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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-94-1-ES

Date: 17 July 2008

Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: **Judge Fausto Pocar, President**

Registrar: **Mr. Hans Holthuis**

Decision of: **17 July 2008**

PUBLIC REDACTED

DECISION OF THE PRESIDENT ON THE APPLICATION FOR PARDON OR COMMUTATION OF SENTENCE OF DUŠKO TADIĆ

Prosecutor:

Mr. Serge Brammertz

Self-Represented Accused:

Mr. Duško Tadić

1. On 11 June 2007, the German authorities notified the International Criminal Tribunal for the former Yugoslavia ("Tribunal") pursuant to Rule 123 of the Rules of Procedure and Evidence ("Rules") that Duško Tadić had served two-thirds of his sentence and that they were reviewing his eligibility for early release pursuant to German national law.

2. On 19 July 2007, the German authorities further notified the Tribunal that they had decided not to grant early release pursuant to Section 57(1) of the German Criminal Code ("StGB"), because Tadić had not filed a request and had therefore not given his consent.[1] The German authorities also notified the Tribunal that the Public Prosecution Office in Munich had denied Tadić's separate 23 May 2007 request for early release by deportation pursuant to Section 456a of the German Code of Criminal Procedure (""top").[2] As a result, the German authorities confirmed that all proceedings for early release based in German national law had been concluded.[3]

3. On 2 August 2007, Tadić submitted a request for early release directly to the Tribunal.[4] After being informed that the release depended on his consent and eligibility under German national law, Tadić requested on 23 August 2007 that the Tribunal intervene directly with the German authorities or send a delegation from the Tribunal to visit the Straubing prison, where he is detained.[5]

4. On 19 December 2007, the Registry informed me that Tadić refused to provide his formal consent to the German early release proceedings under Section 57(1) StGB, despite having been informed of his right to do so by letters from the Registry dated 2 and 15 August 2007 and in person by a German official on 16 October 2007 at the Tribunal's request. [6] The Registry further informed me that Tadić had directly requested intervention by the

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[1] Under Section 57(1) StGB, "[t]he court shall suspend the execution of the remainder of a fixed term of imprisonment and grant probation, if:
1. two-thirds of the imposed punishment, but not less than two months, have been served;
2. this can be justified upon consideration of the security interests of the general public; and
3. the convicted person consents.
To be considered in making the decision shall be, in particular, the personality of the convicted person, his previous history, the circumstances of his act, the importance of the legal interest threatened in case of recidivism, the conduct of the convicted person while serving his sentence, his living conditions and the effects which can be expected as a result of the suspension".

[2] Under Section 456a(1) StPO, "[t]he executing authority may dispense with executing a prison sentence, default imprisonment or a measure of reform and prevention if the convicted person is to be extradited to a foreign government for another offense or if he is expelled from the territorial scope of this Federal statute".

[3] Memorandum of 25 July 2007 from the Deputy Registrar.

[4] Request for Early Release, 2 August 2007 ("Request").

[5] Letter of 23 August 2007 from D. Tadić to A. Osure, Office of Legal Aid and Detention Matters ("Tadić Letter of 23 August 2007"), attached as Annex 3 to the Memorandum of 19 December 2007 from the Registrar.

[6] Memorandum of 19 December 2007 from the Registrar.

International Committee of the Red Cross ("ICRC") and the Embassy of the Republic of Serbia in The Hague.

5. On 7 January 2008, I formally requested that the Registry undertake the steps prescribed in Article 2 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 Tribunal ("Practice Direction")[7] and request the relevant reports from the German prison authorities and from the Prosecutor of the Tribunal.[8] On 27 May 2008, the Registry forwarded to me a letter from the German authorities dated 21 May 2008 and a confidential memorandum from the Office of the Prosecutor ("Prosecution") dated 22 January 2008.[9]

6. The initial indictment against Duško Tadić was issued on 10 February 1995. The indictment alleged that he participated as a member of Serbian armed forces in the attack, destruction, and plunder of Bosnian Muslim and Croat residential areas in the Municipality of Prijedor (Bosnia and Herzegovina) in 1992, as well as the seizure and imprisonment of thousands of the residents under brutal conditions in several detainment camps in the area. In addition, Tadić was accused of physically and psychologically abusing the detainees inside and outside the Omarska camp by torture, sexual assault, killing, and other means.

