



**Submission for the International Expert on the enjoyment of all human rights by older persons – Call for Contributions on older persons deprived of their liberty**

**Older Persons Deprived of their Liberty for Atrocity Crimes and Release**

International criminal courts and tribunals supervise lengthy sentences, including life sentences, imposed on an ageing population. This submission highlights issues related to the humanitarian release of persons convicted of atrocity crimes and by the International Residual Mechanism for Criminal Tribunals (MICT) and International Criminal Court (ICC) in particular.

**Question 1 - What are the key human rights risks and violations affecting older persons deprived of their liberty, considering different intersectional factors?**

*Release on humanitarian grounds under human rights law*

Although advanced age, by itself, is not a bar to imprisonment, it may create human rights obligations when assessed in light of a prisoner's health.<sup>1</sup> Article 3 European Convention of Human Rights, for example, does not generate a general obligation to release detained persons on health grounds. However, in exceptional circumstances, where the detainee's state of health is absolutely incompatible with detention, release may be required.<sup>2</sup> This includes situations in which the suffering caused by natural illness would be exacerbated by conditions of detention.<sup>3</sup> Three factors are relevant to examining the compatibility of a prisoner's state of health with continued detention – the condition of the prisoner, the quality of care provided and the advisability of continuing the detention in view of the prisoner's state of health.<sup>4</sup> Article 3 requires that prisoners are detained in conditions that ensure their health and well-being and provide access to appropriate medical care.<sup>5</sup>

*Release of persons convicted of atrocity crimes due to advanced age*

There is a point at which detention becomes incompatible with dignity and continued custody violates the right to freedom from torture, inhuman and degrading treatment and punishment. Right advocates stressed that there is a high(er) threshold for release for those convicted of atrocity crimes.

In 2022, UN Experts warned that the Peru Constitutional Court's restoration of an executive pardon to former President Alberto Fujimori (claimed to have been granted due to advanced age) was a 'serious blow to justice and the rule of law and a violation of the right to justice for victims and their families' and such release was inconsistent with rights standards which restricted the use of pardon for crimes against humanity.<sup>6</sup> The Experts highlighted that humanitarian pardons could only be granted in cases of imminent terminal illness and not due to the mere passing of time, the age of the person, or the general physical or mental state regulating from age. Instead, detaining authorities should guarantee the right to health care.

<sup>1</sup> *Papon v. France* (no. 1) (Decision on Admissibility) (Application no. 64666/01) 07.06.01.

<sup>2</sup> *Rozhkov v. Russia* (Application no. 64140/00) 19.07.07, para. 104.

<sup>3</sup> *Paposhvili v. Belgium* (Application no. 41738/10) 13.12.16, para. 175.

<sup>4</sup> *Farbtuhs v. Latvia* (Application no. 4672/02) 02.12.04, para. 53.

<sup>5</sup> *Mouisel v. France* (Application no. 67263/01) 14.11.02, para. 40; *Farbtuhs v. Latvia* (Application no. 4672/02) 02.12.04, paras. 51.

<sup>6</sup> UNOHCHR Press Release, 'Peru: Fujimori release undermines access to justice for victims – UN Experts' 22.03.22.



In 2020, a UN Special Rapporteur stressed that national measures to prevent the spread of COVID-19 in prisons (amnesties, pardons, exemptions from criminal liability and benefits of enforcement of sentences) should not result in *de jure or de facto impunity* for persons convicted of serious violations of human rights - any that did would be null and void.<sup>7</sup> Other than cases of terminal illness, prisoners should be *relocated* to safer facilities rather than be released, and only if relocation was not possible should *temporary house arrest* be granted.

In April 2020, house arrest was granted to former President of Chad, Hissène Habré (convicted of crimes against humanity and sentenced to life imprisonment by AU trial in Dakar). He was granted temporary release (60 days) from a Senegalese prison to be spent in house arrest with his family due to his advanced age (78) and high risk of contracting COVID-19 in a prison being used as a quarantine facility for new detainees.

The 2022 OHCHR Statement asserts that ‘the early release of persons convicted of serious human rights violations and international crimes is at odds with international human rights law’ as it could render criminal justice illusory and undermine victims’ and society’s trust in the rule of law.<sup>8</sup> But this observation overlooks the legal frameworks enabling and indeed the operation of release systems at the UN Tribunals, the Residual Special Court for Sierra Leone and the sentence reduction system at the ICC.

