



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-T

Date: 15 June 2009

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. John Hocking

Decision of: 15 June 2009

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVCANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC REDACTED VERSION

DECISION ON GVERO'S MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor
Mr. Peter McCloskey

Government of the Republic of Serbia

Government of The Netherlands

Counsel for the Accused

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Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Vinko Pandurević

THIS TRIAL CHAMBER 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”) is seised of the “Motion Seeking the Provisional Release of Milan Gvero for Humanitarian Reasons During the Period Allowed for the Preparation of Final Briefs and Closing Arguments”, filed confidentially and partially *ex parte* on 1 May 2009 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. Since his voluntary surrender, Gvero has been granted provisional release several times,¹ with the last occasion being on 10 December 2008.²

2. In the Motion, Gvero requests provisional release “at an appropriate and convenient period between the conclusion of oral evidence and commencement of the closing arguments”.³ On 18 May 2009, the Prosecution filed confidentially and *ex parte* the “Prosecution’s Response to Defence Motion Seeking the Provisional Release of Milan Gvero for Humanitarian Reasons During the Period Allowed for the Preparation of Final Briefs and Closing Arguments” (“Response”), objecting to the Motion and requesting a stay of the decision pending appeal in the event that the Motion is granted.⁴ On 22 May 2009, Gvero filed a “Request for Leave to Reply and Reply to Prosecution Response to Milan Gvero’s Application for Provisional Release During the Preparation of Final Briefs” (“Reply”).

II. SUBMISSIONS OF THE PARTIES

A. Motion

3. Gvero maintains that insofar as the requirements for granting provisional release under Rule 65(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) are concerned, nothing has changed since the Trial Chamber rendered the Decision of 10 December 2008.⁵ Acknowledging that each application for provisional release must be considered on its particular merits, Gvero

¹ Decision on Motion for Provisional Release, 19 July 2005; Decision on Joint Motion of the Accused Miletić and Gvero for Temporary Provisional Release from 15 July 2006 Until the Continuation of Trial, 13 July 2006 (“Decision of 13 July 2006”); Decision on Defence Motions for Provisional Release of Radivoje Miletić and Milan Gvero, 7 December 2006 (“Decision of 7 December 2006”); Decision on Motion for Provisional Release from 21 July 2007 Until the Resumption of Trial, 13 July 2007 (“Decision of 12 July 2007”); Decision on Motions for Provisional Release During the Winter Judicial Recess, 7 December 2007 (“Decision of 7 December 2007”); Decision on Gvero’s Motion for Provisional Release, 21 July 2008 (“Decision of 21 July 2008”).

² Decision on Gvero’s Motion for Provisional Release, 10 December 2008 (“Decision of 10 December 2008”).

³ Motion, para. 24.

⁴ Response, paras. 1–2.

⁵ Motion, para. 10.

nevertheless submits that “the only real issue in the present application is whether the Defence are able to advance ‘compelling humanitarian justifications’ for the provisional release of General Gvero”.⁶

4. The humanitarian grounds advanced by Gvero are twofold. First, Gvero seeks provisional release in order to travel to Belgrade to obtain a second opinion on treatment for a [REDACTED].⁷ Gvero was examined by [REDACTED] in the Netherlands on 23 March 2009, who reported that [REDACTED] surgery should be considered in due course.⁸ Gvero suggests that in order to obtain such a second opinion, he would travel to the Military Medical Academy in Belgrade where three weeks of testing would be required.⁹ According to Gvero, Dr. Falke, Medical Officer at the United Nations Detention Unit (“UNDU”), supports Gvero obtaining a second opinion [REDACTED], as it would be of benefit for Gvero to have an opinion from a doctor he knows, trusts and with whom he can speak his own language.¹⁰ Dr. Falke has expressed his willingness to file a report on this issue upon the request of the Trial Chamber, and Gvero asks that the Trial Chamber make such a request of Dr. Falke.¹¹

5. The second humanitarian ground advanced by Gvero concerns [REDACTED] surgery. During Gvero’s most recent period of provisional release, a specialist at the Military Academy in Belgrade recommended a surgical procedure involving two phases [REDACTED].¹² Both phases of the surgery will take approximately three weeks, and between both phases a break of three months is required.¹³ Gvero highlights the need for the [REDACTED] surgery to be carried out well in advance of any [REDACTED] surgery to minimise the risk of infection and complications, pointing out that Gvero’s [REDACTED] surgeons will need to liaise [REDACTED].¹⁴ Gvero also emphasises the fact that the [REDACTED] treatment is an expensive procedure which would be provided free of charge to Gvero if performed in Belgrade.¹⁵

⁶ Motion, para. 12.