7. On 7 May 1997, the Trial Chamber issued its Judgement. The Trial Chamber found Tadić guilty of one count of persecution and five counts of inhumane acts as crimes against humanity under Article 5 of the Statute, in addition to five counts of cruel treatment of civilians as violations of the laws and customs of war under Article 3 of the Statute. The Trial Chamber acquitted him on 19 counts of the indictment, including 11 counts of grave breaches of the Geneva Convention under Article 2 of the Statute. Accordingly, the Trial Chamber sentenced him to 20 years of imprisonment. On 15 July 1999, the Appeals Chamber reversed Tadić's acquittal on nine counts of the indictment. In particular, the Appeals Chamber ruled that the Trial Chamber had erred in concluding that the detainee victims were not "protected persons" under the Geneva Conventions and therefore found Tadić guilty of seven counts of grave breaches of the Geneva Convention under Article 2 of the Statute. The Appeals Chamber also ruled that the Trial Chamber committed a factual error as to Tadić's role in the killing of five detainees and subsequently found him guilty of one count of murder as a crime against humanity and one count of murder as a violation of the laws or customs of war. On 11 November 1999, on remand, the Trial Chamber increased Tadić's sentence to 25 years of

[7] IT/146/Rev. 1, 15 August 2006.
[8] Memorandum of 7 January 2008 to the Registrar.
[9] Memorandum of 27 May 2008 from the Registrar.

imprisonment. On 26 January 2000, however, the Appeals Chamber reduced his sentence to 20 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention from the time of his arrest on 12 February 1994. Tadić was transferred to Germany for the enforcement of his sentence on 31 October 2000. Two-thirds of his sentence was served as of 12 June 2007 (*i.e.* 13 years and 4 months of the 20 year sentence imposed).

8. In their most recent letter to the Registrar, the German authorities provided a general update on Tadić's rehabilitation and the status of his incarceration, including a general statement from Straubing Prison dated 26 February 2008.[10] According to the submission, Tadić's behaviour has been acceptable and no particular disciplinary actions have been necessary.[11] The submission also notes that Tadić has been regularly employed in the prison kitchen and that the staff can attest that he reliably fulfils his duties there.[12] Based on the observations of the prison staff, the submission suggests that Tadić has expressed no remorse for his crimes.[13] However, the letter indicated that the prison authorities have not prepared detailed medical or psychological reports because under German national law such reports are to be prepared after early release proceedings are initiated and these proceedings require Tadić's consent.[14] The report from the prison authorities also notes that "there are no longer any grounds to hinder" his deportation pursuant to Section 456a StPO.[15]

9. The report from the Prosecution indicates that Tadić has not provided any cooperation since his final sentencing on 26 January 2000, although the report does not indicate whether any cooperation has actually been sought.[16] Additionally, the Prosecution seeks to place before me other matters not relevant to Tadić's post-conviction cooperation. In particular, the Prosecution's report argues that Tadić's alleged involvement in the falsification of documents during the course of the appeals proceedings is evidence of his lack of cooperation and an attempt to obstruct justice.[17] Additionally, the Prosecution's report insists that Tadić has not

[10] Letter of 21 May 2008 from T Läufer, Embassy of the Republic of Germany in The Hague, to the Registrar ("Letter of 21 May 2008 from the German Embassy"); Letter of 26 February 2008 from Straubing Correctional Institute to the State Prosecutor's Office in Munich, 26 February 2008 ("Straubing Prison Report").
[11] Letter of 21 May 2008 from the German Embassy, p. 1; Straubing Prison Report, p. 1.
[12] Letter of 21 May 2008 from the German Embassy, p. 1; Straubing Prison Report, p. 1.
[13] Letter of 21 May 2008 from the German Embassy, p. 1; Straubing Prison Report, p. 2.
[14] Letter of 21 May 2008 from the German Embassy, p. 2.
[15] Straubing Prison Report, p. 2.
[16] Memorandum of 23 January 2008 from the Office of the Prosecutor to the Registrar, para. 2.
[17] *Ibid.*, paras 3-4.