#### *Release at the UN Tribunals*

Until 2018, the majority of persons convicted by the ICTY and ICTR were released unconditionally after serving two thirds of their sentence. Although it is not one of the explicit factors to be considered in release decisions, the MICT President can and does consider humanitarian considerations when making release decisions.<sup>9</sup> Jurisprudence recognises that early release can be granted when medical conditions or serious illness make continued detention inappropriate.

Difficulties arise however when prisoners apply for release on health grounds prior to serving two thirds of their sentence. Though prisoners can submit an application for release at any point in their sentence, the requirement to serve two thirds is now considered a pre-requisite for consideration for release before the MICT.<sup>10</sup> Release prior to this point can only be granted if there are exceptional and compelling circumstances. This has proved challenging due to the unconditional nature of the release system that was in place. In two applications concerning terminal illness, early release was denied.

In *Nikolić*, President Meron argued that despite the clear need to show compassion and deference to humanitarian principles, early release could not be granted due to the need to ensure equality of treatment with other prisoners and to show respect for the sentences imposed.<sup>11</sup> He therefore granted provisional release. This was challenged as being *ultra vires*

---

<sup>7</sup> UN Office of the High Commissioner for Human Rights, ‘Covid-19 no excuse for impunity for those convicted of crimes against humanity’ 29.04.20.

<sup>8</sup> UNOHCHR Press Release, ‘Peru: Fujimori release undermines access to justice for victims – UN Experts’ 22.03.22.

<sup>9</sup> Practice Direction on the procedure for the determination of applications for pardon, commutation of sentence, and early release of persons convicted by the ICTR, the ICTY and the Mechanism (MICT/3/Rev.3) 15.05.20, para. 10(f).

<sup>10</sup> *Ibid*, paras. 7-8.

<sup>11</sup> Decision of the President on the Application for Early Release or other Relief of Drago Nikolić, MICT-15-85-ES.4, 13.10.15, paras. 31-35.



by the Prosecutor,<sup>12</sup> but the Appeals Chamber declined to address the matter citing lack of jurisdiction following Nikolić's death.<sup>13</sup>

In *Beara*, the German authorities notified the MICT that Beara's health condition prevented the continued enforcement of his sentence and therefore requested its termination. Despite President Meron's conclusion that Beara's life expectancy was a few weeks at most and his rapid deterioration meant that continued detention would be tantamount to a violation of the right not be subjected to inhuman or degrading treatment or punishment<sup>14</sup> - early release was denied. President Meron and the consulted judges felt it was necessary to grant release but not on the usual unconditional basis. A new form of conditional release was required to not only recognise the limited amount of time served (13 years of a life sentence) but to also ensure that release could be revoked and he could be returned to international custody if there was an improvement in his health.<sup>15</sup>

In 2018, the UN Security Council requested that the MICT consider adopting a conditional release scheme similar to that of the SCSL<sup>16</sup> Conditional release is now an established practice at the MICT. Under President Agius, release decisions routinely assess the health and age of the prisoner to ascertain whether they represent exceptional or compelling circumstances that could warrant release before two thirds of the sentence has been served.

#### *Release at the ICC*

While conditional release is possible for persons detained during trial at the ICC,<sup>17</sup> the Rome Statute does not allow for conditional early release for convicted persons. Instead, it permits sentence reduction. Sentence reductions can be based on 'a worsening state of physical or mental health or advanced age'<sup>18</sup> if it can be demonstrated that there has been a clear and significant change in circumstances since the imposition of the sentence. However, the Rome Statute only permits a sentence reduction review **after** two thirds of the sentence has been served.<sup>19</sup> Further, the prisoner cannot directly petition the court: it is a *proprio motu* review undertaken by a chamber of three judges. There is therefore no clear legal basis for release on humanitarian grounds of ill health combined with advanced age prior to service of two thirds of the sentence or for granting such release on a conditional basis.