⁷ *Ibid.*, paras. 13–15.

⁸ *Ibid.*, para. 13; *ex parte* Annex B.

⁹ *Ibid.*, para. 15; *ex parte* Annex C.

¹⁰ *Ibid.*, para. 14.

¹¹ *Ibid.*, paras. 14, 23.

¹² *Ibid.*, para. 17; *ex parte* Annex D.

¹³ *Ibid.*, para. 16; *ex parte* Annex D.

¹⁴ *Ibid.*, para. 17; *ex parte* Annex D.

¹⁵ *Ibid.*, para. 18.

6. In addition to requesting the report from Dr. Falke, Gvero requests that he be provisionally released for such time as to allow him to undertake the [REDACTED] tests as well as the first phase of the detailed [REDACTED] surgery.¹⁶

B. Response

7. The Prosecution objects to Gvero's assertion that there has been no material change to the circumstances relevant to Gvero's assessment under Rule 65(B) since the Decision of 10 December 2008.¹⁷ The Prosecution submits that not only have all the defence teams presented their cases, "the Prosecution's case against all members of the Joint Criminal Enterprises of which Gvero was a member has been strengthened through the introduction of favourable documentary and testimonial evidence", in particular the video footage showing Gvero at the Bokšanica checkpoint outside Žepa.¹⁸

8. In relation to the humanitarian grounds advanced by Gvero, the Prosecution argues that there is no medical urgency with regard to either of the medical appointments requested by Gvero, and neither relate to the humanitarian grounds upon which Gvero has been granted provisional release in the past, these being Gvero's psychological well-being and ability to assist in his own defence.¹⁹ The Prosecution also submits that Gvero has failed to explain why the tests cannot be performed locally.²⁰ The Prosecution thus argues that there is an increased risk that Gvero will not reappear for trial which outweighs the humanitarian interests advanced in the Motion.²¹

C. Reply

9. In the Reply, Gvero explains that the [REDACTED] surgery is urgent, because Gvero will require [REDACTED] surgery in 6–12 months time.²² In order to mitigate the risk of infection, the invasive part of the [REDACTED] surgery must be performed well before the [REDACTED] surgery, otherwise the [REDACTED] treatment cannot commence until well after the [REDACTED] surgery has been performed.²³ Gvero also states that the [REDACTED] treatment

¹⁶ *Ibid.*, paras. 23–24.

¹⁷ Response, para. 4. *See also* Motion, para. 10.

¹⁸ *Ibid.*, paras. 4–5.

¹⁹ *Ibid.*, paras. 7–12.

²⁰ *Ibid.*, paras. 10–11.

²¹ *Ibid.*, paras. 6, 18.

²² Reply, para. 12.

²³ *Ibid.*, paras. 12, 14.

and the tests required for the second opinion on the [REDACTED] surgery can be performed simultaneously.²⁴

III. LAW

10. Rule 65(A) provides that once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B), a Trial Chamber may order the provisional release of an accused only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness or other person, and after giving the host country and the state to which the accused seeks to be released the opportunity to be heard.²⁵ Rule 65(C) provides that “[t]he Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others”.

11. A decision on a request for provisional release must address all relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision and include a reasoned opinion indicating its view on those relevant factors.²⁶ What these relevant factors are, as well as the weight to be attributed to them, depends upon the particular circumstances of each case,²⁷ since “decisions on motions for provisional release are fact-intensive, and cases are considered on an individual basis in light of the particular circumstances of the individual accused.”²⁸

12. In addition, the Appeals Chamber has held that a Rule 98 *bis* decision declining to enter a judgement of acquittal after the close of the Prosecution case is “a significant enough change in circumstance to warrant the renewed and explicit consideration by the Trial Chamber of the risk of

²⁴ *Ibid.*, para. 13.

²⁵ See, *inter alia*, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.6, Decision on “Prosecution’s Appeal from Decision on Lazarević Motion for Temporary Provisional Release Dated 26 September 2008, 23 October 2008 (“Appeals Chamber Decision of 23 October 2008”), paras. 6–7; *Prosecutor v. Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5 and IT-05-88-AR65.6, Decision on Consolidated Appeal Against Decision on Borovčanin’s Motion for a Custodial Visit and Decisions on Gvero’s and Miletić’s Motions for Provisional Release During the Break in the Proceedings, 15 May 2008 (“Appeals Chamber Decision of 15 May 2008”), paras. 5–6; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.14, Decision on Jadranko Prlić’s Appeal Against the *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prlić*, 9 April 2009, 5 June 2009, para. 7 (“Appeals Chamber Decision of 9 April 2009”).

