



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-05-88-ES
Date: 28 June 2010
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THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Patrick Robinson, President

Registrar: Mr. John Hocking

Decision of: 28 June 2010

PROSECUTOR

V.

MILAN GVERO

CONFIDENTIAL

DECISION OF PRESIDENT ON EARLY RELEASE OF MILAN GVERO

Office of the Prosecutor
Mr. Serge Brammertz

The Kingdom of The Netherlands

Counsel for Milan Gvero
Mr. Dragan Krgović and Mr. David Josse

The Republic of Serbia

1. **I, Patrick Robinson**, 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 the “Application for Early Release”, filed by Mr. Milan Gvero on 15 June 2010 (“Application”), made 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. Gvero submits that he is eligible for early release following his sentence of five years of imprisonment by the Trial Chamber, which gave him credit for time served at the United Nations Detention Unit (“UNDU”).²

I. Background

2. On 25 June 2010, the Deputy Registrar submitted a memorandum, pursuant to paragraph 3(b)–(c) of the Practice Direction, attaching a report from the Prosecution on the co-operation of Mr. Gvero; a report from the medical officer of the UNDU on the health of Mr. Gvero; and a report from the Commanding Officer of the UNDU on the behaviour of Mr. Gvero.³

II. Proceedings Before the Tribunal

3. Mr. Gvero was joined to the *Popović et al.* case on 11 November 2005.⁴ The indictment of 4 August 2006 (“indictment”)⁵ alleged that, during the course of a joint criminal enterprise to remove Bosnian Muslims from the Srebrenica and Žepa enclaves, Mr. Gvero was responsible for murder (as a crime against humanity and a violation of the laws or customs of war) and deportation, inhumane acts (forcible transfer), and persecution (as crimes against humanity).⁶ Mr. Gvero surrendered to the custody of the Tribunal on 24 February 2005, shortly after learning of the charges against him.⁷

¹ IT/146/Rev.2, 1 September 2009.

² *Prosecutor v. Milan Gvero*, Case No. IT-05-88, Application for Early Release, 15 June 2010, para. 9 (“Application for Early Release”).

³ Memorandum from the Deputy Registrar to the President, 25 June 2010.

⁴ *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-05-88-PT, Consolidated Amended Indictment, 11 November 2005.

⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Indictment, 4 August 2006 (“Indictment”).

⁶ Indictment, paras 46-92.

⁷ *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, 19 July 2005, para. 11.

4. In its Judgement of 10 June 2010, the Trial Chamber convicted Mr. Gvero of two counts: persecution and inhumane acts (forcible transfer) as crimes against humanity.⁸ It found that “Gvero, with his detailed knowledge of the strategic aim to remove the Bosnian Muslim population from the enclaves, made a significant contribution to the common purpose of the JCE, through his efforts to delay and block international protective intervention.”⁹ The Trial Chamber further noted that “as evidenced by his actions and the forceful manner in which they were carried out, the only reasonable inference is that Gvero also shared the [relevant] intent.”¹⁰ In addition, it found that Mr. Gvero possessed the requisite discriminatory *mens rea* for the crime of persecution, as his acts were carried out on “political, racial or religious grounds.”¹¹

5. In sentencing Mr. Gvero, the Trial Chamber considered his voluntary surrender to the Tribunal as a mitigating factor.¹² It also considered that his old age and deteriorating health should be given some weight in the reduction of his sentence.¹³ The Prosecution was unable to convince the Trial Chamber that there were any aggravating factors.¹⁴ Mr. Gvero was sentenced to five years’ imprisonment, subject to credit for the time already served since his arrest.¹⁵ He has yet to be transferred from the UNDU whither he will serve his sentence.

III. Discussion

6. 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 this determination, 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.

⁸ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010, paras 1826, 1836 (“Trial Judgement”).

⁹ Trial Judgement, para. 1822.

¹⁰ Trial Judgement, para 1822.

¹¹ Trial Judgement, para. 1833.

¹² Trial Judgement, para. 2207.

¹³ Trial Judgement, paras 2208-2209.

¹⁴ Trial Judgement, paras 2204-2206.

¹⁵ Trial Judgement, Chapter IX, Disposition.

7. Rule 102(A)—“Status of the Convicted Person”—provides as follows:

The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 64.

Therefore, once an appeal is pending and while a convicted person is still detained at the UNDU, provisional release by the Appeals Chamber assigned to his appeal is the procedural avenue to be taken for a request for release from detention.¹⁶ However, in the situation where there is no appeal pending and a convicted person is still detained at the UNDU, a request for release may be entertained by the President of the Tribunal.¹⁷ In such circumstances, although the Statute, Rules, and Practice Direction do not address the situation where a convicted person is serving his sentence 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

8. Mr. Gvero has served over 1,500 days in the custody of the Tribunal, which makes up more than two-thirds of his prison term, which the Trial Chamber decided to impose upon him for his crimes.¹⁹ It is the practice of the Tribunal to consider the eligibility of convicted persons for early release when they have served two-thirds of their sentence.²⁰ Taking into account the treatment of

