹⁷

8. Nikolić filed his Request for Early Release on 12 April 2013.

9. Pursuant to paragraphs 3 and 4 of the Practice Direction, on 28 May 2013, the Registrar provided me with (i) an additional note verbale from the Embassy of Italy, dated 21 May 2013, transmitting a report on Nikolić’s conduct in prison and a psychological evaluation, and a report on

¹⁰ Trial Judgement, para. 213.

¹¹ Trial Judgement, para. 274.

¹² See *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-A, Judgement on Sentencing Appeal (“Appeal Judgement”), 4 February 2005, p. 44.

¹³ Appeal Judgement, paras 92-97.

¹⁴ Order Designating the State in Which Dragan Nikolić is to Serve His Prison Sentence, 31 May 2006, p. 2 (issued confidentially, but made public pursuant to the Order Withdrawing the Confidential Status of Order Designating the State in Which Dragan Nikolić is to Serve His Prison Sentence, 29 October 2008).

¹⁵ See Press Release, CT/MOW/1091e, Dragan Nikolić Transferred to Serve Sentence in Italy, 23 June 2006, available at <http://www.icty.org/sid/8732>.

¹⁶ See Note Verbale.

¹⁷ See Internal Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 27 March 2013, and attachments thereto.

Nikolić's mental health; and (ii) a memorandum from the Prosecution, dated 3 May 2013, containing the Prosecution's view on Nikolić's cooperation with the Prosecution.¹⁸

10. In a memorandum dated 18 June 2013, the Registrar informed me that the above documentation was forwarded to Nikolić in the Bosnian/Croatian/Serbian language on 3 June 2013.¹⁹ In the same memorandum, the Registrar forwarded to me an additional note verbale from the Embassy of Italy to the Netherlands, informing the Tribunal that Nikolić filed an application with the Italian courts for a further sentence remission of 45 days for the period from 22 October 2012 to 21 April 2013.²⁰

11. On 6 June 2013, Nikolić submitted a letter to me, in which he reiterates his request for early release and states his belief that the requirements for early release have been met.²¹

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 of the Tribunal, in consultation with the Judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

13. Rules 123 and 124 of the Rules echo Article 28 of the Statute, and Rule 124 of the Rules further provides that the President of the Tribunal, upon notice of a convicted person's eligibility for pardon or commutation of sentence under national law, shall 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 on pardon or commutation of sentence, the President of the Tribunal shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, and any substantial cooperation of the prisoner with the Prosecution.

¹⁸ See Internal Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 28 May 2013, *transmitting* (i) Note Verbale from the Embassy of Italy, dated 21 May 2013 ("May 2013 Note Verbale"), to which were attached (a) a Behaviour Report, dated 17 April 2013 ("Behaviour Report"), and (b) a Psychiatric Report, dated 30 April 2013 ("Psychiatric Report"); and (ii) Internal Memorandum from Michelle Jarvis, Senior Legal Adviser to the Prosecutor, to Augustus de Witt, Chief, Office of the Registrar *ad interim*, dated 3 May 2013 ("Prosecution Memorandum").

¹⁹ See Internal Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 18 June 2013 ("Memorandum of 18 June"), para. 2.

²⁰ See Memorandum of 18 June, *transmitting* Note Verbale from the Embassy of Italy to the Netherlands, dated 11 June 2013.

²¹ See Letter from Dragan Nikolić, dated 6 June 2013 ("Letter of 6 June").

14. Paragraph 1 of the Practice Direction provides that, upon a convicted person becoming eligible for pardon, commutation of sentence, or early release under the law of the enforcing State, the enforcing State shall, in accordance with its agreement with the Tribunal on the enforcement of sentences and, where practicable, at least forty-five days prior to the date of eligibility, notify the Tribunal accordingly. Paragraph 2 of the Practice Direction provides that a convicted person may directly petition the President of the Tribunal for pardon, commutation of sentence, or early release, if he or she believes that he or she is eligible therefor.

