



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: 17 December 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: 17 December 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON GVERO'S MOTION FOR PROVISIONAL RELEASE
WITH JUDGE AGIUS' DISSENTING OPINION AND JUDGE PROST'S
SEPARATE DECLARATION**

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 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

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”, filed confidentially on 16 November 2009 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. In the Motion, Gvero requests provisional release until the rendering of judgement or for a period of at least 25 days under such conditions deemed appropriate by the Trial Chamber.¹ Gvero has provided a guarantee from the Government of the Republic of Serbia,² and on 19 November 2009 the Netherlands also filed correspondence on the matter in its capacity as host state.³ On 30 November 2009, the Prosecution filed confidentially the “Prosecution’s Response to Motion Seeking Provisional Release of Milan Gvero” (“Response”), opposing the Motion and requesting a stay of the decision pending appeal should the Motion be granted.⁴ On 7 December 2009, Gvero filed the confidential “Reply to Prosecution’s Response to Motion Seeking the Provisional Release of Milan Gvero” (“Reply”).

II. SUBMISSIONS OF THE PARTIES

A. Motion

2. Referring to Judge Prost’s dissenting opinion to the recent confidential “Decision on Miletić’s Motion for Provisional Release,” rendered on 15 October 2009 (“Decision of 15 October 2009”), Gvero contends that contrary to some of the previous Appeals Chamber decisions, the post-Rule 98 *bis* condition of “sufficiently compelling humanitarian justification” should not have been read into Rule 65(B).⁵ This condition is not contained in the text of the Rule and it effectively contravenes the presumption of innocence which is enshrined in the Statute.⁶ Gvero maintains that he meets the two requirements prescribed in Rule 65(B) and he will neither abscond nor present a risk to any victim or witness.⁷

¹ Motion, paras. 1, 27–28.

² *Ibid.*, Annex A.

³ Correspondence from Host Country, 19 November 2009.

⁴ Response, paras. 1, 12.

⁵ Motion, para. 13.

⁶ *Ibid.*, paras. 13–14.

⁷ *Ibid.*, para. 15.

3. Gvero further argues that in the alternative, should the Trial Chamber still consider that “sufficiently compelling humanitarian justification” is required in order to grant a provisional release brought after the close of the Prosecution case, his state of ill-health satisfies this criterion.⁸ Gvero submits that his dental treatment in Serbia before his cardiac surgery is not only his preference, but will also present, according to the UNDU’s medical staff, medical, psychological and social advantages, especially considering his age.⁹ Furthermore, Gvero notes that he would need to be available for treatment in Belgrade for 20–25 days.¹⁰

B. Response

4. The Prosecution argues that at this stage of the proceedings there is an increased risk of flight, given the evidence before the Trial Chamber is probative of Gvero’s guilt.¹¹ Furthermore, Gvero’s assertion that compelling reasons are not required to justify provisional release at this stage of the proceedings is contradictory to the most recent Appeals Chamber decisions.¹²

5. The Prosecution submits that there is no sufficiently compelling humanitarian reason for Gvero to travel to Serbia to receive dental treatment there, which is the only reason he advances in support of the Motion.¹³ The Prosecution asserts that adequate and timely dental treatment is available in the Netherlands which Gvero could have already started were it not for his refusal to await the decision on the Motion.¹⁴ Moreover, while the medical report annexed to the Motion (“Medical Report”) provided mentions a connection between open heart surgery and emotional and psychological problems, it does not suggest this in the context of the dental treatment.¹⁵ The Medical Report provided also contains limited information.¹⁶ Lastly, the Prosecution requests a stay of any decision granting provisional release in order to file an appeal.¹⁷

C. Reply

6. In the Reply, Gvero reiterates arguments made in the Motion and mentions that since the filing of the Motion, he has been seen by a cardiologist, and that while it is still unclear precisely

⁸ *Ibid.*, paras. 16–25.

⁹ *Ibid.*, paras. 21–23. *See also Ibid.*, Annex B.

