



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: 30 November 2012
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Theodor Meron, President
Registrar: Mr. John Hocking
Decision: 30 November 2012

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. 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”), have been advised by the authorities of the Kingdom of Belgium (“Belgium”) pursuant to Article 28 of the Statute of the Tribunal (“Statute”), Rule 123 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”),¹ that Dragañ Zelenović (“Zelenović”) is eligible for early release in accordance with Belgian law.²

I. BACKGROUND

2. Zelenović, together with seven other persons, was initially indicted on 19 June 1996.³ The indictment was first amended on 7 October 1999,⁴ and then again on 20 April 2001 (“Indictment”).⁵ The Indictment charged 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.⁶ Zelenović was arrested on 22 August 2005⁷ and transferred to Bosnia and Herzegovina on 8 June 2006.⁸ Zelenović was subsequently transferred to the Tribunal and detained at the United Nations Detention Unit (“UNDU”) two days later, on 10 June 2006.⁹

3. On 14 December 2006, the Office of the Prosecutor (“Prosecution”) and Zelenović jointly filed a motion for consideration of a plea agreement pursuant to Rule 62 *ter* of the Rules (“Plea Agreement”).¹⁰ On 17 January 2007, Zelenović pleaded guilty to seven counts of rape and torture as crimes against humanity pursuant to Article 7(1) of the Statute.¹¹

¹ IT/146/Rev.3, 16 September 2010.

² Letter from Willy de Buck, Permanent Representative of Belgium to the International Institutions in The Hague, to Theodor Meron, President of the Tribunal, dated 31 August 2012 (“Letter”), *transmitting* Notification from Pauline Warnotte, Attaché of the Belgian International Humanitarian Law Division, dated 24 August 2012 (“Notification”). While the Letter and Notification were originally submitted to me in French, all references herein are to the Tribunal’s certified English translations. The same is true for all other communications between the Tribunal and the Belgian authorities that are cited herein.

³ *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1, Indictment, 19 June 1996. The indictment was confirmed on 26 June 1996. *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1, Review of Indictment Pursuant to Article 19(1) of the Statute, 26 June 1996.

⁴ *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1, Amended Indictment, 7 October 1999.

⁵ *Prosecutor v. Gojko Janković et al.*, Case No. IT-96-23/2-I, Amended Indictment, 20 April 2001 (“Indictment”).

⁶ Indictment, paras 5.9, 6.14, 7.26, 9.3.

⁷ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-S, Sentencing Judgement, 4 April 2007 (“Sentencing Judgement”), para. 4.

⁸ Sentencing Judgement, para. 4.

⁹ Sentencing Judgement, para. 4.

¹⁰ Sentencing Judgement, 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”). On 16 January 2007, the parties filed an annex to the Plea Agreement,

4. On 4 April 2007, the Trial Chamber convicted Zelenović in accordance with his guilty plea and sentenced him to 15 years imprisonment, with credit given for the time he had already served from 22 August 2005.¹² Zelenović appealed the Sentencing Judgement on 27 April 2007,¹³ which was dismissed by the Appeals Chamber on 31 October 2007.¹⁴ Zelenović was transferred to Belgium on 27 February 2008 to serve the remainder of his sentence.¹⁵

II. THE NOTIFICATION

5. On 31 August 2012, I received notification from the Belgian Department of Justice that Zelenović is eligible for early release under the national laws of Belgium, having served more than one-thirds of his sentence.¹⁶ On 19 October 2012, the Registrar, pursuant to paragraph 3 of the Practice Direction, provided me with a letter from the Belgian authorities conveying a report regarding Zelenović's custodial behaviour, as well as a psychosocial report, and a memorandum from the Senior Legal Advisor to the Prosecutor regarding the extent of Zelenović's cooperation with the Prosecution.¹⁷

6. All of the above materials were furnished to Zelenović on 22 October 2012.¹⁸ Zelenović did not respond to the materials pursuant to paragraph 5 of the Practice Direction.¹⁹

III. APPLICABLE LAW

7. 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 125 of the Rules provides that, in making a determination upon pardon or commutation of

consisting of a redacted and revised copy of the indictment reflecting the charges and underlying incidents to which Zelenović agreed to plead guilty. *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-PT, Joint Submission of Annex to Plea Agreement, 16 January 2007. *See also* Sentencing Judgement, paras 11-12.

¹¹ Sentencing Judgement, para. 10; Plea Agreement, para. 2.

¹² Sentencing Judgement, paras 71-72.

¹³ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-S, Defence Notice for Leave to Appeal Sentencing Judgment, 27 April 2007.

