



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-04-82-ES
Date: 23 June 2011
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Patrick Robinson, President

Registrar: Mr. John Hocking

Decision: 23 June 2011

PROSECUTOR

v.

JOHAN TARČULOVSKI

PUBLIC

**DECISION OF PRESIDENT ON EARLY RELEASE OF
JOHAN TARČULOVSKI**

The Office of the Prosecutor:

Mr. Serge Brammertz

Counsel for the Accused:

Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz
Mr. Antonio Apostolski
Mr. Jordan Apostolski

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”) is in receipt of a request for early release from Mr. Johan Tarčulovski, who is currently detained at the United Nations Detention Unit (“UNDU”).

A. Background

2. On 16 March 2011, the counsel for Mr. Tarčulovski filed a request for early release 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 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 International Tribunal (“Practice Direction”).¹ Mr. Tarčulovski submits that he is eligible for early release.²

3. On 22 March 2011, I requested that the Registrar obtain the relevant information from the UNDU and the Office of the Prosecutor (“Prosecution”), as prescribed under Article 3 of the Practice Direction.³

4. On 13 April 2011, the Registrar, pursuant to paragraphs 3(b) and 3(c) of the Practice Direction, provided me with a memorandum from the UNDU dated 31 March 2011 regarding Mr. Tarčulovski’s custodial behaviour and a memorandum from the Prosecutor dated 6 April 2011 regarding the extent of Mr. Tarčulovski’s cooperation.⁴

5. All of the above materials were furnished to Mr. Tarčulovski on 19 April 2011.⁵ Mr. Tarčulovski did not respond with comments on the materials furnished to him, as provided for in Article 5 of the Practice Direction.⁶

¹ IT/146/Rev.3, 16 September 2010.

² *Prosecutor v. Johan Tarčulovski and Ljube Boškoski*, Case No. IT-04-82-ES, Tarčulovski’s Request for Early Release, 16 March 2011 (“Request for Early Release”).

³ Memorandum from the President to the Deputy Registrar, 22 March 2011 (“Memorandum of 22 March 2011”).

⁴ Memorandum from the Registrar to the President, 13 April 2011 (“Memorandum of 13 April 2011”).

⁵ Memorandum from the Registrar to the President, 11 May 2011 (“Memorandum of 11 May 2011”).

⁶ Memorandum of 11 May 2011.

B. Proceedings before the Tribunal

6. The initial indictment against Johan Tarčulovski and his co-accused, Ljube Boškoski, was issued on 22 December 2004⁷ and was confirmed on 9 March 2005.⁸ An amended indictment was issued on 2 November 2005,⁹ followed by a second amended indictment (“Indictment”) on 4 April 2006.¹⁰ In the Indictment, the Prosecution charged Mr. Tarčulovski with three counts of the violation of the laws or customs of war pursuant to Article 3 of the Statute: murder; wanton destruction of cities, towns or villages; and cruel treatment.¹¹ The Indictment alleged that Mr. Tarčulovski participated in a joint criminal enterprise under Article 7(1) of the Statute with the goal to direct an unlawful attack on civilians and civilian objects in the village of Ljuboten, which was not justified by military necessity, a crime under Article 3 of the Statute.¹² The Indictment further alleged that Mr. Tarčulovski ordered, planned, instigated as well as aided and abetted, under Article 7(1) of the Statute, the crimes set out in the indictment.¹³ Mr. Tarčulovski was arrested on 14 March 2005 and was transferred to the UNDU on 16 March 2005.¹⁴

7. On 10 July 2008, the Trial Chamber convicted Mr. Tarčulovski of all three counts contained in the Indictment for his role in ordering, under Article 7(1) of the Statute, the commission of offences against ethnic Albanians in Ljuboten in the Former Yugoslav Republic of Macedonia on 12 August 2001.¹⁵ Mr. Tarčulovski was sentenced to 12 years imprisonment and was given credit for time already served since 16 March 2005, pursuant to Rule 101(C) of the Rules.¹⁶

8. On 19 May 2010, the Appeals Chamber dismissed Mr. Tarčulovski’s appeal in its entirety and affirmed the decision of the Trial Chamber.¹⁷

⁷ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-I, Indictment, 22 December 2004.

⁸ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-I, Decision on Review of Indictment, 9 March 2005.

⁹ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Amended Indictment, 2 November 2005.

¹⁰ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Second Amended Indictment, 4 April 2006 (“Indictment”).

¹¹ Indictment, paras 23, 25, 42.

¹² Indictment, paras 3-4.

¹³ Indictment, paras 9-10.

¹⁴ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgement, 10 July 2008 (“Trial Judgement”), para. 609.

¹⁵ Trial Judgement, paras 589, 594, 607.

¹⁶ Trial Judgement, para. 608.