²⁶ See, *inter alia*, Appeals Chamber Decision of 23 October 2008, para. 7; Appeals Chamber Decision of 15 May 2008, para. 6; Appeals Chamber Decision of 9 April 2009, para. 8.

²⁷ See, *inter alia*, Appeals Chamber Decision of 15 May 2008, para. 7; Appeals Chamber Decision of 1 July 2008, para. 8.

²⁸ Appeals Chamber Decision of 15 May 2008, para. 6 (referring to *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7).

flight by the Accused.”²⁹ It further held that “when considering a provisional release motion at the post-98 *bis* stage of the proceedings, even when a Trial Chamber is satisfied that sufficient guarantees exist to offset the flight risk of an accused, it should not exercise its discretion to grant provisional release unless sufficiently compelling humanitarian reasons tip the balance in favour of allowing provisional release.”³⁰ The humanitarian grounds raised by an accused as a basis for provisional release must be assessed in the context of the two requirements of Rule 65(B), and the Trial Chamber must be satisfied that the conditions of provisional release are sufficient to address any concerns in relation to the requirements of Rule 65(B).³¹

13. The Appeals Chamber has also held that where provisional release is found to be justified on humanitarian grounds, the duration of provisional release should be proportional to the period of time necessary to carry out the humanitarian purpose of the release.³² Accordingly, “a Trial Chamber must address the proportionality between the nature and weight of the circumstances of a particular case and the duration of provisional release requested”.³³

IV. DISCUSSION

14. The Trial Chamber notes that Gvero voluntarily surrendered to the Tribunal upon notification of the charges against him and that he has been granted provisional release on a number of occasions.³⁴ Gvero has always been compliant with the conditions imposed upon him during these previous periods of provisional release.³⁵ Gvero has been granted three periods of provisional release by the Trial Chamber after the Trial Chamber orally rendered its decision pursuant to Rule 98 *bis* (“Rule 98 *bis* Decision”), in which the Trial Chamber declined to enter a judgement of acquittal with reference to any of the accused after the conclusion of the Prosecution case.³⁶ Though the Appeals Chamber ultimately reversed the Decision of 9 April 2008, it held that the Trial

²⁹ See, *inter alia*, *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, 11 March 2008 (“Prlić Appeals Chamber Decision of 11 March 2008”), paras. 19–20.

³⁰ See, for example, Appeals Chamber Decision of 15 May 2008, para. 24.

³¹ See, for example, Decision of 21 July 2008, para. 15; Appeals Chamber decision of 15 May 2008, para. 23.

³² Appeals Chamber Decision of 15 May 2008, paras. 18, 32.

³³ *Ibid.*, para. 18.

³⁴ See *supra*, footnotes 1 and 2.

³⁵ See Decision of 13 July 2006, p. 2; Decision of 7 December 2006, p. 2; Decision of 13 July 2007, p. 2; Decision of 7 December 2007, para. 10; Decision of 21 July 2008, para. 17; Decision of 10 December 2008, para. 18.

³⁶ Decision on Gvero’s Motion for Provisional Release During a Break in the Proceedings, 9 April 2008 (“Decision of 9 April 2008”); Decision of 21 July 2008; Decision of 10 December 2008. The Rule 98 *bis* Decision was rendered on 3 March 2008, T. 21460-21473 (3 March 2008).

Chamber did not err “when it concluded that the 98 *bis* Decision did not increase Gvero’s flight risk”.³⁷

15. The Trial Chamber, when granting Gvero’s provisional release on these occasions, conducted a clear assessment of the risk of flight posed by Gvero in light of the Rule 98 *bis* Decision.³⁸ The Trial Chamber considered, *inter alia*, the nature of the case against him, his personal circumstances, his voluntary surrender and the fact that he has been provisionally released on several occasions and always abided by all conditions imposed by the Trial Chamber.³⁹ After weighing these factors against the Rule 98 *bis* Decision, the Trial Chamber concluded that Gvero did not pose a flight risk or a threat to witnesses, victims or other persons associated with the case.⁴⁰

16. The Trial Chamber acknowledges that all parties have now concluded their cases-in-chief. Because of this new circumstance, the Trial Chamber must consider the requirements of Rule 65 anew. That the trial is in its final stages and the nature of the additional evidence must be considered with reference to the particular circumstances of Gvero in terms of risk of flight. Weighed against Gvero’s surrender, his previous compliance with provisional release conditions, his advanced age and his health concerns, the Trial Chamber is of the view that the mentioned development in the proceedings, in particular the additional evidence adduced, does not alter Gvero’s risk of flight or the threat posed to persons associated with the case in any material way. The Trial Chamber is therefore satisfied that Gvero still does not pose a flight risk or a threat to any victim, witness or person associated with this case.

