

IT-95-13/1-ES.2
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**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-95-13/1-ES.2
Date: 13 December 2013
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Theodor Meron, President
Registrar: Mr. John Hocking
Decision of: 13 December 2013

PROSECUTOR

v.

MILE MRKŠIĆ

PUBLIC REDACTED VERSION

**DECISION OF THE PRESIDENT ON THE EARLY RELEASE
OF MILE MRKŠIĆ**

The Office of the Prosecutor:

Ms. Michelle Jarvis

Mr. Mile Mrkšić

The Republic of Portugal

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 an application for early release from Mr. Mile Mrkšić ("Mrkšić"), filed on 4 June 2013.¹ I consider the Application 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").²

I. BACKGROUND

2. On 15 May 2002, Mrkšić surrendered to the Tribunal and was transferred to the United Nations Detention Unit of the ICTY in The Hague, The Netherlands.³

3. On 16 May 2002, at his initial appearance before Trial Chamber II of the Tribunal ("Trial Chamber"), Mrkšić pleaded not guilty to all the counts in the indictment against him.⁴ On 27 September 2007, the Trial Chamber found Mrkšić guilty of aiding and abetting murder, torture and cruel treatment as violations of the laws or customs of war with respect to events at Ovčara, near Vukovar, on 20 and 21 November 1991.⁵ The Trial Chamber sentenced Mrkšić to a single term of 20 years of imprisonment with credit for time served since 15 May 2002.⁶ On 5 May 2009, the Appeals Chamber of the Tribunal dismissed Mrkšić's appeal in its entirety and affirmed both his convictions and his sentence.⁷

4. On 26 January 2012, the Portuguese Republic was designated as the State in which Mrkšić was to serve the remainder of his sentence.⁸ Mrkšić was transferred to Portugal on 16 August 2012.⁹

¹ See Internal Memorandum from Mr. Gus de Witt, Chief, Office of the Registrar *ad interim*, to Judge Theodor Meron, President, dated 17 June 2013 ("17 June Memorandum"), transmitting, *inter alia*, Letter by Mile Mrkšić, dated 4 June 2013 ("Application").

² IT/146/Rev.3, 16 September 2010.

³ See *Prosecutor v. Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Judgement, 27 September 2007 ("Trial Judgement"), paras 709, 713, 718.

⁴ Trial Judgement, paras 6, 718.

⁵ Trial Judgement, para. 712.

⁶ Trial Judgement, paras 709, 713.

⁷ See *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("Appeal Judgement"), Disposition, p. 169.

⁸ See *Prosecutor v. Mile Mrkšić*, Case No IT-95-13/1-ES.2, Order Designating State in Which Mile Mrkšić is to Serve His Sentence, 26 January 2012, p. 1 (filed confidentially, made public once Mrkšić had been transferred to the Portuguese Republic pursuant to the President's direction, as contained within this order).

⁹ See Press Release, VE/MOW/PR1517e, Mile Mrkšić Transferred to Portugal to Serve Sentence, 17 August 2012, available at <http://www.icty.org/sid/11087>.

II. THE APPLICATION

5. Mrkšić filed the Application, by means of a letter addressed to me, on 4 June 2013. On 31 October 2013, the Registrar of the Tribunal (“Registrar”), in accordance with paragraphs 3 and 4 of the Practice Direction, provided me with: (i) a Memorandum from the Office of the Prosecutor (“Prosecution”), dated 1 July 2013, regarding Mrkšić’s cooperation with the Prosecution (“Prosecution Memorandum”); (ii) a Report of the Director of Monsanto Prison, dated 15 July 2013, regarding Mrkšić’s behaviour while imprisoned and general conditions of imprisonment (“Prison Report”); and (iii) a Briefing note by the Prosecutor General’s Office, dated 1 October 2013, regarding , *inter alia*, Mrkšić’s eligibility for early release under the national law of Portugal (“Briefing Note”).¹⁰

6. In response to the above materials, Mrkšić sent a letter dated 19 November 2013, pursuant to paragraph 6 of the Practice Direction (“November 2013 Letter”).

III. DISCUSSION

7. In coming to my decision on whether it is appropriate to grant Mrkšić’s Application, I have consulted the Judges of the Bureau and the permanent Judges of the sentencing Chamber who remain Judges of the Tribunal, pursuant to Rule 124 of the Rules.

A. Applicable Law

8. 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.

9. Rule 123 of the Rules echoes Article 28 of the Statute, 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 on pardon or commutation of 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

¹⁰ See Internal Memorandum from Mr. Gus de Witt, Chief, Office of the Registrar *ad interim*, to Judge Theodor Meron, President, dated 31 October 2013 (“October Memorandum”).

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

10. 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.