¹⁷ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010 (“Appeal Judgement”), Disposition.

C. Applicable Law

9. 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, 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 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.

10. Although the Statute, Rules, and Practice Direction do not address the situation where a convicted person is detained at the UNDU, rather than in one of the enforcement states, “the conditions for eligibility regarding pardon or commutation of sentence should be applied equally to all individuals convicted and sentenced by the Tribunal” and “the eligibility of individuals serving their sentence at the UNDU must be determined by reference to the equivalent conditions for eligibility established by the enforcement states”.¹⁸

D. Discussion

11. 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. Treatment of Similarly-situated Prisoners

12. Mr. Tarčulovski argues that Macedonian criminal law should be taken into account when considering his early release application, particularly as the Trial Chamber had taken into account

¹⁸ *Prosecutor v. Miroslav Kvočka*, Case No. IT-98-30/1-A, Decision on Application for Pardon or Commutation of Sentence, 30 March 2005, para. 4; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-ES, confidential Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac, 21 June 2005, para. 5; *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010, para. 7.

the general practice regarding prison sentences in the courts of the Former Yugoslav Republic of Macedonia when determining his sentence.¹⁹ According to Article 36, paragraph 2, of the Former Yugoslav Republic of Macedonia Criminal Code, “[t]he condemned that has served one half of a punishment of imprisonment may be released on parole”.²⁰

13. Mr. Tarčulovski has served approximately six years of his 12-year sentence, including time spent in custody up to and including the date of sentencing. However, it is the practice of the Tribunal to consider convicted persons to be eligible for early release only when they have served at least two-thirds of their sentences.²¹ The two-thirds practice has been applied consistently in the past, notwithstanding the domestic law in enforcement States.²² I see no reason why this practice should not be followed in the present case. The mandatory provision in Rule 101(B)(iii) of the Rules directing Trial Chambers to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia in determining sentences does not have a counterpart in Rule 125 of the Rules. Instead, pursuant to Rule 125 of the Rules, I am required to take into account the treatment of similarly-situated prisoners. Accordingly, I am of the view that the time that Mr. Tarčulovski has served for his crimes does not militate in favour of his early release.

14. I note that Mr. Tarčulovski will have served two-thirds of his sentence on approximately 14 March 2013.

¹⁹ Request for Early Release, para. 12; Trial Judgement, para. 602.

²⁰ Criminal Code, as last amended in 2009, Former Yugoslav Republic of Macedonia, Article 36, para. 2 (1996).

²¹ *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 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, 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, 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.

²² See, e.g., *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.

2. Gravity of Crimes

15. Article 125 of the Rules requires me to take into account the gravity of the crimes committed.

16. With respect to gravity, I note that the Trial Chamber recalled in its Judgement that a force of well-armed reserve police, led by Mr. Tarčulovski, committed offences against ethnic Albanians in the village of Ljuboten in the Former Yugoslav Republic of Macedonia on 12 August 2001.²³ The offences perpetrated by the police forces while in the village included killing three men; deliberately destroying or damaging by fire the houses of 12 residents; and very cruelly beating, injuring, or threatening 13 men who had taken shelter in the basements of two houses.²⁴ The Trial Chamber pointed out that all of the victims of these offences were unarmed and offered no physical threat or resistance to the police.²⁵

17. In terms of the impact on victims, the following quotation from the Trial Chamber is instructive:

For the victims who died, the consequences of the conduct of the police were absolute. Close family members must carry the burden of the loss of their loved ones. For the victims who survived, it is apparent that the physical and mental suffering has often been considerable and prolonged. Obviously 12 families suffered the financial and personal loss of their homes and possessions.²⁶

18. With regards to Mr. Tarčulovski's role in these offences, Mr. Tarčulovski points out that the Trial Chamber found that he was not the person that originated the police operation in Ljuboten, neither was he the actual perpetrator of any of the offences, nor had it been established that he participated in a joint criminal enterprise to commit the offences.²⁷ I note that the Trial Chamber found that Mr. Tarčulovski was a relatively junior person in the Ministry of Interior and was carrying out orders of those more senior to him.²⁸ His role was to plan the offences, incite the reserve police he had assembled to carry out the offences, and then order them to perpetrate the

²² Trial Judgement, para. 589.

²³ Trial Judgement, para. 590.

²⁴ Trial Judgement, para. 592.

²⁵ Trial Judgement, para. 593.

²⁶ Request for Early Release, para. 13; Trial Judgement, para. 594.

²⁷ Trial Judgement, para. 594.

crimes.²⁹ The Trial Chamber stated that “[h]is role in ordering the commission of the offences fully and adequately reflects the real gravity of his conduct”.³⁰

19. Based upon the foregoing, I am of the view that Mr. Tarčulovski’s crimes are of a high gravity and that this is a factor that weighs against granting him early release.