#### *State cooperation*

The grant of conditional release requires voluntary cooperation from national authorities. In *Nikolić* and *Beara*, the terminally ill men were obliged to surrender their passports and remain under armed guard at their homes (or in hospital). Their release would not have been possible without Serbia agreeing to facilitate their transfers, nominate a monitoring authority, ensure 24 armed surveillance, cover all expenses incurred and agree to an obligation to arrest and transfer individuals back to the MICT should they breach any condition of their release.<sup>20</sup> This

---

<sup>12</sup> Prosecution Appeal of the Decision Granting Provisional Release to Drago Nikolić, MICT-15-85-ES.4, 27.07.15.

<sup>13</sup> Decision on the Prosecution Appeal of the Decision Granting Provisional Release, MICT-15-85-ES.4, 22.10.15.

<sup>14</sup> Decision of the President on the Early Release of Ljubiša Beara, MICT-15-85-ES.3, 16.06.17, paras. 45, 47.

<sup>15</sup> *Ibid*, paras. 48-49.

<sup>16</sup> UN SC Resolution 2422, para. 10.

<sup>17</sup> Rule 119 ICC RPE.

<sup>18</sup> Rule 223(e) ICC RPE.

<sup>19</sup> Article 110(3) ICC Statute.

<sup>20</sup> Decision of the President on the Application for Early Release or other Relief of Drago Nikolić, MICT-15-85-ES.4, 13.10.15, paras. 41-44; Decision of the President on the Early Release of Ljubiša Beara, MICT-15-85-ES.3, 16.06.17, para. 52.



cooperation was based solely on political guarantees given that states of the former Yugoslavia were barred from directly enforcing sentences of imprisonment.<sup>21</sup>

Such support will not be forthcoming for all internationally convicted persons. A recent controversy has highlighted the persistent difficulties faced by international tribunals trying to relocate former international prisoners. Despite concluding a bilateral agreement with the MICT specifically to accept persons released and acquitted by the ICTR, the Niger authorities issued deportation orders against them shortly after they arrived on its territory.<sup>22</sup>

The security situation of the requested country for relocation may also prevent release on humanitarian grounds. In *Al Hassan*, the ICC agreed that the death of the applicant's young daughter created an 'exceptional humanitarian circumstance' but the request to modify the location of his detention to facilitate a compassionate visit had to be denied due to the security situation in Mali. The operation of armed groups and the lack of state authority meant that the exceptional humanitarian considerations did not outweigh the risks involved in transferring him to national or international custody.<sup>23</sup>

#### *Expediency of decision-making*

Requests for release at the MICT prior to service of two thirds of the sentence based on exceptional and compelling circumstances must be 'duly substantiated'.<sup>24</sup> In *Beara*, the German notification highlighted that his 'precarious health condition... requires very quick action without any undue delay' as no German detention facility could address his health concerns.<sup>25</sup> Even though President Meron expedited the usual process, the need to take essential steps of independently verifying Beara's life expectancy and consulting with other judges, impacted on the time-frame.<sup>26</sup> Beara died in a prison hospital in Berlin, Germany the day after release was granted aged 77.

Delay in facilitating release is particularly pertinent in cases of terminal illness and advanced age. In *Farbtuhs v Latvia*, a year-long delay in granting release despite formal requests from the prison director (due to his age, disability and state of health) meant the national authorities had failed to provide the prisoner with treatment compatible with Article 3.<sup>27</sup>

#### *Access to medical records*

The international criminal courts and tribunals may face challenges in accessing medical records. In *Simba*, the release application was pending for two years due to the need to monitor his health and access to health care and delays in receiving materials from the Beninese authorities.<sup>28</sup> The President had to appoint an independent medical consultant to examine the applicant and engage an independent medical officer based in the enforcing state (Chief Medical Officer of the UN Development Programme) to obtain and assess his medical

---

<sup>21</sup> Decision of the President on the Application for Early Release or other Relief of Drago Nikolić, MICT-15-85-ES.4, 13.10.15, para. 36; Decision of the President on the Early Release of Ljubiša Beara, MICT-15-85-ES.3, 16.06.17, para. 49, footnote 75.

<sup>22</sup> Decision on the motions regarding the relocation agreement with Niger and Order for the Transfer of the Relocated Persons to the Arusha Branch, MICT-22-124, 07.02.22.

<sup>23</sup> *Prosecutor v Al Hassan*, Public redacted version of the 'Decision on the urgent Defence request for a custodial visit on compassionate grounds' ICC-01/12-01/18, 18.01.21, paras. 13-14.