exhibited good behaviour during the course of his sentence and that this should weigh against granting his early release.[18]

10. The Practice Direction indicates that the Prosecution is to file a report on any cooperation provided by the convicted person and on the significance of that cooperation. It does not permit the Prosecution to make submissions on other matters unless I specifically request it pursuant to Article 2(d) of the Practice Direction. Since the Practice Direction specifically refers to the cooperation of the "convicted person", I consider that this refers only to cooperation provided after the final judgement and sentencing. I also note that the Prosecution is not in a position to comment on Tadić's behaviour while in the custody of the German authorities. It has not been my practice to consider that the Prosecution can provide more relevant information on these matters than what has been provided by the enforcement State and what can be derived from the Tribunal's judgements. Further, I do not consider it appropriate at this stage of the Tribunal's proceedings to change this longstanding practice by allowing the Prosecution to make submissions on a convicted accused's application for early release. Accordingly, I do not believe that the additional material submitted by the Prosecution should be considered in rendering a determination on this request.

11. In his Request, Tadić asks that the Tribunal initiate early release proceedings and outlines several grounds for his eligibility. First, Tadić emphasizes that he does not have a prior criminal record and that he has not violated any laws or prison regulations during the course of his imprisonment.[19] Tadić also argues that he should be eligible since other similarly-situated convicted persons have been granted early release after serving two-thirds of their sentences, noting that he has already served more than the minimum sentence imposed in the final sentencing Judgement.[20] Emphasizing his cooperation with both the Tribunal and domestic authorities, Tadić insists that he fully cooperated with the Tribunal during the contempt proceedings against his former counsel [Redacted.[21] In addition, Tadić emphasizes the hardship he endured during his imprisonment, indicating that he was not eligible for certain privileges reserved for German prisoners, that he had been abused by the other prisoners, and that his family had been financially unable to visit him on a frequent basis.[22] Tadić also notes that he has been regularly employed in the prison kitchen to the satisfaction of the staff.[23] Finally, Tadić cites his original Trial Chamber judgement for the

[18] *Ibid.*, para. 5.
[19] Request, paras 1-2.
[20] *Ibid.*, paras 3-5.
[21] *Ibid.*, paras 7-8
[22] *Ibid.*, paras 9-10, 12.
[23] *Ibid.*, para. 11.

proposition that the Tribunal is not subject to the national laws of Germany and has primacy over national courts, presumably implying that the Tribunal could have ordered early release despite his previous ineligibility under German national law.[24]

12. In his correspondence with the Tribunal and the Embassy of Serbia, Tadić indicated that he had refused to consent to early release proceedings under Section 57(1) StGB primarily because he was concerned that he would not be allowed to return to Serbia and that his conditional release would be subject to abuse by the German authorities.[25] [Redacted]. While Tadić has consistently declined to provide his consent to early release proceedings under Section 57(1) StGB, he has indicated that he repeatedly provided his consent to deportation to Serbia under Section 456a StPO.[26]

13. Reviewing Tadić's eligibility for early release under German national law, I note that Tadić could potentially be eligible for release under two separate procedural mechanisms. Under Section 57(1) StGB, all prisoners are eligible for early release after serving two-thirds of their sentence if the applicant consents to the proceedings and the authorities determine that releasing the individual would not endanger the safety of the general public. To date, however, the German authorities have indicated that Tadić is not eligible for early release under this procedure because he has not consented to the proceedings. Alternatively, under Section 456a StPO, prisoners subject to extradition or expulsion orders may be granted early release through deportation, on the condition that they do not return to Germany during the remainder of the original sentence. Although the German authorities previously rejected Tadić's application for early release pursuant to this provision, the most recent report from the German prison authorities indicates that a committee reviewing his eligibility "came to the conclusion that there are no longer any grounds to hinder a measure pursuant to § 456a StPO".[27] Accordingly, I consider Tadić's current application for early release based on his apparent eligibility for deportation under Section 456a StPO and not pursuant to Section 57(1) StGB.