¹⁴ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-A, Judgement on Sentencing Appeal, 31 October 2007 ("Appeals Judgement").

¹⁵ *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.

¹⁶ Notification, pp. 2-3.

¹⁷ Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 19 October 2012 ("19 October Memorandum"), transmitting a Letter from the Belgian Ministry of Justice, dated 16 October 2012, with attachments ("Custodial Report", "Psychosocial Report", and "Anthropological Report", respectively), and a Memorandum from the Prosecution, dated 17 September 2012 ("Prosecution Memorandum").

¹⁸ Memorandum from John Hocking, Registrar, to Judge Theodor Meron, President, dated 7 November 2012 ("7 November Memorandum"), para. 2.

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

8. 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) of the Enforcement Agreement 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.

9. Consistent with Rule 124 of the Rules and paragraph 6 of the Practice Direction, I have consulted members of the Bureau in coming to this decision, including the Vice-President and the Permanent Judges of the Sentencing Chamber who remain Judges of the Tribunal.²⁰

IV. DISCUSSION

1. Eligibility under Belgian Law

10. According to the Notification, Belgian legislation provides that an accused who has served one-third of his sentence is eligible for provisional release.²¹ Zelenović, having served seven years, or roughly half of his sentence, is therefore eligible for provisional release pursuant to Belgian law.²²

2. Gravity of the Crimes

11. Zelenović, having pleaded guilty to seven counts of torture and rape as crimes against humanity, was convicted for crimes which are of a high gravity. In its Sentencing Judgement, the Trial Chamber pointed out that “[t]orture is among the most serious crimes in international criminal

¹⁹ 7 November Memorandum, para. 2.

²⁰ See also Rule 23(a) of the Rules.

²¹ Notification, p. 2 n. 1.

²² Notification, pp. 2-3.

law [...]. Moreover, torture by means of rape is a particularly grave form of torture.”²³ Specifically, the Trial Chamber observed that:

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.²⁴

12. The Trial Chamber further considered both the vulnerability of the victims and the impact of the crimes on the victims, stating that:

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 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.

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.²⁵

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

3. Treatment of Similarly-Situated Prisoners

14. It is the practice of the Tribunal to consider a convicted person eligible for early release when he has served at least two-thirds of his sentence.²⁶ I note, however, that a convicted person

²³ Sentencing Judgement, para. 36 (footnotes omitted).

²⁴ Sentencing Judgement, para. 38 (footnotes omitted).

²⁵ Sentencing Judgement, paras 39-40 (footnotes omitted).

²⁶ See, e.g., *Prosecutor v. Vinko Martinović*, Case No. IT-98-34-ES, Decision of the President on Early Release of Vinko Martinović, 16 December 2011, para. 12; *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-ES, Decision of President on Early Release of Dragan Zelenović, 21 October 2011, para. 15; *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;

having served two-thirds of his sentence is merely eligible for early release and not entitled to such release. Zelenović will have served two-thirds of his sentence on approximately 21 August 2015. Taking into account the treatment of similarly-situated prisoners, the fact that Zelenović has not yet served two-thirds of his sentence is a factor weighing against his release.

4. Demonstration of Rehabilitation

15. The Custodial Report indicates that Zelenović is employed in the prison's workshop, regularly takes part in open-air activities, and appears to be "fully integrated".²⁷ According to the Custodial Report, Zelenović has had about a dozen visitors, mainly from attorneys, and he occasionally makes phone calls to his family in Russia.²⁸ The Custodial Report notes that Zelenović, when interviewed by prison authorities on 3 October 2012, stated that he is not seeking early release out of fear that he would be incarcerated in another state that has an enforcement agreement with the Tribunal.²⁹ In light of Zelenović's position, the Custodial Report concludes that the prison would not support a decision to granting Zelenović release.³⁰

16. The Psychosocial Report, which was compiled following Zelenović's request for prison leave to visit an Orthodox chaplain who works for the prison, notes that Zelenović is still in contact with his sister and communicates with her via letters and phone calls.³¹ Zelenović indicated that he still has the possibility of residing on Russian territory, and that he intends to do so upon release so that he can visit his ex-wife.³² The Psychosocial Report further notes that other than his conviction by the Tribunal, Zelenović has no prior criminal record.³³

17. The Psychosocial Report observes that Zelenović's attitude towards the crimes for which he was convicted "is somewhat ambivalent".³⁴ According to the Report, Zelenović asserts that the charges against him were subject to many negotiations, pursuant to which he admitted full participation in the crimes.³⁵ Zelenović claims, therefore, to have assumed partial responsibility for acts committed by his subordinates, whose actions he regrets.³⁶ In regards to facts and evidence that directly implicate him, Zelenović generally admits that "he had various sexual relations", but

Prosecutor v. Ivica Rajić, Case No. IT-95-12-ES, Decision of the President on Early Release of Ivica Rajić, 22 August 2011, para. 12; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-ES, Decision of the President on Early Release of Milomir Stakić, 18 July 2011, para. 22.