¹⁰ *Ibid.*, para. 24. *See also Ibid.*, Annex C.

¹¹ Response, paras. 4, 12.

¹² *Ibid.*, para. 2.

¹³ *Ibid.*, paras. 1, 4–12.

¹⁴ *Ibid.*, paras. 6, 8.

¹⁵ *Ibid.*, paras. 7, 9–10.

¹⁶ *Ibid.*, para. 10.

¹⁷ *Ibid.*, para. 12.

how soon the open heart surgery is required, it is “in the relatively near future.”¹⁸ He submits that due weight should be given to the Medical Report and the view of the Chief Medical Officer at the UNDU who is Gvero’s primary carer should be considered “compelling.”¹⁹ Gvero also requests leave to file the Reply.²⁰

III. LAW

7. 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.²¹ 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.” 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).²²

8. 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 must include a reasoned opinion indicating its view on those relevant factors.²³ What these relevant factors are, as well as the weight to be attributed to them, depends upon the particular circumstances of each case,²⁴ since “decisions on motions for provisional release are fact-intensive,

¹⁸ Reply, paras. 4–6.

¹⁹ *Ibid.*, para. 7.

²⁰ *Ibid.*, paras. 3, 9.

²¹ See, for example, *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 5 June 2009”).

²² See, for example, Decision on Miletić’s Motion for Provisional Release, 21 July 2008, para. 13 (“Decision of 21 July 2008”). See also *Prosecutor v. Šainović, et al.*, Case No. IT-05-87-A, Decision on Urgent Motion Requesting Provisional Release of Nebojša Pavković on Compassionate Grounds, 17 September 2009 (“Appeals Chamber Decision of 17 September 2009”).

²³ See, for example, Appeals Chamber Decision of 23 October 2008, para. 7; Appeals Chamber Decision of 15 May 2008, para. 6; Appeals Chamber Decision of 5 June 2009, para. 8; Decision on Radivoje Miletić’s Appeal Against Decision on Miletić’s Motion for Provisional Release, 19 November 2009 (“Appeals Chamber Decision of 19 November 2009”), para. 7.

²⁴ See, for example, Appeals Chamber Decision of 15 May 2008, para. 6; Appeals Chamber Decision of 19 November 2009, para. 7.

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

9. 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.”²⁷ It has also 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.”²⁸

10. 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), taking into account the possibility

²⁵ 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); Appeals Chamber Decision of 19 November 2009, para. 7.

²⁶ Appeals Chamber Decision of 19 November 2009, para. 7; *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution’s Appeal Against the Trial Chamber’s Decision on Slobodan Praljak’s Motion for Provisional Release, 8 July 2009 (“Appeals Chamber Decision of 8 July 2009”), para. 7; Appeals Chamber Decision of 5 June 2009, para. 8; *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005, para. 8.

²⁷ See, for example, *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 (“Appeals Chamber Decision of 11 March 2008”), paras. 19–20.

²⁸ Appeals Chamber Decision of 15 May 2008, para. 24. See *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR65.9, Decision on “Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Stojić* Dated 8 April 2008”, 29 April 2008 (“Appeals Chamber Decision of 29 April 2008”); *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR65.8, Decision on “Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prlić* Dated 7 April 2008”, 25 April 2008 (“Appeals Chamber Decision of 25 April 2008”); *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 (“Appeals Chamber Decision of 21 April 2008”). See also Appeals Chamber Decision of 19 November 2009, para. 7; Appeals Chamber Decision of 8 July 2009; *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Temporary Provisional Release, 26 September 2008 (“*Milutinović* Decision of 26 September 2008”); *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87-T, Decision on Milutinović Motion for Temporary Provisional Release, 16 December 2008 (“*Milutinović* Decision of 16 December 2008”); *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87-T, Decision on Lazarević Motion for Temporary Provisional Release, 9 February 2009 (“*Milutinović* Decision of 9 February 2009”); Appeals Chamber Decision of 19 November 2009, para. 7. But see *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR65.6, Reasons for Decision on “Prosecution’s Urgent Appeal Against *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Pusić* Issued on 14 April 2008”, 23 April 2008, para. 15 (“Decision of 23 April 2008”) (stating that “Because Rule 65(B) of the Rules does not require ‘sufficiently compelling’ humanitarian reasons for provisional release, this Bench understands the *Prlić* Decision of 11 March 2008 to have ruled that it is only when a Trial Chamber, having considered all the circumstances of the case and the impact of the significant change of circumstances constituted by the 98 *bis* decision, cannot exclude the existence of flight risk or danger, that ‘sufficiently compelling’ humanitarian reasons, coupled with necessary and sufficient measures to alleviate any flight risk or danger, can constitute a basis for resolving uncertainty and doubt in favour of provisional release.”)

