

**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-05-88-AR65.9

Date: 6 August 2009

Original: English

BEFORE THE DUTY JUDGE

Before: Judge Christoph Flügge, Duty Judge
Registrar: Mr. John Hocking
Decision of: 6 August 2009

PROSECUTOR

v.

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

Public Redacted Version

**DECISION ON PROSECUTION'S APPEAL AGAINST
DECISION ON GVERO'S MOTION FOR PROVISIONAL
RELEASE**

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Mr. Zoran Živanović and Ms. Mira Tapušковиć 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

1. I, Christoph FLÜGGE, Judge 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”), acting in my current capacity as Duty Judge in accordance with Rule 28 of the Rules of Procedure and Evidence (“Rules”), am seised of the “Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release”, filed confidentially on 29 July 2009 (“Prosecution’s Appeal”), whereby the Prosecution appeals the “Decision on Request for Urgent Reconsideration of Gvero’s Motion for Provisional Release”, issued confidentially by Trial Chamber II on 28 July 2009 (“Impugned Decision”), which, *inter alia*, granted provisional release to the Accused Milan Gvero (“Gvero”) for a period not exceeding 21 days and terminating no later than 1 September 2009, and granted the Prosecution’s request for a stay of the execution of the Impugned Decision pending appeal.¹ On 3 August 2009, Gvero filed a confidential response to the Prosecution’s Appeal (“Gvero’s Response”).² The Prosecution filed a confidential reply on 4 August 2009 (“Prosecution’s Reply”).³

I. BACKGROUND

2. On 1 May 2009, Milan Gvero filed a confidential motion – with both *inter-partes* and *ex parte* annexes – requesting provisional release to travel to Belgrade to receive a second opinion on treatment [redacted] (“Original Motion”).⁴ On 15 June 2009, the Trial Chamber granted the Original Motion, finding that Gvero did not pose a flight risk or a threat to any victim, witness, or person associated with this case⁵ and that it was “crucial that Gvero seeks a second opinion [redacted]”.⁶ It further found that, “[i]n order to make an informed decision, Gvero will undoubtedly benefit from receiving such second opinion from a doctor who speaks his language

¹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Request for Urgent Reconsideration of Gvero’s Motion for Provisional Release, 28 July 2009, para. 22.

² *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.9, Defence Response to Prosecution’s Appeal Against Further Decision on Gvero’s Motion for Provisional Release, 3 August 2009. The Defence subsequently filed a Corrigendum in which it made a correction in the third sentence of paragraph 13 of his Response, see *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.9, Corrigendum to Defence Response to Prosecution’s Appeal against Further Decision on Gvero’s Motion for Provisional Release, 3 August 2009.

³ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.9, Prosecution’s Reply to Gvero’s Response to Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 4 August 2009.

⁴ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Motion Seeking the Provisional Release of Milan Gvero for Humanitarian Reasons During the Period Allowed for the Preparation of Final Briefs and Closing Arguments, 1 May 2009 (“Original Motion”), paras 13–17. The Prosecution filed a confidential and *ex parte* response on 15 May 2009, see *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, 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, 15 May 2009. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Request for Leave to Reply and Reply to Prosecution Response to Milan Gvero’s Application for Provisional Release During the Preparation of Final Briefs, filed as confidential and *ex parte* on 22 May 2009.

⁵ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Gvero’s Motion for Provisional Release, 15 June 2009 (“Original Impugned Decision”), para. 16.

⁶ Original Impugned Decision, para. 18.

and from doing the associated testing in Belgrade, a familiar environment.”⁷ The Trial Chamber also granted the Prosecution’s request for a stay of the execution of the Original Impugned Decision pending appeal.⁸

3. On 17 June 2009, the Prosecution filed a confidential appeal against the Original Impugned Decision (“Original Appeal”).⁹ On 20 July 2009, the Appeals Chamber 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”¹⁰ and granted the Original Appeal¹¹ on the basis that the Trial Chamber erred by:

[...] neglect[ing] to address a relevant factor in its assessment of whether sufficiently compelling humanitarian reasons existed that warranted Gvero’s release, namely whether Gvero could receive the treatment in the Netherlands [...].¹²