²⁷ Custodial Report, p. 3.

²⁸ Custodial Report, p. 3. *See also* Psychosocial Report, p. 10.

²⁹ Custodial Report, p. 4. *See also* Psychosocial Report, p. 9.

³⁰ Custodial Report, p. 4.

³¹ Psychosocial Report, p. 7.

³² Psychosocial Report, p. 7.

³³ Psychosocial Report, p. 8.

³⁴ Psychosocial Report, p. 8. *See also* Anthropological Report, p. 13.

³⁵ Psychosocial Report, p. 8.

³⁶ Psychosocial Report, p. 8.

“regrets his inability to recall the specific facts”.³⁷ The Psychosocial Report notes that the “investigation [was] conducted through an intermediary” and since “understanding the facts depends entirely on specific socio-cultural elements, “there are many misunderstandings.”³⁸

18. According to the Psychosocial Report, Zelenović’s “behaviour in prison has been very positive.”³⁹ Zelenović is described as “a calm detainee who respects the rules, the prison staff and his peers.”⁴⁰ The Psychosocial Report further notes that there has been only one disciplinary report about Zelenović since his arrival at the prison in February 2008. This report, which was not followed up on, concerned his refusal to work in the dustiest of workshops due to his respiratory problems.⁴¹

19. With respect to the prospect of reintegrating into society, the Psychosocial Report notes that “[t]he risk of committing new and serious offences has reduced considering that the events occurred in a special socio-political context, which no longer affects the country following the territorial compromise”.⁴² The Psychosocial Report goes on to note that the “specific framework of various military and paramilitary functions of which [Zelenović] was part no longer appears to exist.”⁴³ Finally, the Psychosocial Report observes that the risk of endangering victims if Zelenović is released appears to be reduced, provided he does not return to Foča, where he could possibly run into one of his victims. The Psychosocial Report concludes however, that “the difficulty in obtaining information and the anonymous status of the victims in question make it difficult [...] to judge adequately the probability of this risk.”⁴⁴

20. Based on the foregoing, I consider that Zelenović’s good behaviour during his detention demonstrates some rehabilitation, but that the Psychosocial Report raises some concerns, such as Zelenović’s ambivalent attitude toward his crimes. While the ultimate assessment of the Belgian prison authorities with respect to these concerns is inconclusive, on balance I consider the evidence of his rehabilitation to be insufficient to weigh in favour of early release.

³⁷ Psychosocial Report, p. 8.

³⁸ Psychosocial Report, p. 8.

³⁹ Psychosocial Report, p. 10.

⁴⁰ Psychosocial Report, p. 10.

⁴¹ Psychosocial Report, p. 10.

⁴² Psychosocial Report, p. 11.

⁴³ Psychosocial Report, p. 11.

⁴⁴ Psychosocial Report, p. 11.

5. Cooperation with the Prosecution

21. According to the Prosecution, Zelenović “cooperated in accordance with his plea agreement. No additional cooperation has been given.”⁴⁵ I note that the entry of a guilty plea by an accused person constitutes cooperation with the Prosecution. I further note that the Prosecution does not indicate whether it in fact sought additional cooperation from Zelenović in addition to his guilty plea. While accepting that the entry of a guilty plea was a factor taken into account by the Trial Chamber, I am of the view that this factor weighs in favour of Zelenović’s early release, primarily due to the impact such a plea has on the efficient administration of justice.

6. Conclusion

22. Taking all the foregoing into account and having considered those factors identified in Rule 125 of the Rules, I consider that, while Zelenović has demonstrated some rehabilitation and cooperated with the Prosecution in accordance with his plea agreement, there remain significant factors that weigh against granting him early release. 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 and evidence of rehabilitation is ambivalent. I am therefore of the view that Zelenović should be denied early release, a view which is shared unanimously by my colleagues.

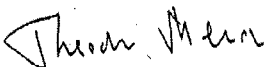
V. DISPOSITION

23. 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, Dragan Zelenović is hereby **DENIED** early release.

24. The Registrar is hereby **DIRECTED** to inform the Belgian 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 30th day of November 2012,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Tribunal]

⁴⁵ Prosecution Memorandum, para. 2.