that the particular humanitarian reasons advanced by the accused may alter the risk of flight or the risk that the accused will pose a danger to a victim, witness or other person.²⁹ 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.³⁰ 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.”³¹

11. Specifically with regard to medical grounds advanced as compelling humanitarian reasons, the Appeals Chamber has held that

[...] the availability of medical care in the Netherlands [...] is a relevant factor in establishing whether sufficiently compelling humanitarian grounds exist for the release, which a Chamber must take into account. [...] [A]n 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.³²

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.³³ 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”.³⁴

IV. DISCUSSION

A. Rule 65(B) Requirements

13. 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 previous occasions.³⁵ Gvero has always been compliant with the conditions imposed upon him

²⁹ See Appeals Chamber Decision of 19 November 2009, para. 13; *Prosecutor v Boškoški and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 27 July 2007, para 14.

³⁰ Appeals Chamber Decision of 15 May 2008, paras. 18, 32.

³¹ *Ibid.*, para. 18.

³² Appeals Chamber Decision of 20 July 2009, paras. 11, 13. See also *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević’s Second Motion for Temporary Provisional Release on the Grounds of Compassion, 21 May 2009, para. 11; *Prosecutor v. Stanšić and Simatović*, Case No. IT-03-69-AR-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008, para. 68.

³³ Appeals Chamber Decision of 15 May 2008, paras. 18, 32.

³⁴ *Ibid.*, para. 18.

³⁵ 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

during these periods of provisional release.³⁶ This Trial Chamber has granted Gvero five periods of provisional release after it rendered the Rule 98 *bis* Decision (“Rule 98 *bis* Decision”)³⁷ although it was reversed on appeal on three occasions.³⁸ The Trial Chamber notes however that even when reversed, the Appeals Chamber held that the Trial Chamber had not erred in its assessment that the 98 *bis* Decision had not increased Gvero’s flight risk.³⁹

14. When granting Gvero’s provisional release requests on these occasions, the Trial Chamber conducted a clear assessment of the risk of flight posed by Gvero in light of the Rule 98 *bis* Decision.⁴⁰ The Trial Chamber considered, *inter alia*, the nature of the case against Gvero, his personal circumstances, including his advancing age, his voluntary surrender and the fact that he had been provisionally released on several occasions and always abided by all conditions imposed by the Trial Chamber.⁴¹ 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.⁴²

15. Since rendering the Decision of 15 June 2009 and its reconsideration in the Decision of 28 July 2009, the Trial Chamber notes that the evidentiary phase of the proceedings has been completed. All the Defence cases have been presented, including Gvero’s, who presented more evidence following the reopening of the Prosecution case, and rebuttal and rejoinder evidence has been adduced. Furthermore, all parties have filed their final briefs and delivered their closing arguments, and the Trial Chamber has adjourned for the purpose of assessing the evidence before it and for drafting the judgement. Because of these new circumstances, the requirements of Rule

July 2007 Until the Resumption of Trial, 13 July 2007 (“Decision of 13 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”); Decision on Gvero’s Motion for Provisional Release, 10 December 2008 (“Decision of 10 December 2008”).