11. Article 3 of the Agreement between the United Nations and the Portuguese Republic on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, dated 19 December 2007 ("Enforcement Agreement") provides that in enforcing a sentence imposed by the Tribunal, the Portuguese authorities shall be bound by the duration of the sentence; and that the conditions of imprisonment shall be governed by Portuguese law, subject to the supervision of the Tribunal.¹¹ Article 8 of the Enforcement Agreement provides, *inter alia*, that, following notification of eligibility for pardon, amnesty or commutation of sentence under Portuguese law, the President of the Tribunal shall determine, in consultation with the Judges of the Tribunal, whether pardon or amnesty or commutation of the sentence is appropriate; the Registrar shall then inform Portugal of the President's determination accordingly.

B. Eligibility under Portuguese Law

12. The Prosecutor General's Office has informed the Registrar that, under Portuguese law, a detainee may be released on parole upon completion of half of his sentence, if additional requirements are met.¹² In particular, Article 61 of the Portuguese Criminal Code states that a detainee who has served half of his sentence may be released "conditionally" (i.e., on parole) provided that (a) "[c]onsidering the circumstances of the case, the offender's previous lifestyle, his personality and its evolution during the enforcement of the sentence of imprisonment, it is reasonable to expect that the convict, once released, will lead his life in a socially responsible manner, without committing further criminal offences; and (b) [his] release proves to be compatible with the defence of the social order and the social peace".¹³

13. According to the Briefing Note, Mrkšić completed half of his sentence in 2012.¹⁴ This, however, does not mean that he is automatically entitled to early release under Portuguese law. A detainee who has completed half of his sentence may only be released on parole if there is a

¹¹ See Article 3(3) of the Enforcement Agreement.

¹² See October Memorandum, Briefing Note, paras 1-2, referring to, the Portuguese Criminal Code, Articles 61-64.

¹³ Article 61(2) of the Portuguese Criminal Code (excerpts of which have been translated in English by the Prosecutor General's Office and attached to the Briefing Note).

¹⁴ See October Memorandum, Briefing Note, para. 8.

“favourable assessment” of the detainee’s “future behavior”.¹⁵ The Prosecutor General’s Office, however, does not make a “favourable assessment” pursuant to Article 61 of the Portuguese Criminal Code and expressly advises against Mrkšić’s release at this point.¹⁶

14. I note, however, that irrespective of the conditional release provisions of the Portuguese Criminal Code, the early release of persons convicted by the Tribunal falls exclusively within the discretion of the President of the Tribunal, pursuant to Rule 124 of the Rules and Article 8(2) of the Enforcement Agreement.

C. Gravity of Crimes

15. Mrkšić was convicted for crimes of very high gravity, which included aiding and abetting the torture, cruel treatment and murder of about 200 prisoners of war in Ovčara, near Vukovar.¹⁷ Concerning these crimes, the Trial Judgement found that:

in the present case the victims of the offences were all murdered on the day. The consequences for them were absolute. Close family members have been left without their loved ones. In almost all cases the anguish and hurt of such tragedy has been aggravated by uncertainty about the fate which befell these victims.¹⁸

16. In determining Mrkšić’s sentence, the Trial Chamber stated that he showed “a preparedness to ignore the responsibility which was on him as commander, and by virtue of international law, to take appropriate measures for the care of prisoners of war in [the Yugoslav Army’s] custody”, and utterly “failed to act as an officer in his position should have acted, with terrible consequences for the prisoners of war and their loved ones”.¹⁹ The Appeals Chamber of the ICTY affirmed the Trial Chamber’s sentencing determinations.²⁰

17. In these circumstances, I am of the view that the high gravity of Mrkšić’s offences weighs against his early release, his voluntary surrender notwithstanding.

D. Treatment of Similarly-Situated Prisoners

18. In deciding early release applications, Rule 125 of the Rules requires the President of the Tribunal to consider, as a separate factor, the need for equal treatment of similarly-situated prisoners.

¹⁵ See October Memorandum, Briefing Note, para. 5.

¹⁶ See October Memorandum, Briefing Note, paras 11-12.

¹⁷ Trial Judgement, paras 686-687.

¹⁸ Trial Judgement, para. 685.

¹⁹ Trial Judgement, para. 702.

²⁰ See Appeal Judgement, paras 370-371, 377-379.

19. In this respect, I recall that the practice of the Tribunal is to consider convicted persons eligible for early release only when they have served at least two-thirds of their sentence.²¹ 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.²²

20. According to the Portuguese authorities and based on my own calculation, Mrkšić has completed, as of the date of this Decision, more than half but less than two-thirds of his 20-year sentence, given that he has been detained since 15 May 2002.²³ The fact that Mrkšić has not yet completed two-thirds of his sentence counsels against his early release. The well-settled practice of the Tribunal is not to grant early release to convicts who have not completed two-thirds of their sentence, absent compelling reasons to do so.²⁴

E. Demonstration of Rehabilitation

21. 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[.]

