

**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-04-84-R77.1-ES
Date: 28 September 2011
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Patrick Robinson, President

Registrar: Mr. John Hocking

Decision: 28 September 2011

PROSECUTOR

v.

SHEFQET KABASHI

PUBLIC

DECISION OF PRESIDENT ON EARLY RELEASE OF SHEFQET KABASHI

The Office of the Prosecutor:

Ms. Joanna Korner

Counsel for Shefqet Kabashi:

Mr. Michael G. Karnavas

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 seised of Mr. Shefqet Kabashi’s application for early release (“Application”).¹

A. Background

2. On 20 September 2011, counsel for Mr. Kabashi filed an application 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”).² Mr. Kabashi seeks urgent consideration of his application so that, if granted, he may be released on 25 September 2011, after having served two-thirds of his sentence.³

3. On 21 September 2011, the Prosecution filed its “Prosecution Response to Shefqet Kabashi’s Urgent Request for Early Release” (“Response”), indicating that it takes a neutral stance on Mr. Kabashi’s request for early release and accordingly makes no submissions.⁴

B. Proceedings Before the Tribunal

4. On 5 June 2007, Mr. Kabashi appeared before Trial Chamber I (“Trial Chamber”) as a witness for the Prosecution in the case *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T (*Haradinaj et al.* trial). Upon taking the stand, Mr. Kabashi refused to testify.⁵ The Trial Chamber decided to prosecute Mr. Kabashi for contempt of the Tribunal and summoned him to appear on 7 June 2007.⁶ Mr. Kabashi failed to appear before the Trial Chamber on 7 June 2007, and the Trial Chamber issued a warrant for Mr. Kabashi’s arrest that same day.⁷

5. On 20 November 2007, Mr. Kabashi appeared before the Trial Chamber a second time to give testimony by video-conference link, but refused to testify and answer the questions put to him.⁸

¹ *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1-ES, Shefqet Kabashi’s Urgent Request for Early Release (Public with Confidential Annex D), 20 September 2011 (“Application”).

² IT/146/Rev.3, 16 September 2010.

³ Application, p. 5.

⁴ *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1-ES, Prosecution Response to Shefqet Kabashi’s Urgent Request for Early Release, 21 September 2011 (“Response”), p. 2.

⁵ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, 5 June 2007, T. 5441-5443, 5445-5448.

⁶ *In the Contempt Case of Shefqet Kabashi*, Case No. IT-04-84-R77.1, Order in Lieu of Indictment on Contempt Concerning Shefqet Kabashi, 5 June 2007.

⁷ *In the Contempt Case of Shefqet Kabashi*, Case No. IT-04-84-R77.1, Warrant of Arrest and Order for Surrender of Shefqet Kabashi, 7 June 2007.

⁸ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, 20 November 2007, T. 10935-10941.

6. On 11 December 2007, the Trial Chamber referred the matter of contempt to the Prosecution to further investigate and prosecute.⁹ On 13 December 2007, the Prosecution sought leave to amend the Order in Lieu of Indictment,¹⁰ which the Trial Chamber granted.¹¹ The amended indictment charged Mr. Kabashi with two counts of contempt of Tribunal for his contumacious refusal or failure to testify on 5 June 2007 and 20 November 2007.¹²

7. On 17 August 2011, Mr. Kabashi was arrested in The Netherlands. On 18 August 2011, he was transferred to the United Nations Detention Unit (“UNDU”).

8. On 31 August 2011, Mr. Kabashi pleaded guilty to two counts of contempt of Tribunal for his refusal or failure to testify and answer questions put to him by the Prosecution on 5 June 2007 and 20 November 2007. The Contempt Chamber¹³ accepted the guilty plea.¹⁴

9. On 16 September 2011, Mr. Kabashi was sentenced to two months of imprisonment, with a credit of 31 days provided for time already spent in detention.¹⁵

C. Applicable Law

10. 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 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 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-

⁹ *In the Contempt Case of Shefqet Kabashi*, Case No. IT-04-84-R77.1, confidential and *ex parte* Decision to Refer the Case to the Prosecution, 11 December 2007, para. 7.

¹⁰ *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1, confidential and *ex parte* Prosecution’s Submission on an Indictment Against Shefqet Kabashi, 13 December 2007; *see also Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1, confidential and *ex parte* Prosecution’s Addendum to 13 December 2007 Motion Concerning Indictment of Shefqet Kabashi, 19 December 2007.

¹¹ *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1, Decision Granting Leave to Amend the Indictment, 18 February 2008.

¹² *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1, Amended Indictment, 18 February 2008.

¹³ The Chamber trying the contempt case after Mr. Kabashi’s arrest was composed of Judge Alphons Orié (presiding), Judge O-Gon Kwon, and Judge Howard Morrison (“Contempt Chamber”). *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1, Order Replacing Judges in a Case Before a Trial Chamber, 29 August 2011.

¹⁴ *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1, Sentencing Proceedings, 31 August 2011, T. 86-88.

¹⁵ *Prosecutor v. Shefqet Kabashi*, Case No. IT-04-84-R77.1, Sentencing Judgement, 16 September 2011 (“Sentencing Judgement”), paras 18-19.