³⁶ 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.

³⁷ Decision on Request for Urgent Reconsideration of Gvero’s Motion for Provisional Release, 28 July 2009 (“Decision of 28 July 2009”); Decision on Gvero’s Motion for Provisional Release, 15 June 2009 (“Decision of 15 June 2009”); Decision on Gvero’s Motion for Provisional Release During the 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).

³⁸ Appeal Chamber Decision of 15 May 2008; Decision on Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 20 July 2009 (“Appeals Chamber Decision of 20 July 2009”); Decision on Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 6 August 2009 (“Duty Judge Decision of 6 August 2009”),

³⁹ Appeals Chamber Decision of 15 May 2008, para. 23. See also Appeals Chamber Decision of 20 July 2009, para. 13; Duty Judge Decision of 6 August 2009,” paras. 20–21.

⁴⁰ Decision of 28 July 2009, para. 13; Decision of 15 June 2009, paras. 14–16; Decision of 9 April 2008, paras. 11–16; Decision of 21 July 2008, paras. 18–19; Decision of 10 December 2008, para. 20.

⁴¹ Decision of 28 July 2009, para. 13; Decision of 15 June 2009, paras. 14–16; Decision of 9 April 2008, paras. 15–16; Decision of 21 July 2008, paras. 18–19; Decision of 10 December 2008, para. 19.

⁴² Decision of 28 July 2009, para. 13; Decision of 15 June 2009, para. 16; Decision of 9 April 2008, paras. 15–17; Decision of 21 July 2008, paras. 18–19; Decision of 10 December 2008, paras. 19–20.

65(B) must be re-considered with reference to Gvero's particular circumstances in terms of risk of flight as well as the nature and extent of the additional evidence adduced.

16. The Trial Chamber has weighed the impact of the recent developments in the proceedings, including the fact that the Trial Chamber is effectively assessing the evidence that is before it and that Gvero may be more aware of the evidence against him at this stage of the proceedings than ever before, with the nature of the case against Gvero, his personal circumstances including his advanced age and health issues, his voluntary surrender, and his previous strict compliance with provisional release conditions. In balancing these factors, the Trial Chamber is satisfied that the new circumstances have not altered the Trial Chamber's previous assessment of Gvero's risk of flight or the threat he poses to persons associated with the case in any material way.

17. The Trial Chamber is therefore satisfied that Gvero's flight risk has not increased, nor is he a threat to any victim, witness or other person associated with this case. The Trial Chamber is also satisfied with the guarantee provided by the Republic of Serbia,⁴³ and is in receipt of written confirmation from the host country of The Netherlands that it has no objection to the requested provisional release.⁴⁴

B. Humanitarian Grounds

18. The Trial Chamber notes the Appeals Chamber's ruling that even where the Rule 65(B) requirements are met, a Trial Chamber should only exercise its discretion and grant provisional release at this late stage of proceedings if "sufficiently compelling humanitarian reasons" exist to justify that release.⁴⁵ This has again been recently reiterated by the Appeals Chamber, albeit in a three-to-two majority.⁴⁶ In line with the Appeals Chamber decisions, the Trial Chamber will now consider this further requirement. Judge Prost appends a separate declaration on this issue.

19. Gvero advances his state of health as a compelling humanitarian ground warranting provisional release. Gvero has submitted a Medical Report dated 6 November 2009, drawn up by the UNDU medical officer, on his various ailments and the proposed treatment based on various reports provided by medical specialists. While the medical ground advanced to justify provisional release for 20-25 days is for Gvero's first phase of dental surgery, the inflammation treatment,⁴⁷ its scheduling is linked to Gvero's open heart surgery which will eventually become necessary.⁴⁸ In

⁴³ See Motion, Annex 1.

⁴⁴ Correspondence from Host Country, 19 November 2009.

⁴⁵ See *supra*, para. 10.

⁴⁶ Appeals Chamber Decision of 19 November 2009, para. 7.