¹⁶ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision of the President on the Early Release of Miroslav Kvočka, 13 December 2002; *Prosecutor v. Veselin Šlijančanin*, Case No. IT-95-13/1-T, confidential and *ex parte* Decision on Request for Early Release or, Alternatively, Motion for Provisional Release, 9 November 2007; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision of the President on Enver Hadžihasanović’s Request for Early Release, 12 April 2007, para. 14; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para 15; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on the Request for Provisional Release of Miroslav Kvočka, 17 December 2003, p. 3; *Prosecutor v. Mile Mrkšić and Veselin Šlijančanin*, Case No. IT-95-13/1-A, Decision on the Motion of Veselin Šlijančanin for Provisional Release, 11 December 2007, p. 3; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Mario Čerkez’s Request for Provisional Release, 12 December 2003; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Decision on Lahi Brahimaj’s Application for Provisional Release, 27 May 2009.

¹⁷ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision of the President on Enver Hadžihasanović’s Request for Early Release, 12 April 2007; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Decision of the President on Amir Kubura’s Request for Early Release, 11 April 2006; *Prosecutor v. Veselin Šlijančanin*, Case No. IT-95-13/1-T, confidential and *ex parte* Decision on Request for Early Release or, Alternatively, Motion for Provisional Release, 9 November 2007.

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.

¹⁹ Application for Early Release, paras 9-10.

²⁰ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-ES, Decision of the President on Application for Pardon or Commutation of Sentence of Dragan Zelenović, 10 June 2010, para. 13; *Prosecutor v. Dario Kordić*, Case No. IT-

similarly-situated prisoners, I am of the view that the amount of time that Mr. Gvero has served militates in favour of his release.

9. With respect to the gravity of Mr. Gvero's crimes, the Trial Chamber found Mr. Gvero guilty of persecution and inhumane acts (forcible transfer) as crimes against humanity.²¹ The Trial Chamber stated that Mr. Gvero, with his "detailed knowledge of the strategic aim to remove the Bosnian Muslim population from the enclaves, made a significant contribution to the common purpose of the JCE, through his efforts to delay and block international protective intervention."²² Mr. Gvero himself admits that the crimes for which he was convicted are grave.²³ I am of the view that the high gravity of his offences is a factor that weighs against his early release.

10. Paragraph 3(b) of the Practice Direction envisages reports from enforcement states regarding the mental condition of the convicted person during his 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 125.²⁴ Moreover, previous decisions have determined that the state of a convicted person's health may be taken into account when the seriousness of his condition makes it inappropriate for him to remain in a prison environment.²⁵ Mr. Gvero has attached to his Application a report of the UNDU medical officer, dated 19 October 2009, stating that Mr. Gvero requires cardiovascular surgery and dental treatment. The medical officer states that "[i]t is imperative that the first phase of the dental treatment, elimination of [the oral] inflammation, is concluded before cardiac surgery is performed" and that "[t]reatment in The Netherlands poses no medical problems." Moreover, the medical officer states that "open h[e]art surgery in general can lead to emotional and psychological problems; and even more so in view of the advanced age of Mr. Milan Gvero." The medical officer comments, "I

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.

²¹ Trial Judgement, paras 1826, 1836.

²² Trial Judgement, para. 1822.

²³ Application for Early Release, para. 11.

²⁴ *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39 & IT-40/1-ES, *Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić*, 14 September 2009, para. 11.

²⁵ *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*, 9 July 2009, para. 20; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-ES, *Decision of the President on the Application for Pardon or Commutation of Sentence of Pavle Strugar*, 16 January 2009, para. 11; cf. *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, para. 19.

understand Mr. Milan Gvero's strong preference for treatment in his home country, as being able to communicate in his own language and confer with his doctors and family presents medical, psychological and social advantages."²⁶

11. The medical officer of the UNDU also submitted a report, dated 25 June 2010, stating as follows:

[Mr. Gvero's cardiac situation] has slowly progressed to the stage where an operation is medically indicated; this could be performed in The Netherlands[.] [Mr. Gvero], however, has a strong preference for [the] operation [to be] performed by "his own" doctors at the VMA in Belgrade. ... I understand his choice[:] open h[e]art surgery is a major operation, often leading to post operative psychological problems notably PTSD. Being operated [upon] in one's home country by a doctor speaking one's own language and from the same cultural background would undoubtedly have a positive effect in the prevention of post operative psychological complication; furthermore, being able to communicate easily with members of one's family would help in surmounting the expected negative emotions. ... It is my opinion that being operated [upon] in one's own country would present important medical advantages.²⁷

It is also stated in this report that Mr. Gvero has been seen regularly by a psychologist as a preventive measure, but that no psychological or psychiatric problems have been diagnosed.²⁸

12. I take note of a memorandum, dated 11 June 2010, from the Commanding Officer of the UNDU, in which he states that "Mr Gvero has a complex medical state and requires an operation to treat a potentially life threatening condition which he has so far refused to have in The Netherlands. This operation is now overdue." The Commanding Officer also requests that Mr. Gvero's application be "acted upon as quickly as possible in order that Mr Gvero can have his treatment in the Region without delay."²⁹

13. Based upon the foregoing, I find that Mr. Gvero does not appear to be suffering any psychological difficulties and therefore that his mental condition is not a factor that bears upon my decision regarding his early release. However, based upon the specific circumstances pertaining to Mr. Gvero's medical situation, I do consider that his urgent need for medical intervention militates in favour of his release.