4. On 22 July 2009, in light of the Appeals Chamber Decision, Gvero confidentially and urgently filed a request for reconsideration of the Original Impugned Decision, seeking provisional release on the terms set out in the Original Impugned Decision or for such time as to allow for his treatment and return to the United Nations Detention Unit (“UNDU”) for the resumption of proceedings on 2 September 2009 (“Motion”).¹³ Annexed to the Motion, Gvero submitted a statement by Dr. Eekhof – the Reporting Medical Officer at the UNDU – documenting his health condition (“Dr. Eekhof’s statement”).¹⁴ On 28 July 2009, the Trial Chamber granted the Motion, finding:

[...] that the report of Dr. Eekhof [...] 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, and that it establishes that [redacted] treatment in the Netherlands would be subject to delay. With these additional considerations, the

⁷ Original Impugned Decision, para. 18.

⁸ Original Impugned Decision, para. 23(g).

⁹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.8, Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 17 June 2009. The Defence filed a confidential response on 25 June 2009, see *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.8, Defence Response to Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 25 June 2009.

¹⁰ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.8, Decision on Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 20 July 2009 (“Appeals Chamber Decision”), para. 13.

¹¹ Appeals Chamber Decision, para. 14.

¹² Appeals Chamber Decision, para. 13.

¹³ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Request for Reconsideration of Milan Gvero’s Motion for Provisional Release in Light of the Appeals Chamber Decision of 20 July 2009, 22 July 2009 (“Motion”), para. 13. The Prosecution filed a confidential response on 23 July 2009, in which it submitted that the Motion should be denied and requested pursuant to Rule 65(E) of the Rules that should the Motion be granted, any such decision should be stayed to allow an appeal to be filed; see *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Prosecution’s Response to Gvero’s Request for Reconsideration of His Motion for Provisional, 23 July 2009.

¹⁴ See Motion, to which Dr. Eekhof Statement is annexed.

Trial Chamber again finds that there are sufficiently compelling humanitarian reasons justifying Gvero's release.¹⁵

The Trial Chamber further noted that Dr. Eekhof's statement did not address the need for a second opinion with regard to Gvero's [redacted] but found that nevertheless:

[...] Gvero's urgent need for [redacted] treatment prior to the [redacted] that he also needs is a sufficiently compelling humanitarian reason for his provisional release.¹⁶

II. STANDARD OF REVIEW

5. An interlocutory appeal is not a *de novo* review of a Trial Chamber's decision.¹⁷ The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules of Procedure and Evidence of the Tribunal ("Rules") is a discretionary one. Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.¹⁸

6. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a discernible error. The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (a) based on an incorrect interpretation of governing law; (b) based on a patently incorrect conclusion of fact; or (c) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁹ The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.²⁰

¹⁵ Impugned Decision, para. 18 (footnotes omitted).

¹⁶ Impugned Decision, para. 21.

¹⁷ See, e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 17 December 2008 ("*Praljak Decision*"), para. 4 (citing *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006 ("*Brahimaj Decision*"), para. 5; *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić Decision*"), para. 6 and *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5).

¹⁸ See, e.g., *Praljak Decision*, para. 4; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para. 3; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006, para. 5.

¹⁹ *Praljak Decision*, para. 5.

²⁰ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on Popović's Motion for Provisional Release, 1 July 2008, para. 6.

III. APPLICABLE LAW

7. Under Rule 65(B) of the Rules, a Chamber may grant provisional release 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 having given the host country and the State to which the accused seeks to be released, the opportunity to be heard.²¹

8. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.²² It must then provide a reasoned opinion indicating its view on those relevant factors.²³ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²⁴ This is because 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.²⁵ The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.²⁶ If the Trial Chamber is satisfied that the requirements of Rule 65(B) have been met, it has discretion as to whether or not to grant provisional release to an accused. An application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, should only be granted when sufficiently compelling humanitarian reasons exist.²⁷

IV. DISCUSSION

A. Submissions of the parties

9. The Prosecution appeals the Impugned Decision on the ground that “the Trial Chamber committed a discernible error by failing to correctly apply the governing law in respect of Gvero’s alleged need to receive [redacted] in Serbia”.²⁸ Specifically,

²¹ *Praljak* Decision, para. 6; *Brahimaj* Decision, para. 6; Appeals Chamber Decision, para. 5.