17. The Trial Chamber will now turn to the humanitarian grounds advanced by Gvero in support of his Motion, namely [REDACTED] surgery and medical testing with a view to obtaining a second opinion on his need for [REDACTED] surgery.⁴¹ In this regard, the Trial Chamber recalls its previous finding that Gvero is of advanced age, suffers from a variety of ailments, and has shown signs of his health deteriorating throughout the proceedings.⁴²

³⁷ Appeals Chamber Decision of 15 May 2008, para. 23.

³⁸ Decision of 9 April 2008, paras. 11–16; Decision of 21 July 2008, paras. 18–19; Decision of 10 December 2008, para. 20.

³⁹ Decision of 9 April 2008, paras. 15–16; Decision of 21 July 2008, paras. 18–19. Decision of 10 December 2008, para. 18.

⁴⁰ Decision of 9 April 2008, paras. 15–16; Decision of 21 July 2008, paras. 18–19. Decision of 10 December 2008, paras. 20–22.

⁴¹ See Motion, paras. 13–22.

⁴² Decision of 21 July 2008, para. 21, referring also to T. 21523–21524 (22 May 2008). See also Decision of 10 December 2008, para. 21.

18. The Trial Chamber notes that based on the [REDACTED] report before it, Gvero will need [REDACTED] surgery in due course.⁴³ The Trial Chamber considers it crucial that Gvero seeks a second opinion on his [REDACTED] condition and the need for surgery. In order to make an informed decision, Gvero will undoubtedly benefit from receiving such second opinion from a doctor who speaks his language and from doing the associated testing in Belgrade, a familiar environment.⁴⁴ The Trial Chamber accepts the statement in paragraph four of the Motion that Dr. Falke supports such a consultation and considers that Gvero would derive some benefit from it. The Trial Chamber therefore does not require a report from Dr. Falke on this issue.

19. In addition, the Trial Chamber notes that [REDACTED] surgery is recommended [REDACTED].⁴⁵ Any delay of the [REDACTED] surgery now may be aggravated by the anticipated need for [REDACTED] surgery. The Trial Chamber is persuaded that if Gvero is not afforded the opportunity to have the [REDACTED] surgery soon, it may be quite some time before he is again in a position to have it done. The second opinion on Gvero's [REDACTED] condition and the [REDACTED] surgery should therefore be carried out as soon as possible. Their being carried out at the Military Medical Academy in Belgrade would have the advantages mentioned above and allow the [REDACTED] surgeon and the [REDACTED] to liaise with each other. The Trial Chamber is therefore satisfied that the humanitarian grounds advanced by Gvero on this occasion tip the balance in favour of allowing provisional release.

20. Applying the test in Rule 65(B), considering all the particular circumstances of Gvero, the Trial Chamber is convinced that he will return for the continuation of his trial and that he poses no threat to witnesses, victims or any other person in this case.

21. In relation to the period of Gvero's provisional release, the Trial Chamber notes that according to the report from the Military Medical Academy in Belgrade, Gvero will need to spend 20–25 days in Belgrade for the [REDACTED] surgery.⁴⁶ In relation to the [REDACTED] examination, the report recommends that [REDACTED].⁴⁷ The consultant [REDACTED] has informed Gvero that he would need three weeks to carry out these tests.⁴⁸ Gvero has informed the Trial Chamber that both the [REDACTED] surgery and the [REDACTED] testing can be carried

⁴³ See Motion, para. 13; *ex parte* Annex B.

⁴⁴ See Motion, para. 14.

⁴⁵ See Motion, para. 16.

⁴⁶ Motion, *ex parte* Annex D.

⁴⁷ Motion, *ex parte* Annex C, p. 2.

⁴⁸ Motion, para. 15.

out simultaneously.⁴⁹ In light of this, the Trial Chamber is satisfied that a period of three weeks is justified in order to achieve the dual humanitarian purpose of the provisional release, namely [REDACTED] surgery and [REDACTED] testing.