15. Article 3(1) of the Agreement Between the Government of the Italian Republic and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, dated 6 February 1997 (“Enforcement Agreement”), provides that the Italian authorities shall be bound by the duration of the sentence imposed by the Tribunal. Article 3(2) of the Enforcement Agreement further states that the conditions of imprisonment shall be governed by the law of Italy, subject to the supervision of the Tribunal. Article 3(3) of the Enforcement Agreement provides that, if a detainee becomes eligible for non-custodial measures, working activities outside the prison, or conditional release under Italian law, the Italian Minister of Justice shall notify the President of the Tribunal accordingly; under Article 3(4), the Registrar shall inform the Italian Minister of Justice of the President’s determination as to whether the requested measure is appropriate or not. Article 8 of the Enforcement Agreement provides, *inter alia*, that, following notification from the Italian authorities of a detainee’s eligibility for pardon or commutation of sentence under Italian law, the President of the Tribunal shall determine, in consultation with the Judges of the Tribunal, whether pardon or commutation of the sentence is appropriate, and the Registrar shall inform the Italian Minister of Justice of the President’s determination accordingly.

D. Discussion

16. In coming to my decision upon whether it is appropriate to grant early release, I have consulted the Judges of the Bureau and the permanent Judges of the sentencing Chamber who remain Judges of the Tribunal.

1. Eligibility under Italian Law and Treatment of Similarly-situated Prisoners

17. Pursuant to the Note Verbale, Nikolić has been granted a reduction of his sentence by 1125 days from the period from 21 June 2006 to 21 October 2012, due to his participation in the rehabilitation programmes offered to persons detained in Italy.²² The Note Verbale adds that, as a

²² See Note Verbale.

result of the successive sentence remissions granted so far, the enforcement of Nikolić's sentence would end on 22 March 2017, instead of 21 April 2020, according to Italian law.²³

18. At the outset, I note that, according to Article 3 of the Enforcement Agreement, Italy is bound to respect the duration of the sentence of persons convicted by the Tribunal, as determined by the Tribunal.²⁴ Indeed, according to the provisions of Article 3(3) and Article 8 of the Enforcement Agreement, the Italian Minister of Justice must notify the Tribunal whenever a person convicted by the Tribunal serving his sentence in Italy becomes eligible for any kind of measure that affects the duration or the nature of his sentence, such as pardon, commutation of sentence, non-custodial measures, or conditional early release. The Italian authorities may not approve such measures without first informing the President of the Tribunal, who retains the discretion to determine, in consultation with the Judges of the Tribunal, whether the suggested measures are appropriate, in light of the Tribunal's Statute, Rules, and practice.²⁵

19. In a recent decision (which also involved sentence remissions granted under Italian law), I adhered to the past practice of this Tribunal to provisionally recognize the sentence remissions granted under the laws of enforcement States, provided that the other criteria of Rule 125 of the Rules also militate in favour of this recognition.²⁶ In this case, however, the issue of whether Nikolić's remissions should be recognized is, in my opinion, moot because, as noted *infra*, Nikolić will have completed two-thirds of his original 20-year sentence by August 2013, regardless of any remissions granted under Italian law.

20. In this respect, I note the well-settled practice of the Tribunal to consider convicted persons eligible for early release only when they have served at least two-thirds of their sentence.²⁷ I note, however, that a convicted person having served two-thirds of his sentence is merely eligible for early release and not entitled to such release, which may only be granted by the President as a matter of discretion.²⁸

21. In this case, the fact that Nikolić will have served two-thirds of his 20-year sentence on 20 August 2013²⁹ is a factor that weighs in favour of his early release, pursuant to the practice of the Tribunal.

²³ See Note Verbale.

²⁴ See Enforcement Agreement, Article 3(1).

²⁵ See Enforcement Agreement, Articles 3(3), 3(4), and 8.

²⁶ See *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-ES, Decision of the President on Sentence Remission of Goran Jelisić, 28 May 2013 (public redacted version) ("*Jelisić Decision*"), paras 19-21, and authorities cited therein.