²² *Praljak* Decision, para. 6; *Brahimaj* Decision, para. 6; Appeals Chamber Decision, para. 6.

²³ *Praljak* Decision, para. 7; *see also* *Brahimaj* Decision, para. 10; Appeals Chamber Decision, para. 6.

²⁴ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8; Appeals Chamber Decision, para. 6.

²⁵ *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.

²⁶ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8; Appeals Chamber Decision, para. 6.

²⁷ *See Praljak* Decision, para. 15; Appeals Chamber Decision, para. 6.

²⁸ Prosecution’s Appeal, para. 2.

the Trial Chamber erred when it found – based on [Dr. Eekhof’s statement] – that Gvero cannot receive timely [redacted] treatment in the Netherlands and that there are sufficient social and psychological reasons for [redacted] treatment to take place outside the Netherlands.²⁹

10. The Prosecution contends that Dr. Eekhof’s statement: (i) due to its brevity and lack of detail, is not a “proper medical documentation” as required by the Appeals Chamber Decision;³⁰ (ii) is unsubstantiated in that it neither demonstrates the specific steps taken to determine whether the [redacted] treatment can be carried out in a timely manner in the Netherlands, nor provides an explanation for its claim that scheduling “what is routine [redacted] treatment in a country with a highly-developed health care system” will take months;³¹ and in fact (iii) states that the medical procedures can be performed in the Netherlands.³² According to the Prosecution, the Trial Chamber therefore erred in finding that the [redacted] treatment was not available in the Netherlands as it was “subject to delay”, without inquiring why Gvero cannot receive [redacted] treatment in the Netherlands in a timely manner.³³

11. Regarding the sufficient social and psychological reasons for [redacted] treatment to take place outside the Netherlands, the Prosecution further submits that the Trial Chamber erred in considering “the overall health benefit that may result from Gvero being released”.³⁴ In particular, the Prosecution argues that the Trial Chamber erred in finding that Gvero’s ability to “communicate in his own language and confer with his doctor and family”³⁵ provides “sufficient social and psychological reasons for Gvero to receive [redacted] treatment in Serbia” and therefore provides sufficiently compelling humanitarian basis for release.³⁶ In light of the above, the Prosecution argues that “the Trial Chamber erred when it relied on [Dr. Eekhof’s statement] to find that [redacted] treatment in Serbia was a sufficiently compelling humanitarian reason for the purposes of Rule 65”.³⁷ The Prosecution therefore requests that the Appeals Chamber reverses the Impugned Decision and deny provisional release to Gvero.³⁸

12. Gvero opposes the Prosecution’s Appeal on the ground that the Trial Chamber, after carefully considering all relevant factors, correctly applied and interpreted the governing law when it found, based on Dr. Eekhof’s statement, that “Gvero required urgent [redacted] treatment prior to

²⁹ Prosecution’s Appeal, paras 2, 14 and 17; Prosecution’s Reply, para. 2.

³⁰ Prosecution’s Appeal, paras 12-13 (citing *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.16, Decision on Appeal Concerning the Severance of Matthieu Ndirumpatse, 19 June 2009 (“Ndirumpatse Decision”), para. 22); Prosecution’s Reply, para. 4.

³¹ Prosecution’s Appeal, paras 12-13; Prosecution’s Reply, paras 2-3 and 5.

³² Prosecution’s Appeal, para. 11.

³³ Prosecution’s Appeal, paras 10 and 14 (referring to Impugned Decision, para 18); Prosecution’s Reply, para. 2.

³⁴ Prosecution’s Appeal, para. 16.

³⁵ Dr. Eekhof’s statement annexed to Motion, para. 5.

³⁶ Prosecution’s Appeal, para. 16; Prosecution’s Reply, paras 2 and 6.