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

11. Rule 102(A) of the Rules—"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 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

¹⁶ *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010, para. 7; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Decision on Lahi Brahimaj's Application for Provisional Release, 25 May 2009; *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. 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 on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para 15; *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. 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. 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. Kvočka et al.*, Case No. IT-98-30/1-A, Decision of the President on the Early Release of Miroslav Kvočka, 13 December 2002.

¹⁷ *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010, para. 7; *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; *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.

¹⁸ *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010, para. 7; *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.

D. Discussion

12. 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

13. As of 25 September 2011, Mr. Kabashi has served 40 days in the custody of the Tribunal, which constitutes two-thirds of the prison term imposed by the Contempt Chamber. It is the practice of the Tribunal to consider convicted persons to be eligible for early release when they have served at least two-thirds of their sentences.¹⁹ I note that a convicted person reaching two-thirds of his sentence is merely eligible for early release and not entitled to such a release. Taking into account the treatment of similarly-situated prisoners, I am of the view that the amount of time that Mr. Kabashi has served for his crimes militates in favour of his early release.

2. Gravity of the Crimes

14. With respect to gravity, the crimes for which Mr. Kabashi has been convicted have been described by the Contempt Chamber as two occasions of contumacious refusal or failure to answer

¹⁹ *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-ES, confidential Decision of President on Early Release of Dragan Obrenović, 21 September 2011, para. 16; *Prosecutor v. Ivica Rajić*, Case No. IT-95-12-ES, Decision of President on Early Release of Ivica Rajić, 22 August 2011, para. 12; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-ES, Decision of President on Early Release of Milomir Stakić, 15 July 2011, para. 22; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-ES, Decision of President on Early Release of Momčilo Krajišnik, 11 July 2011, para. 21; *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-ES.1, Decision of President on Early Release of Veselin Šljivančanin, 5 July 2011, para. 20; *Prosecutor v. Johan Tarčulovski*, Case No. IT-04-82-ES, Decision of President on Early Release of Johan Tarčulovski, 23 June 2011, para. 13; *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 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-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.

questions in the *Haradinaj et al.* trial, which deprived the Trial Chamber of “evidence relevant for an effective ascertainment of truth in the adjudication of that case.”²⁰

15. I consider Mr. Kabashi’s crimes to be of a serious nature because they threaten the effective functioning of the Tribunal. I therefore am of the view that the seriousness of Mr. Kabashi’s crimes is a factor that weighs against his early release.

3. Demonstration of Rehabilitation

16. 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 as to the behaviour of the convicted person during his or her period of incarceration. In light of the urgent nature of Mr. Kabashi’s request for early release, I do not have before me reports and observations from the UNDU as to Mr. Kabashi’s custodial behaviour. I consider the absence of such reports to be a neutral factor that weighs neither for nor against Mr. Kabashi’s request for early release.

17. Paragraph 3(b) of the Practice Direction envisages reports regarding the psychological condition of the convicted person during his or her incarceration. Mr. Kabashi has submitted a medical report from the medical officer at the UNDU, in which it is stated that, after a psychiatric evaluation, it was determined that Mr. Kabashi suffers from post-traumatic stress disorder (“PTSD”).²¹ There is no indication from the report that Mr. Kabashi’s PTSD would cause him to be a danger to others.²² I accordingly find Mr. Kabashi’s PTSD to be a neutral factor in determining his demonstrated rehabilitation.

18. Based upon the foregoing, I find the lack of demonstrated rehabilitation on the part of Mr. Kabashi to be neutral factor, neither weighing for nor against his request for early release.

4. Substantial Cooperation with the Prosecution

19. Rule 125 of the Rules states that the President shall take into account any substantial cooperation of the prisoner with the Prosecutor. In its Response, the Prosecution expresses its intention not to make any submission regarding Mr. Kabashi’s request for early release, preferring instead to take a neutral stance with respect to his Application.²³ I accordingly consider the factor of

²⁰ Sentencing Judgement, para. 13.

²¹ Application, Annex C.

²² Application, Annex C.

²³ Response, p. 2.

substantial cooperation with the Prosecution to be a neutral one with respect to Mr. Kabashi's request for early release.

5. Conclusion

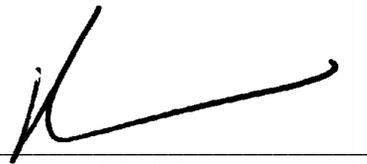
20. Taking all the foregoing into account and having considered those factors identified in Rule 125 of the Rules, I consider that, despite Mr. Kabashi's eligibility for early release due to having served two-thirds of his sentence, the seriousness of his crimes warrants a denial of his Application.

21. I note that two of my colleagues are of the view that Mr. Kabashi should be released, and two are of the opposite view.

E. Disposition

22. 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. Shefqet Kabashi is hereby DENIED early release.

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



Judge Patrick Robinson
President

Dated this twenty-eighth day of September 2011,
At The Hague,
The Netherlands.

[Seal of the Tribunal]