



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: 28 July 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

**Acting Registrar:** Mr. John Hocking

**Decision of:** 28 July 2009

**PROSECUTOR**

v.

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

***PUBLIC REDACTED VERSION***

**DECISION ON REQUEST FOR URGENT RECONSIDERATION OF  
GVERO'S MOTION FOR PROVISIONAL RELEASE**

**Office of the Prosecutor**  
Mr. Peter McCloskey

**Government of the Republic of Serbia**

**Counsel for the Accused**

**Government of the Netherlands**

Mr. Zoran Živanović and Ms. Mira Tapušević for Vujadin Popović  
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara  
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 “Request for Reconsideration of Milan Gvero’s Motion for Provisional Release in Light of the Appeals Chamber Decision of 20 July 2009”, filed confidentially on 22 July 2009 (“Motion”), and hereby renders its decision thereon.

## I. PROCEDURAL BACKGROUND

1. On 1 May 2009, Gvero filed confidential and partially *ex parte* 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” (“Original Motion”), in which he requested provisional release to enable him to have medical examination and treatment. On 15 June 2009, the Trial Chamber granted the Original Motion in the “Decision on Gvero’s Motion for Provisional Release” (“Trial Chamber Decision”).

2. On 20 July 2009, the Appeals Chamber granted an appeal by the Prosecution in its “Decision on Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release” (“Appeals Chamber Decision”). It found that the Trial Chamber “should have obtained medical documentation identifying the sufficient social and psychological reasons for medical treatment to take place outside the Netherlands”<sup>1</sup> and that the Trial Chamber neglected to address “whether Gvero could receive the treatment in the Netherlands.”<sup>2</sup>

3. On 22 July 2009, Gvero filed confidentially the “Request for Reconsideration of Milan Gvero’s Motion for Provisional Release in Light of the Appeals Chamber Decision of 20 July 2009” (“Motion”), in which he sought provisional release on the terms set out in the Trial Chamber Decision or for such time as to allow for Gvero’s treatment and return to the United Nations Detention Unit (“UNDU”) for the resumption of proceedings on 2 September 2009.<sup>3</sup> On 23 July 2009, the Prosecution filed confidentially “Prosecution’s Response to Gvero’s Request for Reconsideration of his Motion for Provisional Release” (“Response”), in which it submitted that the Motion should be denied and requested pursuant to Rule 65(E) of the Rules of Procedure and Evidence (“Rules”) that should the Motion be granted, any such decision should be stayed to allow an appeal to be filed.<sup>4</sup> On 24 July 2009, Gvero filed confidentially “Request for Leave to Reply and Reply to Prosecution Response to Milan Gvero’s Request for Reconsideration of his Motion for Provisional Release” (“Reply”).

<sup>1</sup> Appeals Chamber Decision, para. 13.

<sup>2</sup> *Ibid.*, para.13.

## II. SUBMISSIONS OF THE PARTIES

### A. Motion

4. Following the Appeals Chamber Decision, Gvero obtained a medical report by Dr. Michael Eekhof,<sup>5</sup> which states that Gvero requires [REDACTED] surgery towards the beginning of next year and that he suffers a serious [REDACTED] problem which should be treated before he has the [REDACTED] surgery.<sup>6</sup> Gvero also points out that the medical report states that having the treatment in Serbia will be an “important medical, psychological and social advantage.”<sup>7</sup> Gvero submits that the necessary treatment has been delayed by the time spent waiting for the Appeals Chamber Decision and that Dr. Eekhof confirms that treatment in the Netherlands “will take months witch (sic) process is logistically very difficult to influence”.<sup>8</sup>

### B. Response

5. The Prosecution submits that the Motion does not put forth any argument related to Gvero’s [REDACTED] condition, and that therefore Gvero failed in producing “medical documentation”<sup>9</sup> proving his need for a second opinion on this health issue outside The Netherlands.<sup>10</sup> With regard to Dr. Eekhof’s report, the Prosecution contends that it did not give any specific reason for the treatment not to be performed in the Netherlands<sup>11</sup> and that it states that the procedures can be performed in the Netherlands.<sup>12</sup>

6. The Prosecution further submits that the nature of Gvero’s submissions has changed since the Original Motion where he stated that his [REDACTED] treatment should be carried out in Serbia because the Tribunal would not pay for it in the Netherlands while now he relies on the “alleged impossibility of getting his [REDACTED] treatment in the Netherlands in the coming months.”<sup>13</sup>

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<sup>3</sup> Motion, para. 13.

<sup>4</sup> Response, para. 11.