³⁷ Prosecution’s Appeal, paras 8-9 and 18-19; Prosecution’s Reply, para. 1.

the [redacted] that he will also need in due course” and that as a result, sufficiently compelling humanitarian reasons existed warranting his provisional release.³⁹

13. Further, Gvero disagrees with the Prosecution’s claim that Dr. Eekhof’s statement is not “proper medical documentation”.⁴⁰ He responds that Dr. Eekhof is “a respected medical practitioner at the UNDU who is totally independent of the Defence” and that his statement “is the result of numerous meetings [...] during which the details of his various medical afflictions were analysed in some detail”.⁴¹ Gvero argues that the Prosecution fails to explain why and in what ways Dr. Eekhof’s statement is unsubstantiated and that the Trial Chamber did not err in relying upon it.⁴² He further submits that the Trial Chamber correctly found that by providing Dr. Eekhof’s statement to the Trial Chamber, Gvero had satisfied “the burden of establishing that any treatment in the Netherlands is not appropriate in his particular circumstances”.⁴³ Gvero claims that all the criteria set out by the Appeals Chamber Decision were therefore fulfilled in the Impugned Decision.⁴⁴

14. Gvero further avers that the Trial Chamber correctly acted within the proper exercise of its discretion by accepting the conclusions in Dr. Eekhof’s statement and in relying on the fact that his [redacted] treatment in the Netherlands would be subject to delay and that this would result in a negative social and psychological effect.⁴⁵ In response to the Prosecution’s argument that the Trial Chamber erred when it relied on the Report to find that [redacted] treatment in Serbia was a sufficiently compelling humanitarian reason for the purposes of Rule 65, Gvero argues that the Prosecution failed to address the issue of “the [redacted] treatment in the context of Gvero’s [redacted]”.⁴⁶ Gvero therefore asks that the Prosecution’s Appeal be dismissed.⁴⁷

³⁸ Prosecution’s Appeal, paras 1, 19; Prosecution’s Reply, para. 8.

³⁹ Gvero’s Response, paras 9 and 18.

⁴⁰ Gvero’s Response, paras 14-15, Gvero contends that the Ngirumpatse Decision, upon which the Prosecution relies, was not taken in the context of a provisional release application and that the reason for the report being considered unsatisfactory in that case was the silence of the report on the nature of the accused’s medical problem. The Prosecution replies that it is irrelevant that the Ngirumpatse Decision was not taken in the context of a provisional release application and that, similar to the present case, the Trial Chamber in the Ngirumpatse Decision relied on a report that was “lacking detail”, “provisional”, “disputed by the parties”, and played a “significant role” in the Trial Chamber’s decision; see Prosecution’s Reply, para. 4.

⁴¹ Gvero’s Response, para. 13.

⁴² Gvero’s Response, para. 13.

⁴³ Gvero’s Response, para. 10.

⁴⁴ Gvero’s Response, para. 10.

⁴⁵ Gvero’s Response, para. 16.

⁴⁶ Gvero’s Response, paras 11-12. The Prosecution replies that, while Gvero has not sufficiently demonstrated the urgency for either his [redacted] treatment, the Prosecution has not challenged the findings of the Trial Chamber in this regard; see Prosecution’s Reply, para. 2.

⁴⁷ Gvero’s Response, para. 18.

B. Analysis

15. As a preliminary matter, I note that the issue on this appeal as defined by the Prosecution is the Chamber's findings in relation to [redacted], and not in relation to the need for [redacted].⁴⁸ For this reason, my discussion is limited to this particular finding.

16. I recall that the Appeals Chamber reversed the Original Impugned Decision on the basis that the Trial Chamber committed a discernible error in failing to obtain "medical documentation identifying the sufficient social and psychological reasons for medical treatment to take place outside the Netherlands".⁴⁹ The Appeals Chamber also found that the Trial Chamber erred by neglecting to address whether Gvero could receive the treatment in the Netherlands as a relevant factor in assessing whether sufficiently compelling humanitarian reasons existed warranting his provisional release.⁵⁰