²⁷ See *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-ES, Decision of President on Early Release of Johan Tarčulovski, 8 April 2013 ("*Tarčulovski Decision*"), para. 17, and authorities cited therein.

²⁸ *Tarčulovski Decision*, para. 17.

²⁹ Request for Early Release, para. 15.

2. Gravity of Crimes

22. In sentencing Nikolić, the Trial Chamber made the following critical findings:

(i) The acts of [Nikolić] were of an enormous brutality and continued over a relatively long period of time. They were not isolated acts. They expressed his systematic sadism. [Nikolić] apparently enjoyed his criminal acts.

(ii) [Nikolić] ignored the pleadings of his brother to stop.

(iii) [Nikolić]'s role was one of a commander in the camp and [Nikolić] knowingly abused that position.

(iv) [Nikolić] abused his power especially *vis à vis* the female detainees in subjecting them to humiliating conditions in which they were emotionally, verbally and physically assaulted and forced to fulfil [Nikolić]'s personal whims, *inter alia*, washing and putting cream on his feet for his personal refreshment or having to relieve themselves in front of everybody else in the hangar.

(v) Beatings were placed in the Indictment under the charge of torture. Due to the seriousness and particular viciousness of the beatings, the Trial Chamber considers this conduct as being at the highest level of torture, which has all of the making of *de facto* attempted murder.

(vi) The detainees were particularly vulnerable and treated rather as slaves than as inmates under [Nikolić]'s supervision.

(vii) Finally, the high number of victims in Sušica camp and the multitude of criminal acts have to be taken into account.³⁰

23. After evaluating such mitigating factors as Nikolić's guilty plea, expression of remorse, and his cooperation with the Prosecution, the Trial Chamber eventually concluded that a substantial reduction of his sentence was warranted.³¹ Nevertheless, I am of the view that the very high gravity of the crimes for which Nikolić was convicted, and to which he pleaded guilty, weighs against his early release.

3. Demonstration of Rehabilitation

24. Rule 125 of the Rules provides that the President of the Tribunal shall take into account a prisoner's demonstration of rehabilitation in determining whether pardon or commutation is appropriate. In addressing the convicted person's rehabilitation, paragraph 3(b) of the Practice Direction states that the Registrar shall

request reports and observations from the relevant authorities in the enforcing 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, and request from such authorities any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration[.]

³⁰ Trial Judgement, para. 213.

³¹ Trial Judgement, para. 274.

25. According to the Behaviour Report – submitted by the authorities of the Milano-Opera prison in which Nikolić has been held since November 2008³² – Nikolić “was not given any disciplinary sanctions and he maintained normal contacts with officials” since 2009, when his detention regime changed and he was placed out of a high-level supervision area.³³ Presently, Nikolić “seems to be calm and positive”, [REDACTED].³⁴ Nikolić has not had direct contact with any family member “in a long time”, [REDACTED].³⁵ The Behaviour Report adds that since 31 May 2012, Nikolić “has not performed any work [REDACTED]”.³⁶

26. The Behaviour Report also contains a section devoted to Nikolić’s psychological evaluation. [REDACTED]³⁷ [REDACTED]³⁸ [REDACTED]³⁹

27. The Psychiatric Report provides a similar account of Nikolić’s psychological state: [REDACTED]⁴⁰ [REDACTED].⁴¹ The Psychiatric Report concludes that Nikolić exhibits “[a]ppropriate behaviour”.⁴²

28. Having carefully reviewed the materials before me, I take note of the fact that Nikolić’s behaviour in detention has been proper and has not given rise to any disciplinary complaints; I also note that Nikolić appears to acknowledge his responsibility for his crimes, to which he pleaded guilty, and even feels that his admission of responsibility “gave him a great emotional lift”.⁴³ [REDACTED], Nikolić does not attempt to lay the blame for his crimes and his long imprisonment on others. In this context, I am of the opinion that Nikolić has demonstrated signs of rehabilitation and thus this factor weighs in favour of his early release.

4. Co-operation with the Prosecution

29. Rule 125 of the Rules states that the President of the Tribunal shall take into account any “substantial cooperation” of the prisoner with the Prosecution. 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 Prosecution and the significance thereof.