3. Demonstration of Rehabilitation

20. Rule 125 of the Rules provides that the President shall take into account the prisoner’s demonstration of rehabilitation. 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.

21. The 31 March 2011 report from the UNDU acknowledges that Mr. Tarčulovski has been respectful to the staff and management of the unit, that he has complied with the Rules of Detention and any instructions given by the Detention Officers, and that there are no negative comments in his custodial record.³¹ Mr. Tarčulovski is described as a man “who is serving his sentence in the best possible way”.³² The Commanding Officer of the UNDU describes Mr. Tarčulovski’s relationships with his fellow detainees as “good and cordial” and says “his presence on the wing has a positive effect on the group dynamics”.³³ Mr. Tarčulovski adds that his fellow inmates are from varying nationalities and that he has never sought to divide them according to their different ethnic groups or religions.³⁴

22. Paragraph 3(b) of the Practice Direction envisages reports from the enforcement States regarding the psychological condition of the convicted person during his or her incarceration, and 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. I note that no psychological or psychiatric reports have been provided by the UNDU. I consider the lack of such reports to be a neutral factor in deciding upon Mr. Tarčulovski’s early release application.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Memorandum of 13 April 2011 (Memorandum from UNDU dated 31 March 2011 regarding Mr. Tarčulovski’s Custodial Behaviour).

³¹ *Ibid.*

³² *Ibid.*

³³ Request for Early Release, para. 9.

23. Mr. Tarčulovski argues that the impact of his incarceration on his wife and two young children should also be taken into account.³⁵ Mr. Tarčulovski's separation from his family is a natural consequence of his conviction and sentence and therefore, in my view, should not significantly weigh in favour of early release. I also note that, according to the Commanding Officer of the UNDU, Mr. Tarčulovski has maintained a close relationship with his wife and receives regular visits from her and their two children.³⁶

24. Based upon Mr. Tarčulovski's good behaviour during his detention at the UNDU, I am of the view that Mr. Tarčulovski has demonstrated some—albeit very limited—rehabilitation, which militates in favour of his early release.

4. Co-operation with the Prosecution

25. Rule 125 of the Rules states that the President shall take into account any substantial co-operation of the prisoner with the Prosecutor. Paragraph 3(c) of the Practice Direction states that the Registry shall request the Prosecutor to submit a detailed report of any co-operation that the convicted person has provided to the Office of the Prosecutor and the significance thereof.

26. On 6 April 2011, the Prosecutor submitted a memorandum stating that Mr. Tarčulovski has not co-operated with the Prosecution in the course of his trial, appeal, or at any point whilst serving his sentence.³⁷ Based upon the foregoing, I consider the factor of co-operation to be a neutral one.

5. Conclusion

27. Taking all the foregoing into account and having considered those factors identified in Rule 125 of the Rules, I consider that, while Mr. Tarčulovski has displayed some—albeit very limited—evidence of rehabilitation, I am of the view that there remain significant factors that weigh against granting him early release. Mr. Tarčulovski's crimes are of a high gravity, involving the killing three men; deliberately destroying or damaging by fire the houses of 12 residents; and very cruelly beating, injuring, or threatening 13 men who had taken shelter.³⁸ These crimes were perpetrated by a force of well-armed reserve police, led by Mr. Tarčulovski.³⁹ Moreover, in respect

³⁴ Request for Early Release, para. 11.

³⁵ Memorandum of 13 April 2011 (Memorandum from UNDU dated 31 March 2011 regarding Mr. Tarčulovski's Custodial Behaviour).

³⁶ Memorandum of 13 April 2011 (Memorandum from the Prosecutor dated 6 April 2011 regarding Mr. Tarčulovski's cooperation with the OTP).

³⁸ Trial Judgement, para. 590.

³⁹ *Ibid.*

of the requirement that the President shall take into account the treatment of similarly-situated prisoners, the practice of the Tribunal is to consider the eligibility of a convicted person only after he has served two-thirds of his sentence; therefore, the fact that Mr. Tarčulovski has only recently completed serving half of his sentence does not weigh in favour of his early release. I am therefore of the view that Mr. Tarčulovski should not be granted early release.

28. I note that my colleagues unanimously share my view that Mr. Tarčulovski should be denied early release.

E. Disposition

29. For the foregoing reasons and pursuant to Article 28 of the Statute, Rules 124 and 125 of the Rules, and paragraph 8 of the Practice Direction, Mr. Johan Tarčulovski is hereby DENIED early release.

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



Judge Patrick Robinson
President

Dated this twenty-third day of June 2011
At The Hague
The Netherlands

[Seal of the Tribunal]