⁴⁷ See Motion, paras. 21-24.

⁴⁸ See *supra* para. 6. See also Motion, para. 19, Annex B, para. 1(a).

particular, the Trial Chamber notes that the dental surgery has to take place before Gvero's open heart surgery.⁴⁹

20. An argument has been made for having the dental surgery in Serbia for "medical, psychological and social" reasons.⁵⁰ Both the psychiatrist and the UNDU medical officer agree that Gvero's psychological flexibility is reduced due to his age, and therefore a high risk of post-treatment psychological problems, frequent at any age, is to be expected.⁵¹ It has been submitted that to prevent such psychological problems, Gvero would benefit from being able to communicate in his own language with his doctors and family.⁵² The UNDU medical officer concludes that he understands Gvero's "strong preference" for treatment in his home country and adds that in general this presents "medical, psychological and social advantages."⁵³

21. The Trial Chamber, by majority, Judge Agius dissenting ("Majority"), finds that, consistent with the Trial Chamber's unanimous decision of 28 July 2009, Gvero has demonstrated humanitarian circumstances to justify provisional release in so far as that has been required by the Appeals Chamber.⁵⁴ In so doing, the Majority emphasizes the history of this particular request for provisional release. On 15 June 2009 the Trial Chamber granted the original request for provisional release submitted by Gvero on essentially the same grounds.⁵⁵ That decision was overturned by the Appeals Chamber on the basis that "the Trial Chamber, in the particular circumstances of the present case, should have obtained medical documentation "[...] *identifying the sufficient social and psychological reasons for medical treatment to take place outside the Netherlands.*"⁵⁶ It is important to note that the Appeals Chamber decision does not obligate Gvero to negate the availability of the same treatment in the Netherlands but rather to provide evidence as to why it would be beneficial to Gvero for the treatment to take place elsewhere.

22. Subsequently, the Trial Chamber reconsidered its original decision after receiving a medical opinion as mandated by the Appeals Chamber.⁵⁷ That opinion outlined why it would be advisable on a humanitarian basis for the treatment to be administered in Belgrade. Specifically the report provided that "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

⁴⁹ See Motion, para. 21, Annex B, paras. 3(b), 6(a).

⁵⁰ See *ibid.*, para. 5(b).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*, para. 6(d). See also Motion, para. 22.

⁵⁴ See Decision of 28 July 2009, paras. 18, 21.

⁵⁵ See Decision of 15 June 2009, paras. 14–23.

⁵⁶ See Appeals Chamber Decision of 20 July 2009, paras. 13–14 (Emphasis added)

⁵⁷ See Decision of 28 July 2009.

will present an important medical, psychological and social advantage.”⁵⁸ On the basis of that medical opinion the Trial Chamber granted Gvero provisional release.⁵⁹

23. The Appeals Chamber has neither considered nor overturned that decision of the Trial Chamber. While a duty judge granted the Prosecution’s appeal,⁶⁰ the Majority does not consider a decision of a single judge who is not a member of the Appeals Chamber to be binding on the Trial Chamber, nor is it persuaded to a contrary view from the reasoning advanced in that decision.

24. The circumstances of this provisional release application are virtually identical to those which were before the Trial Chamber in June and in July. If anything, the Majority is of the opinion that the Medical Report is more detailed than that which was before the Trial Chamber previously. But most importantly, Dr Falke’s, the UNDU Chief Medical Officer’s opinion is consistent with the previous report as to the advantages to Gvero of treatment being carried out in Belgrade, particularly given his advanced age.⁶¹ The Majority has also considered the new fact that treatment in the Netherlands is now available to Gvero, but it is persuaded that the psychological and social advantages to Gvero of having this treatment in Serbia, especially in the light of his age and his overall medical health, still outweigh any considerations for having the treatment in the Netherlands. In these circumstances, the Majority can see no reason to depart from the Trial Chamber’s previous assessment that there are again sufficiently compelling humanitarian reasons justifying Gvero’s provisional release.