14. As the procedure under Section 456a stop requires, Tadić is the subject of a non-appealable expulsion order dated 10 December 2001. In fact, based on the most recent letter from the Serbian Embassy, Tadić may have already been transferred to the "expulsion unit" of the Straubing Prison in preparation for his deportation.[28] The Republic of Serbia has also

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[24] *Ibid.*, para. 6.
[25] Tadić Letter of 23 August 2007.
[26] *Ibid.*, para. 15.
[27] Straubing Prison Report, p. 2.
[28] Letter of 9 June 2008 from the Embassy of the Republic of Serbia to the Registry.

expressed its willingness to accept Tadić, provided him with citizenship, and contacted the Tribunal on his behalf to ensure that he is deported there upon release.[29] Although Tadić's request not to be deported to Bosnia and Herzegovina was mistakenly considered as an application for political asylum and may have previously prevented his deportation, Tadić formally notified the German authorities that he did not want to apply for asylum and did not wish to remain in Germany.[30] In addition, he has repeatedly expressed his consent to early release proceedings with deportation to Serbia under Section 456a StPO. As a result, I note that there do not appear to be any barriers to his deportation to Serbia.

15. Although [Redacted] the submissions clearly indicate that Tadić will be deported to Serbia instead. While deportation to Bosnia and Herzegovina would have been likely when he held only Bosnian citizenship, Tadić ensured his right to be deported to Serbia when he secured Serbian citizenship as of 14 March 2006. As a result, the 5 July 2007 letter from the German immigration authorities to the Serbian Consulate clearly indicates that "he holds both Serbian and Bosnian citizenship", but that he "will be deported to the Republic of Serbia as soon as possible".[31]

16. Evaluating his eligibility for early release under Rule 125 of the Rules, I note that Tadić appears to have demonstrated evidence of rehabilitation. As indicated in the letter from the German authorities, Tadić has been regularly employed during his imprisonment and has consistently fulfilled his duties and responsibilities. I also consider that he has not been the subject of any disciplinary actions, despite an apparent tension between Tadić and the prison officials relating to his early release. Although the letter from the German authorities indicates that he does not demonstrate remorse for his crimes, I consider that this observation cannot be afforded great weight in the absence of any psychological report.

17. Notwithstanding the gravity of his crimes, I also note that Tadić has served more than two-thirds of his sentence. Considering that other convicted persons similarly situated have been eligible for early release after serving two-thirds of their sentence, this factor further supports his eligibility for early release.

18. Finally I note that, although Tadić's lack of cooperation with the Prosecution after final sentencing may not support his eligibility for early release, this does not weigh heavily

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[29] Letter of 9 June 2008 from the Embassy of the Republic of Serbia to the Registry.
[30] Report on the Hearing at the Nürnberg JVA of 10 May 2007, attached as part of Annex 5 to the Memorandum of 19 December 2007 from the Registrar.
[31] Letter of 5 July 2007 from H. Müller, Munich District Administration Department, to N. Marković, Consulate General of the Republic of Serbia, attached as part of Annex 5 to the Memorandum of 19 December 2007 from the Registrar.

against his release since the Prosecution does not appear to have sought any such cooperation. Additionally, I consider that any earlier cooperation that Tadić may or may not have provided in connection with the contempt proceedings against his former counsel Milan Vujin are not an appropriate consideration at this stage (*i.e.*, early release), since such a factor will have already been taken into account, if relevant, at the sentencing stage. [Redacted].

19. In accordance with Article 5 of the Practice Direction, I attached the information collected by the Registrar for the consideration of the Bureau and the Judges of the sentencing Chamber and Appeals Chamber that remain Judges of the Tribunal and offered my views on this Request, as expressed above, for consideration by my colleagues.

20. While some of my colleagues expressed doubts as to whether Tadić had actually demonstrated rehabilitation as opposed to good behaviour, none objected to his application being granted.

21. In light of the above, and having considered those factors identified in Rule 125 of the Rules, I am satisfied that the Request should be granted effective immediately. The Registrar is requested to transmit this decision to the authorities of the Government of Germany as soon as practicable.

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

Done this 17th day of July 2008,
At The Hague,
The Netherlands.

Judge Fausto Pocar
President

[Seal of the Tribunal]