22. The Trial Chamber is satisfied with the guarantee provided by the Republic of Serbia,⁵⁰ and is in receipt of written confirmation from the host country of the Netherlands that it has no objection to the requested provisional release.⁵¹

V. DISPOSITION

23. For these reasons, pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 65 and of the Rules, the Trial Chamber hereby:

- (a) **GRANTS** Gvero leave to file the Reply;
- (b) **GRANTS** the Motion, and **ORDERS** the provisional release of Gvero on the following terms and conditions:
 - (i) Gvero shall be provisionally released for a period not exceeding 21 days (excluding travel time); the exact dates of his provisional release shall be determined in consultations between the UNDU, the Registrar and a representative of the Trial Chamber, but the provisional release shall not commence before 30 June and Gvero must return to the UNDU no later than 23 August 2009;
 - (ii) Gvero shall be transported to Schiphol airport in The Netherlands by the Dutch authorities;
 - (iii) at Schiphol airport, Gvero shall be provisionally released into the custody of a designated official of the Republic of Serbia, who shall accompany him for the remainder of his travel to Belgrade, Republic of Serbia and to his place of residence or the Military Medical Academy therein;
 - (iv) during the period of his provisional release, Gvero shall abide by the following conditions, and the authorities of the Republic of Serbia, including the local police, shall ensure compliance with such conditions:

⁴⁹ Reply, para. 13.

⁵⁰ Motion, Annex A.

⁵¹ Correspondence from Host Country, 13 May 2009.

1. to provide the addresses at which he will be staying in Belgrade to the Ministry of Internal Affairs of the Republic of Serbia and the Registrar of the Tribunal, before leaving the UNDU in The Hague;
 2. to remain within the confines of the municipality of Belgrade;
 3. to surrender his passport to the relevant authorities of the Republic of Serbia;
 4. to report each day that he is not hospitalised to the police in Belgrade at a local police station to be designated by the authorities of the Republic of Serbia;
 5. on the days in which Gvero is in hospital, an officer of the Belgrade police shall visit him there and file a written report with the Tribunal confirming his presence;
 6. to consent to having the Ministry of Internal Affairs of the Republic of Serbia check with the local police about his presence and to the making of occasional, unannounced visits by the same Ministry or by a person designated by the Registrar of the Tribunal;
 7. not to have any contact with the co-accused in the case;
 8. not to have any contact whatsoever or in any way interfere with any victim or potential witness or otherwise interfere in any way with the proceedings or the administration of justice;
 9. not to discuss his case with anyone, including the media, other than with his counsel;
 10. to comply strictly with any requirements of the authorities of the Republic of Serbia necessary to enable them to comply with their obligations under this Decision and their guarantee;
 11. to comply strictly with any further order of the Tribunal varying the terms of or terminating his provisional release;
- (v) Gvero shall return to UNDU no later than 23 August 2009, unless otherwise ordered by the Trial Chamber. He shall be accompanied from his place of residence in Belgrade by the designated officials of the Republic of Serbia, who shall deliver him into the custody of the Dutch authorities at Schiphol airport; the Dutch authorities shall then transport him back to the UNDU;

(c) **REQUIRES** the Republic of Serbia to assume responsibility as follows:

(i) by designating officials of the Republic of Serbia into whose custody Gvero shall be provisionally released and who shall accompany Gvero from Schiphol airport to the Republic of Serbia and to his place of residence or the Military Medical Academy in Belgrade, and notifying, as soon as practicable, the Trial Chamber and the Registrar of the Tribunal of the name of the designated officials;

(ii) for the personal security and safety of Gvero while on provisional release;

(iii) for all expenses concerning transport of Gvero from Schiphol airport to Belgrade and back;

(iv) for all expenses concerning accommodation and security of Gvero while on provisional release;

(v) at the request of the Tribunal, or the parties, to facilitate all means of cooperation and communication between the parties and to ensure the confidentiality of any such communication;

(vi) to arrest and detain Gvero immediately if he should breach any of the conditions of this Decision; and

(vii) to report immediately to the Trial Chamber any breach of the conditions set out above;

(d) **INSTRUCTS** the Registrar to consult with the Ministry of Justice of the Kingdom of the Netherlands as to the practical arrangements for the provisional release of Gvero;


(e) **REQUESTS** the authorities of all States through which Gvero will travel:

(i) to hold Gvero in custody for any time he will spend in transit at the airport;

(ii) to arrest and detain Gvero pending his return to the UNDU, should he attempt to escape;

- (f) **ORDERS** that Gvero shall be immediately detained should he breach any of the foregoing terms and conditions of his provisional release; and
- (g) **GRANTS** the Prosecution's request for a stay of the execution of this decision pending appeal.

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



O-Gon Kwon
Judge

Dated this sixteenth day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]