25. For the foregoing reasons, the Trial Chamber finds that the conditions for provisional release set forth in Rule 65(B) have been met. Furthermore, the Majority finds that Gvero’s urgent need for dental surgery, prior to the cardiac surgery that he also needs is a sufficiently compelling humanitarian reason for his provisional release. Since Gvero will need to spend between 20-25 days in Belgrade for dental surgery,⁶² he should be granted provisional release for that same period of time.

V. DISPOSITION

26. For these reasons, pursuant to Article 29 of the Statute of the Tribunal and Rules 54, 65 and 126 *bis*, the Trial Chamber hereby:

⁵⁸ Request for Reconsideration of Milan Gvero’s Motion for Provisional Release in Light of the Appeals Chamber Decision of 20 July 2009, Annex, confidential, 22 July 2009. *See also* Decision of 28 July 2009, para. 17.

⁵⁹ *See* Decision of 28 July 2009, paras. 18–22.

⁶⁰ *See* Duty Judge Decision of 6 August 2009, para. 22.

⁶¹ *See supra* paras. 19–20; Request for Reconsideration of Milan Gvero’s Motion for Provisional Release in Light of the Appeals Chamber Decision of 20 July 2009, Annex, confidential, 22 July 2009. *See also* Decision of 28 July 2009, para. 17.

- (a) **GRANTS** Gvero leave to file the Reply;
- (b) **GRANTS** the Motion by Majority, Judge Agius appending his dissenting opinion, and **ORDERS** the provisional release of Gvero on the following terms and conditions:
- (i) Gvero shall be provisionally released for a period not exceeding 25 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 15 February 2010;
 - (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:
 - 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 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;
 - 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,

⁶² See *supra* para. 3.

unannounced visits by the same Ministry or by a person designated by the Registrar;

7. 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;

8. not to discuss his case with anyone, including the media, other than with his counsel;

9. 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;

10. 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 15 February 2010, 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.



Carmel Agius
Presiding

Dated this seventeenth day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

JUDGE AGIUS' DISSENTING OPINION

1. According to the Majority, Gvero not only meets the Rule 65(B) requirements but also satisfies the criterion of “sufficiently compelling humanitarian reasons.”⁶³ While I agree with my colleagues on the assessment of former, in my view, the humanitarian reasons advanced by Gvero in this Motion do not tip the balance in favour of granting him provisional release and therefore I respectfully dissent.

2. The medical grounds advanced by Gvero to justify provisional release for 20-25 days is for his first phase of dental treatment, namely the inflammation treatment.⁶⁴ According to the Medical Report, while the inflammation treatment has to take place before his open heart surgery,⁶⁵ the latter at the moment is not “urgently required.”⁶⁶ Moreover, the Medical Report clearly states that the inflammation treatment “poses no medical problems” in the Netherlands⁶⁷ and furthermore it has already been scheduled with the dental surgeon at the UNDU hospital which would have already started were it not for Gvero postponing it to await the outcome of his provisional release request.⁶⁸

3. The Medical Report also points out that Gvero has no specific medical psychiatric problems.⁶⁹ While I understand from the Medical Report what psychological and social advantages Gvero could benefit from having the inflammation treatment in his home country,⁷⁰ I am not convinced that they amount to sufficiently serious and compelling reasons to warrant Gvero’s provisional release.

4. I have not reached this conclusion lightly. I am well aware that the inflammation treatment is a surgery and that recovery from it could take a few weeks.⁷¹ In evaluating the degree of gravity of this treatment I resorted to the dental surgeon’s report dated 6 January 2009 of the Belgrade Military Medical Academy which states that due to his medical condition, Gvero will need to be monitored by a cardiologist and an endocrinologist prior to, during and after implant rehabilitation which the Trial Chamber understands to be his second phase of his dental treatment.⁷² By omitting such a comment with regard to the inflammation treatment, I find that this treatment is relatively

⁶³ See *supra* paras. 17, 24–25.