³² Behaviour Report, p. 1.

³³ Behaviour Report, p. 2.

³⁴ Behaviour Report, p. 2.

³⁵ Behaviour Report, p. 3.

³⁶ Behaviour Report, p. 2.

³⁷ Behaviour Report, p. 4.

³⁸ Behaviour Report, p. 3.

³⁹ Behaviour Report, p. 3.

⁴⁰ Psychiatric Report, p. 1.

⁴¹ Psychiatric Report, p. 1.

⁴² Psychiatric Report, p. 1 (“Comportamento adeguato” in the original version in Italian).

⁴³ Behaviour Report, p. 3.

30. According to the Prosecution, [REDACTED]⁴⁴ The Prosecution points out, however, that both the parties' and the Trial Chamber's intention was for Nikolić to *actually* serve at least 15 years in prison.⁴⁵

31. I first note that the entry of a guilty plea by an accused person pursuant to a plea agreement with the Prosecution constitutes cooperation with the Prosecution, due to the impact of such a plea on the efficient administration of justice.⁴⁶ [REDACTED]⁴⁷ [REDACTED]⁴⁸ [REDACTED]⁴⁹

32. In its Memorandum, the Prosecution states that, [REDACTED] Nikolić should not be released before he actually serves 15 years in prison – the minimum term of imprisonment that the Trial Chamber determined should be actually served.⁵⁰ I note, however, that, on appeal, the Appeals Chamber overturned the minimum term requirement and imposed a reduced sentence of 20 years.⁵¹

33. In conclusion, I am of the view that [REDACTED].

5. Conclusion

34. In light of the above, and having considered the factors identified in Rule 125 of the Rules, as well as all relevant information on the record, I am of the view that, despite the severe gravity of his crimes – to which Nikolić entered a guilty plea and for which he continues to admit responsibility – Nikolić should be granted early release upon completion of two-thirds of his sentence on 20 August 2013. I am satisfied that Nikolić has shown signs of rehabilitation [REDACTED].

35. I note that my colleagues unanimously share my view that Nikolić should be granted early release.

⁴⁴ Prosecution Memorandum, para. 2.

⁴⁵ See Prosecution Memorandum, para. 3, *citing, inter alia*, Trial Judgement, para. 282.

⁴⁶ See *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-ES, Decision of President on Early Release of Dragan Zelenović, 30 November 2012, para. 21. As recognized by the Trial Chamber in Nikolić's case, the entry of a guilty plea has long been considered as a mitigating factor because "a guilty plea saves the Tribunal the 'effort of a lengthy investigation and trial'." Trial Judgement, para. 231, and authorities cited therein.

⁴⁷ Trial Judgement, para. 259.

⁴⁸ See Letter of 6 June.

⁴⁹ See *Prosecutor v. Vladimir Šantić*, Case No. IT-95-16-ES, Public Redacted Decision of the President on the Application for Pardon or Commutation of Sentence of Vladimir Šantić, 16 February 2009, paras 8, 13-15; *Prosecutor v. Dragan Obrenović*, IT-02-60/2-ES, Public Redacted Decision of President on Early Release of Dragan Obrenović, 29 February 2012, paras 25-28.

⁵⁰ See Prosecution Memorandum, para. 3, *citing, inter alia*, Trial Judgement, para. 282.

⁵¹ Appeal Judgement, paras 92-97.

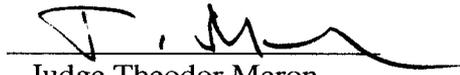
E. Disposition

36. 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 3 of the Enforcement Agreement, Dragan Nikolić is hereby **GRANTED** early release effective 20 August 2013.

37. The Registrar is hereby **DIRECTED** to inform the Italian authorities of this decision as soon as practicable, as prescribed in paragraph 11 of the Practice Direction.

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

Done this 16th day of January 2014,
At The Hague,
The Netherlands.


Judge Theodor Meron
President

[Seal of the Tribunal]