22. The Prison Report states that during his time in prison, Mrkšić has shown "good integration and adaptation skills" and developed "a good relationship with the Detention Facility staff, the surveillance officers and the other inmates".²⁵ The Prison Report also states that Mrkšić has so far "displayed a regular conduct" in prison and that "[n]o incident or disciplinary sanction has been registered in his file".²⁶ The director of the prison where Mrkšić is held adds that, since his transfer

²¹ See *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-ES, Decision of President on Early Release of Dragan Nikolić, 12 November 2013 (public redacted version) ("*Nikolić Decision*"), para. 20, and authorities cited therein.

²² See *Nikolić Decision*, para. 20.

²³ See Trial Judgement, paras 709, 713. See also October Memorandum, Briefing Note, paras 7-8.

²⁴ See *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-ES, Decision of the President on Early Release of Momčilo Krajišnik, 8 November 2012, paras 28-29, 43 (public with confidential annex) (denying the early release request of a detainee who had not yet completed two-thirds of his sentence because, *inter alia*, the detainee had not justified the requested deviation from the two-thirds eligibility threshold of the ICTY).

²⁵ October Memorandum, Prison Report, p. 3.

²⁶ October Memorandum, Prison Report, p. 2.

to Portugal, Mrkšić has benefited from several family visits, including intimate visits from his wife, as well as monthly visits from a representative of the Embassy of Serbia in Portugal.²⁷

23. As regards Mrkšić's psychological and emotional condition, [REDACTED].²⁸ I note that this assessment is provided by the prison authorities; Mrkšić has not been evaluated by an independent psychiatrist or psychologist. I observe, however, that nothing in the Practice Direction requires an enforcement State to hire an independent expert to conduct the psychiatric or psychological evaluation of a detainee.²⁹

24. On Mrkšić's mental and psychological condition, [REDACTED].³⁰ In this regard, I note that in his Application, Mrkšić declares that he respects his sentence and that he regrets the harm inflicted on all the victims of the war in the former Yugoslavia.³¹ In his November 2013 Letter to me, Mrkšić further clarifies that he was "not convicted because [he] was the commander, but on grounds of individual responsibility";³² he also emphasizes that he is "aware of [his] punishment", which he "[has] accepted".³³ [REDACTED].³⁴ For these reasons, the Prosecutor General's Office advises against Mrkšić's release at this stage.³⁵ In his November 2013 Letter to me, however, Mrkšić states that his intention was never to "belittl[e] anyone's victims" and recognizes expressly that "no one had emerged from the war without victims of their own".³⁶

25. Having carefully reviewed the materials before me, I am of the opinion that Mrkšić has demonstrated some signs of rehabilitation, which militate in favour of his early release.

F. Substantial Cooperation with the Prosecution

26. 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.

²⁷ October Memorandum, Prison Report, p. 3.

²⁸ October Memorandum, Prison Report, p. 2.

²⁹ See Practice Direction, para. 3(b) (stating that, in connection with a detainee's early release application, the Registrar shall request "from the relevant authorities in the enforcing State" "any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration").

³⁰ October Memorandum, Briefing Note, para. 10.

³¹ See Application.

³² November 2013 Letter, p. 1.

³³ November 2013 Letter, p. 1.

³⁴ October Memorandum, Briefing Note, para. 10.

³⁵ October Memorandum, Briefing Note, paras 11-12.

³⁶ November 2013 Letter, p. 1.

27. The Prosecution Memorandum states that Mrkšić did not cooperate with the Prosecution in the course of his trial or appeal, nor has he cooperated with the Prosecution at any point whilst serving his sentence.³⁷

28. I note, however, that the Prosecution does not indicate whether it sought Mrkšić's cooperation at any point during his trial or after he was convicted. I also note that an accused person is under no obligation, in the absence of a plea agreement, to cooperate with the Prosecution.³⁸ I, therefore, consider that Mrkšić's lack of cooperation with the Prosecution is a neutral factor in my determination of whether or not to grant him early release.

G. Conclusion

29. Having carefully considered the factors identified in Rule 125 of the Rules, as well as the particular circumstances of Mrkšić's case, and taking into account the information provided to me, I am inclined to deny Mrkšić early release at this stage. Mrkšić has been convicted of very serious crimes and has only served half of his 20-year sentence, although he has exhibited some signs of rehabilitation. These factors, in my view, do not warrant his release now.

30. I note that my colleagues unanimously share my view that Mrkšić should not be granted early release at this stage.

IV. DISPOSITION

31. 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 of the Enforcement Agreement, I hereby **DENY** the Application.

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

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

Done this 13th day of December 2013,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Tribunal]

³⁷ See October Memorandum, Prosecution Memorandum, para. 2.

³⁸ See, e.g., *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, para. 25; *Prosecutor v. Mladen Naletilić*, Case No. IT-98-34-ES, Public Redacted Version of the 29 November 2012 Decision of the President on Early Release of Mladen Naletilić, 26 March 2013, para. 30.