14. The Commanding Officer of the UNDU submitted a memorandum on 25 June 2010, stating that Mr. Gvero's behaviour towards staff and management of the UNDU has always been respectful and polite and poses no management problems. The Commanding Officer notes that Mr. Gvero appears to behave in a rather detached way with some of his peers, but manages his

²⁶ Application for Early Release, paras 15–17, confidential Annex 1.

²⁷ Memorandum from the Deputy Registrar to the President, 25 June 2010.

²⁸ Memorandum from the Deputy Registrar to the President, 25 June 2010.

²⁹ Memorandum from Commanding Officer of UNDU to Registrar, 11 June 2010.

relationships with them appropriately, and that this appears to be related to his age and lack of patience, rather than any deficiency in normal social skills.³⁰ Based upon the foregoing, I consider that Mr. Gvero has demonstrated some evidence of rehabilitation, which weighs in favour of his early release.

15. On 24 June 2010, the Prosecution submitted a memorandum stating that it has received no cooperation from Mr. Gvero; however, the report does not indicate whether the Prosecution has sought any cooperation from Mr. Gvero.³¹ Under these circumstances, I consider the factor of cooperation to be a neutral one. I also note that the Prosecution informs that it will be appealing the Judgement in relation to Mr. Gvero on legal grounds and in relation to the sentence and that “consideration of early release *may* be premature.”³² Based upon the precedent of the Tribunal and all of the relevant circumstances—in particular the fact that Mr. Gvero has served in the UNDU a period significantly longer than two-thirds of his sentence, that his sentence is currently being enforced pursuant to Rule 102(A) of the Rules as no appeal has been filed yet,³³ and that he is in need of urgent medical attention—I am of the view that it is appropriate to consider the early release of Mr. Gvero.

16. Having consulted the members of the Bureau and the permanent Judges of the Sentencing Chamber who remain Judges of the Tribunal, I note that two of my colleagues share my view that Mr. Gvero should be granted early release.

17. One of my colleagues doubted the severity of Mr. Gvero’s medical condition, expressed his preference that he serve his entire sentence, and was of the view that the decision on his early release should be postponed for two months.

18. Another of my colleagues considered that requests for early release should not be entertained and decided until the Judgement has become final, thus expressing his disagreement with the practice of the Tribunal of entertaining early release applications of convicted persons still at the UNDU before an appeal has been filed. In his view, I should await the deadline for the notices of appeal to be filed, and then either allow the Appeals Chamber to decide on whether Mr. Gvero should be provisionally released (if an appeal is filed) or decide whether Mr. Gvero should be granted early release (if no appeal is lodged). I discern no cogent reasons to break with the practice of the Tribunal (discussed in paragraph 7 of this decision above) and to await the filing of

³⁰ Memorandum from the Deputy Registrar to the President, 25 June 2010.

³¹ Memorandum from Prosecution to Deputy Registrar, 24 June 2010.

³² Memorandum from Prosecution to Deputy Registrar, 24 June 2010 (emphasis added).

³³ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision of the President on Enver Hadžihasanović’s Request for Early Release, 12 April 2007, para. 14

the notices of appeal in this case, especially due to Mr. Gvero's urgent need for medical attention and due to the fact that the parties have been granted an extension of time until 8 September 2010 to file their notices of appeal.³⁴ Furthermore, my colleague did not consider that the medical situation of Mr. Gvero—for the urgency of which he is to some extent himself responsible—justified granting early release in advance of obtaining the usual information pursuant to the Practice Direction. I note that, since my colleague's observations, I have received the information contemplated in the Practice Direction; moreover, I am convinced by the information provided by the medical officer and Commanding Officer of the UNDU that it is both necessary and appropriate to grant early release to Mr. Gvero so that he may be urgently treated for his acute medical conditions as soon as possible.

19. In the particular circumstances presented in the case of Mr. Gvero—his very serious health conditions for which immediate treatment is required (in combination with his relatively advanced age) and the fact that he has served over two-thirds of the sentence imposed upon him by the Trial Chamber—I am of the view that, based upon humanitarian grounds, it is in the interests of justice to grant him early release, despite the high gravity of his crimes.


IV. Disposition

20. For the foregoing reasons and pursuant to Article 28 of the Statute, Rules 124 and 125 of the Rules, and paragraphs 8 and 11 of the Practice Direction, Milan Gvero is hereby GRANTED early release and shall be released from the custody of the Tribunal as soon as practicable and once the administrative procedures have been completed.

³⁴ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Joint Motion for Extension of Time to File Notice of Appeal, 25 June 2010.

21. The Registrar is hereby DIRECTED to lift the confidentiality of this decision, once Milan Gvero has been released.

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



Judge Patrick Robinson
President

Dated this twenty-eighth day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]