⁶⁴ See *supra* paras. 3, 19.

⁶⁵ *Ibid.*

⁶⁶ See Motion, para. 19, Annex B, para. 1(a).

⁶⁷ Motion, Annex B, para. 6(a).

⁶⁸ *Ibid.*, para. 6(b).

⁶⁹ *Ibid.*, para. 5(a).

⁷⁰ See *supra* para. 20.

⁷¹ See Motion, Annex C.

⁷² See Motion, Annex C.

less grave and consequently any psychological and social benefits gained from treatment in Serbia should be less.

5. Looking at the purported psychological and social benefits that Gvero would gain by having this treatment in Serbia and weighing them with the benefit of his having it in the Netherlands—a treatment that is readily available to him and which “medically” poses no problems, I find that the medical ground brought forward by Gvero lacks the gravity or the urgency required to make it a sufficiently compelling humanitarian reason. In particular, I take the fact that Gvero capriciously refused the treatment offered and available to him in the Netherlands, thus delaying the start of his inevitable long-term planned treatment of both his dental and open-heart surgeries, possibly to the detriment of his own health, very seriously. In view of these considerations, I am of the view that, this time, given all the circumstances, Gvero has not advanced serious and sufficiently compelling humanitarian reasons to justify provisional release. I would therefore not have granted him provisional release.



Judge Carmel Agius

JUDGE PROST'S SEPARATE DECLARATION

1. I depart from the Decision in respect of the consideration of the additional requirement of “sufficiently compelling humanitarian grounds” before provisional release is granted.
2. Once again, the Trial Chamber is unanimous in its determination that the criteria provided for in Rule 65(B) have been met by Gvero.⁷³ In reaching this conclusion, the Trial Chamber has reconsidered all of the relevant factors, given that the evidentiary phase of the proceedings has now been completed.⁷⁴ Even after this assessment, the Trial Chamber remains satisfied that the new circumstances have not altered the Trial Chamber’s previous assessment of Gvero’s risk of flight or the threat he poses to persons associated with the case in any material way.⁷⁵ Gvero “will appear for trial” and “will not pose a danger to any victim, witness or other person.”⁷⁶ Thus the Trial Chamber is of the view that the requirements for provisional release as set out in the Rules have been met.
3. Despite finding that the requirements of Rule 65(B) have been met, the other members of the Trial Chamber consider it necessary, based on Appeals Chamber jurisprudence, for Gvero to demonstrate an additional factor of “sufficient humanitarian grounds” before provisional release may be granted.⁷⁷ For the reasons expressed in my previous dissent in the case of Miletić, I remain of the opinion that this additional prerequisite is not provided for under any interpretation of Rule 65(B).⁷⁸ The mandatory application of it to all provisional release cases arising after a Rule 98 *bis* decision constitutes an improper fettering of the discretion accorded to a Trial Chamber in matters of provisional release. As described by Judges Güney and Liu in their dissent in the same matter, the importation by the Trial Chamber of this additional requirement constitutes an *ultra vires* extension of the Rules.⁷⁹

⁷³ See *supra* para. 17.

⁷⁴ See *supra* paras. 13–17.

⁷⁵ See *supra* para. 16.

⁷⁶ See Rule 65(B).

⁷⁷ See *supra* para. 18.

⁷⁸ Decision of 15 October 2009, Judge Prost’s Dissenting Opinion, paras. 5–13.

⁷⁹ Appeals Chamber Decision of 19 November 2009, Joint Dissenting Opinion of Judges Güney and Liu, para. 3.

4. Most importantly, although I agree with the conclusion reached by the Majority I feel compelled to maintain my dissent on this essential legal issue, despite the subsequent Appeals Chamber ruling, as I consider the “reading in” of such a requirement to be in direct contravention of Article 21(3) of the Statute which accords to Gvero a right to be presumed innocent until proven guilty.



Judge Kimberly Prost