17. In the present case, Dr. Eekhof's statement lies at the core of the Impugned Decision to grant Gvero's Motion. In granting provisional release to Gvero, the Trial Chamber found that Dr. Eekhof's statement constitutes "medical documentation identifying the sufficient social and psychological reasons for medical treatment to take place outside the Netherlands" as required by the Appeals Chamber Decision.⁵¹

18. I recall that the pertinent paragraph of Dr. Eekhof's statement provides:

Although these procedures can be performed in The Netherlands this undertaking will take months witch [sic] process is logistically very difficult to influence. On humanitarian grounds treatment in Belgrade is advisable. These procedures will give rise to temporary pain, communication and eating problems; being able to communicate in his own language and confer with his doctor and family will present an important medical, psychological and social advantage.⁵²

19. I note that Dr. Eekhof's statement does not substantiate or explain why the first phase of the [redacted] treatment will take months if carried out in the Netherlands. Without any explanation or reliable documentation, I am not convinced of the veracity of this contention. I further note Gvero's silence on any step to be taken in order to have such treatment provided in the Netherlands. Therefore, Dr. Eekhof's statement does not provide an evidentiary basis on which it may be

⁴⁸ Prosecution's Response, para. 11; Prosecution's Reply, para. 2; *See also* Impugned Decision, para. 21, which states: "the Trial Chamber finds that Gvero's urgent need for [redacted] treatment prior to the [redacted] that he also needs is a sufficiently compelling humanitarian reason for his provisional release. Since Gvero will need to spend 20-25 days in Belgrade for [redacted], 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] which Gvero has requested from OLAD, in order to issue its decision on provisional release".

⁴⁹ Appeals Chamber Decision, para. 13.

⁵⁰ Appeals Chamber Decision, para. 13.

⁵¹ Impugned Decision, para. 18.

reasonably concluded that [redacted] treatment in the Netherlands would be subject to delay. Hence, Dr. Eekhof's broad and unsubstantiated statement, and the Trial Chamber's reliance on it, demonstrates that the Trial Chamber failed to properly inquire whether Gvero could receive the [redacted] treatment in the Netherlands.

20. Dr. Eekhof's statement further argues that Gvero's ability to both communicate in his own language and confer with his doctor and family will present an important medical, psychological and social advantage. I am not satisfied, however, that these considerations amount to "sufficient social and psychological reasons for medical treatment to take place outside the Netherlands" as required by the Appeals Chamber Decision. I concur with the submission by the Prosecution that if this were indeed sufficient, all accused before this Tribunal seeking medical treatment would be granted provisional release in order to receive medical care in their home countries,⁵³ irrespective of the nature of the medical treatment sought and the stage of the proceedings at which the request is made. This, however, would be in contradiction to the Appeals Chamber's jurisprudence on provisional release.⁵⁴ Consequently, the Trial Chamber erred in finding that sufficiently compelling humanitarian reasons existed warranting Gvero's provisional release.⁵⁵

21. Accordingly, I conclude that the Trial Chamber failed to correctly exercise its discretion and committed a discernible error in concluding that Dr. Eekhof's statement met the criteria required by the Appeals Chamber Decision.

V. DISPOSITION

22. For the foregoing reasons, I **GRANT** the Prosecution's Appeal and **REVERSE** the Impugned Decision.

⁵² Dr. Eekhof's statement as annexed to Motion, para. 5.

⁵³ Prosecution's Reply, para. 6.

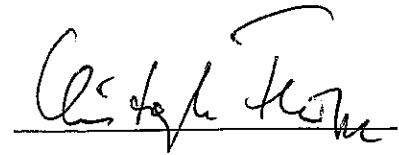
⁵⁴ See, e.g., *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on "Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions", 8 December 2005; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković* Dated 31 March 2008", 21 April 2008, para. 17 and references cited therein, in which the Appeals Chamber notes that the development of the Tribunal's jurisprudence implies that an application for provisional release brought at a late stage of proceedings will only be granted when serious and sufficiently compelling humanitarian reasons exist.

⁵⁵ See Appeals Chamber Decision, para. 13.

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

Done this 6th day of August 2009,

At The Hague, The Netherlands



Judge Christoph Flügge
Duty Judge

[Seal of the Tribunal]