<sup>5</sup> Motion, para. 8.

<sup>6</sup> *Ibid.*, para. 9.

<sup>7</sup> *Ibid.*, para. 9.

<sup>8</sup> *Ibid.*, para. 11.

<sup>9</sup> Appeals Chamber Decision, para. 13

<sup>10</sup> Response, para.4.

<sup>11</sup> *Ibid.*, para. 5.

<sup>12</sup> *Ibid.*, para. 7.

<sup>13</sup> *Ibid.*, para. 9.

### C. Reply

7. Gvero submits that Dr. Eekhof's report fulfils the requirements of "medical documentation", as required by the Appeals Chamber,<sup>14</sup> in relation to his [REDACTED] condition,<sup>15</sup> but Gvero accepts that the report does not address the need for a second opinion on his [REDACTED] condition.<sup>16</sup> Gvero has therefore asked the Office for Legal Aid and Detention Matters (OLAD) for a further report relating to this medical issue and requests the Trial Chamber to wait for this report before issuing a decision on the Motion, if it regards the [REDACTED] treatment, only when considered in conjunction with [REDACTED] treatment, to amount to sufficiently compelling humanitarian circumstances.<sup>17</sup>

8. Furthermore, Gvero submits that the availability of medical care in the Netherlands is a factor in establishing whether sufficient compelling grounds exist for provisional release after a Rule 98 *bis* decision, but it is not determinative.<sup>18</sup> He also underlined the independence and the professional status of Dr. Eekhof.<sup>19</sup>

### III. LAW

9. 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.<sup>20</sup> 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".

<sup>14</sup> Appeals Chamber Decision, para. 13.

<sup>15</sup> Reply, para. 5.

<sup>16</sup> *Ibid.*, para. 5.

<sup>17</sup> *Ibid.*, para. 6.

<sup>18</sup> *Ibid.*, para. 7.

<sup>19</sup> *Ibid.*, para. 9.

<sup>20</sup> 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").

10. 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.<sup>21</sup> What these relevant factors are, as well as the weight to be attributed to them, depends upon the particular circumstances of each case,<sup>22</sup> 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.”<sup>23</sup>

11. 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 flight by the Accused.”<sup>24</sup> 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.”<sup>25</sup> 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).<sup>26</sup>

12. 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.<sup>27</sup> 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”.<sup>28</sup>

<sup>21</sup> 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.

<sup>22</sup> See, *inter alia*, Appeals Chamber Decision of 15 May 2008, para. 7; Appeals Chamber Decision of 1 July 2008, para. 8.

<sup>23</sup> Appeals Chamber Decision of 15 May 2008, para. 6 (referring to *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7).

<sup>24</sup> 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.

<sup>25</sup> See, for example, Appeals Chamber Decision of 15 May 2008, para. 24.

<sup>26</sup> See, for example, Decision of 21 July 2008, para. 15; Appeals Chamber decision of 15 May 2008, para. 23.

<sup>27</sup> Appeals Chamber Decision of 15 May 2008, paras. 18, 32.

<sup>28</sup> *Ibid.*, para. 18.

#### IV. DISCUSSION

13. For the reasons given in paragraphs 14–16 of the Trial Chamber Decision, the Trial Chamber continues to be satisfied that Gvero does not pose a flight risk or a threat to any victim, witness or person associated with the case.

14. In the Trial Chamber Decision, the Trial Chamber found that Gvero needed a second opinion on his [REDACTED] condition and that he would undoubtedly benefit from receiving it in a familiar environment from a doctor who speaks his language,<sup>29</sup> that he needed [REDACTED] surgery as soon as possible and that there were benefits in the [REDACTED] examination and the [REDACTED] surgery being carried out at the Military Medical Academy in Belgrade.<sup>30</sup> The Trial Chamber concluded that the humanitarian grounds advanced by Gvero justified his provisional release.<sup>31</sup>

15. The Appeals Chamber found that the Trial Chamber had not properly assessed whether there were sufficiently compelling humanitarian reasons justifying Gvero's release given the stage of the proceedings.<sup>32</sup> It found that in the particular circumstances of the case the Trial Chamber should have obtained "medical documentation identifying the sufficient social and psychological reasons for medical treatment to take place outside the Netherlands".<sup>33</sup> Recalling that an applicant for provisional release on medical grounds bears the burden of establishing that any treatment in the Netherlands is not appropriate in his particular circumstances, the Appeals Chamber concluded that the Trial Chamber neglected to address a relevant factor in its assessment of whether sufficiently compelling humanitarian reasons existed, namely whether Gvero could receive the treatment in the Netherlands.<sup>34</sup>

16. The Trial Chamber finds that Gvero requires [REDACTED] surgery towards the beginning of next year and that the first part of the [REDACTED] treatment that he also requires should take place prior to the [REDACTED] surgery.<sup>35</sup> The Trial Chamber notes also its earlier finding that any delay of the [REDACTED] surgery may be aggravated by the anticipated need for [REDACTED]

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<sup>29</sup> Trial Chamber Decision, para. 18.