<sup>24</sup> Decision on Sentence Remission and Early Release of Milomir Stakić, MICT-13-60-ES, 31.12.20, para. 44.

<sup>25</sup> Decision of the President on the Early Release of Ljubiša Beara, MICT-15-85-ES.3, 16.06.17, para. 7.

<sup>26</sup> *Ibid*, paras. 11, 36.

<sup>27</sup> Application no. 4672/02, 02.12.04, para. 61.

<sup>28</sup> Decision on the Early Release of Aloys Simba, MICT-14-62-ES.1, 07.01.19, para. 1.



records.<sup>29</sup> In *Munyakazi*, the Malian authorities failed to provide information on the applicant's health despite numerous requests and promises to respond.<sup>30</sup>

### **Question 3 - What kind of specific measures have been taken and implemented concerning older persons deprived of their liberty in the context of the COVID-19 pandemic?**

During the COVID-19 pandemic, requests were received for interim release from pre-trial detention (ICC), provisional or early release from an enforcing state (MICT) and temporary transfer from one enforcing state to another (RSCSL). These requests were based on rights-related grounds: the right to health(care), degrading conditions of detention and reduced contact with the outside world. All release and transfer requests were unsuccessful. This is due, in part, to the inappropriateness, vagueness and impossibility of the forms of relief sought.<sup>31</sup> The decisions did request modified conditions of detention including access to videos made by family members, the use of email and access to videoconferencing. While there have been complex feasibility and security issues, the pandemic has acted as a catalyst for its introduction at the ICC Detention Centre and UN Detention Unit. The introduction of alternate means of communication, while compensatory during the pandemic, should continue to be used in a complementary manner in the long term. Facilitating contact with family members through technology is an important tool for improving the quality of life for prisoners of advanced age, particularly at the end of life.

### **Question 5 - Please share examples of good practices on how to ensure that older persons deprived of their liberty can exercise their human rights**

*Recognition of the importance of socio-cultural factors in medical care and recovery:* In 2010, President Robinson at the ICTY granted early release to Gvero on humanitarian grounds due to his deteriorating health and advanced age.<sup>32</sup> This case is noteworthy as Gvero's sentence had not yet been finalised meaning provisional release was the more typical remedy. The President felt the urgency of the detainee's medical needs meant he could not wait for the filing of notices to appeal.<sup>33</sup> Further, the President's Decision highlighted the views of the UN Detention Unit Medical Officer that the medical risk of post-operative psychological problems (PTSD in particular) would be reduced by having surgery in his country of origin so that he could communicate with doctors in his own language and allow him to be near to his family.<sup>34</sup>

*Increasing available penal capacity with access to relevant health facilities:* The MICT is currently investing resources to increase its pool of potential enforcing states in Africa to ensure it can facilitate the movement of prisoners to another state if this is required for health reasons.<sup>35</sup>

---

<sup>29</sup> Ibid, paras. 5, 9-11.

<sup>30</sup> Decision on the Application of Yussuf Munyakazi for Early Release, MICT-12-18-ES.2, 29.11.19.

<sup>31</sup> See R. Mulgrew, 'International prisoners and the pandemic: seeking release, improved conditions and family contact before international criminal courts' in Dünkel, Harrendorf and Van Zyl Smit *The Impact of Covid-19 on Prison Conditions and Penal Policy* (Routledge, 2022).

<sup>32</sup> Decision of the President on Early Release of Milan Gvero (IT-05-88.ES) 28.06.10, para. 19.

<sup>33</sup> Ibid, para. 18.

<sup>34</sup> Ibid, paras. 10-12.

<sup>35</sup> Proposed Budget for the International Residual Mechanism for Criminal Tribunals for 2021, Report of the Secretary-General, A/75/383, 09.10.20 para. 14 at 14.



*The appointment of an expert on ageing prisoners:* The MICT has appointed an independent prison management expert on ageing prisoners and their associated vulnerabilities and is implementing the expert's recommendations.<sup>36</sup>

Dr. Róisín Mulgrew  
National University of Ireland, Galway and Irish Centre for Human Rights  
Email: [roisin.mulgrew@nuigalway.ie](mailto:roisin.mulgrew@nuigalway.ie)

---

<sup>36</sup> Ibid, paras. 33-4 at 13.