<sup>30</sup> *Ibid.*, para. 19.

<sup>31</sup> *Ibid.*, para. 19.

<sup>32</sup> Appeals Chamber Decision, paras. 9–13.

<sup>33</sup> *Ibid.*, para. 13.

<sup>34</sup> *Ibid.*, para. 13.

<sup>35</sup> Motion, para. 9, Annex.

surgery and 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.<sup>36</sup>

17. Dr. Eekhof's report gives details of Gvero's [REDACTED] condition, his [REDACTED] problem and the [REDACTED] treatment that he requires.<sup>37</sup> The final paragraph of his report states:

Although these procedures can be performed in The Netherlands this undertaking will take months with (*sic*) process is logistically very difficult to influence. On humanitarian grounds treatment in Belgrade is advisable. These procedures will give rise to [REDACTED]; being able to communicate in his own language and confer with his doctor and family will present an important medical, psychological and social advantage.<sup>38</sup>

18. The Trial Chamber finds that the report of Dr. Eekhof, who is a Medical Officer at the United Nations Detention Unit ("UNDU"),<sup>39</sup> constitutes "medical documentation identifying the sufficient social and psychological reasons for medical treatment to take place outside the Netherlands", as required in the Appeals Chamber Decision,<sup>40</sup> and that it establishes that [REDACTED] treatment in the Netherlands would be subject to delay. With these additional considerations, the Trial Chamber again finds that there are sufficiently compelling humanitarian reasons justifying Gvero's release. In making this finding the Trial Chamber considers that its assessment is not erroneous for the reasons that were identified in the Appeals Chamber Decision.

19. The Trial Chamber also continues to be satisfied with the guarantees provided by the Republic of Serbia<sup>41</sup> and takes note of the written confirmation from the host country that it has no objection to the requested provisional release.<sup>42</sup>

20. For the foregoing reasons, the Trial Chamber finds that the conditions for provisional release set forth in Rule 65(B) have been met.

21. As Gvero concedes,<sup>43</sup> Dr. Eekhof's report does not address the need for a second opinion on Gvero's [REDACTED] condition. However, the Trial Chamber finds that Gvero's urgent need for [REDACTED] treatment prior to the [REDACTED] surgery that he also needs is a sufficiently compelling humanitarian reason for his provisional release. Since Gvero will need to spend 20-25

<sup>36</sup> Trial Chamber Decision, para. 19.

<sup>37</sup> Motion, Annex.

<sup>38</sup> *Ibid.*, Annex.

<sup>39</sup> Reply, para. 9.

<sup>40</sup> Appeals Chamber Decision, para. 13.

<sup>41</sup> Trial Chamber Decision, para. 22; Original Motion, Annex A.

<sup>42</sup> *Ibid.*, para. 22; Correspondence from Host Country, 13 May 2009.

<sup>43</sup> Reply, para. 5

days in Belgrade for [REDACTED] surgery,<sup>44</sup> he should be granted provisional release for the same period of time as he was in the Trial Chamber Decision. Therefore the Trial Chamber does not consider it necessary to wait for the further report on Gvero's [REDACTED] condition which Gvero has requested from OLAD, in order to issue its decision on provisional release.

## V. DISPOSITION

22. For these reasons, pursuant to Article 29 of the Statute of the Tribunal and Rules 54, 65 and 126 *bis*, 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 Gvero must return to the UNDU no later than 1 September 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:
    - a. 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;
    - b. to remain within the confines of the municipality of Belgrade;
    - c. to surrender his passport to the relevant authorities of the Republic of Serbia;

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<sup>44</sup> Trial Chamber Decision, para. 21, Original Motion, *ex parte* Annex D.

- d. 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;
- e. on the days on 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;
- f. 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;
- g. not to have any contact with the other Accused in the case;
- h. 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;
- i. not to discuss his case with anyone, including the media, other than with his counsel;
- j. 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;
- k. 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 1 September 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 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.



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Carmel Agius  
Presiding

Dated this 28th day of July 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**