



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: 9 April 2008

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. Hans Holthuis

Decision of: 9 April 2008

PROSECUTOR

v.

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

PUBLIC

**DECISION ON GVERO'S MOTION FOR PROVISIONAL RELEASE
DURING THE BREAK IN THE PROCEEDINGS**

Office of the Prosecutor

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Republic of Serbia

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

Kingdom of the Netherlands

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 for the Provisional Release of Milan Gvero During the Forthcoming Break in the Proceedings”, filed on 8 February 2008 with confidential Annexes (“Motion”), and hereby renders its decision thereon.

I. SUBMISSIONS

1. Gvero requests to be provisionally released from the day after the rendering of the decision pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence (“Rules”) until 20 May 2008, or for such period as thought appropriate by the Trial Chamber, subject to the same terms and conditions under which he was provisionally released on several occasions, or any other terms that the Trial Chamber deems fit.¹

2. Gvero presents guarantees provided by the Republic of Serbia which confirm that the Republic of Serbia will respect all orders made by this Trial Chamber in respect of his provisional release.² Furthermore, he submits that a number of factors, including his voluntary surrender to the custody of the Tribunal and his previous provisional releases during which he complied with all the conditions imposed on him by the Trial Chamber, militate in favour of granting his request.³

3. The Prosecution opposes the Motion arguing that the circumstances since the last provisional release of Gvero have changed and the risk of flight has increased. The Prosecution submits that it “has closed its case-in-chief, the Trial Chamber has heard the Accused’s Rule 98 *bis* submissions and the Prosecution response and soon will render its 98 *bis* decision. Now that the Accused know in full the evidence against them, there is an increased risk that they will not return to detention if they are granted provisional release.”⁴

4. The Prosecution also submits that the length of the proposed period of provisional release is excessive and likely to adversely affect the level and quality of surveillance provided by the Serbian authorities, and thus to increase the risk of flight.⁵

¹ Motion, paras. 1, 6, 12.

² *Ibid.*, para. 10, Annex A.

³ *Ibid.*, paras. 2–7, 11, Annex B. Gvero adds that he could provide additional personal reasons in support of his application, but refrains from doing so in light of the holding of the Trial Chamber in its previous decision that it does not find the personal circumstances raised by Gvero to have any relevance or to carry any weight for the purpose of the provisional release’s request. *Ibid.*, para. 9 (referring to Decision on Motions for Provisional Release During the Winter Judicial Recess, 7 December 2007 (“Decision of 7 December 2007”), para. 9).

⁴ Prosecution Response to Gvero’s and Miletić’s Motions for Provisional Release During the Forthcoming Break in the Proceedings, 22 February 2008 (“Response”), para. 5.

⁵ *Ibid.*, para. 6.

5. Moreover, the Prosecution requests a stay of the decision in order to file an appeal should the Trial Chamber grant provisional release to Gvero.⁶

6. Gvero seeks leave to reply to the Response.⁷ In addition to reiterating the submissions raised in his Motion,⁸ Gvero argues that “it would be rare for a Trial Chamber to change its previous determination, save where the circumstances merited it”, and that “[t]he case against [him] has altered to no substantial or significant degree from the case he faced in December 2007 when the Trial Chamber last granted him provisional release. [...] [T]he Prosecution advance no basis for the Trial Chamber to reconsider its finding of December 2007.”⁹ Moreover, he points out that he “is now 70 years of age and in all the circumstances outlined in both the Motion and in this Reply, the prospect that he might take flight bears up to no scrutiny at all.”¹⁰

7. Furthermore, Gvero argues that the Prosecution provided no support for “its allegation that by reason of the length of release sought, a substantial burden will be placed on the Serbian authorities to monitor [him]”.¹¹ He also submits that in the case-law of the Tribunal a number of accused were granted long periods of provisional release supervised by the Serbian authorities.¹²

8. Addressing the Prosecution’s application for a stay of the decision in order to file an appeal in the event that the Motion is granted, Gvero submits that it should be denied,¹³ since in light of the circumstances of this case and the jurisprudence of the Tribunal an appeal by the Prosecution “would be doomed to failure, or alternatively its chances of success are so small that the remedy of a stay would be a disproportionate remedy in these circumstances.”¹⁴

II. APPLICABLE LAW

9. Pursuant to Rule 65(A), 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 after giving the host country and the state to which the accused seeks to be

⁶ *Ibid.*, paras. 2, 7.

⁷ Request for Leave to Reply and Reply to Prosecution Response to Milan Gvero’s Application for Provisional Release During the Forthcoming Break in the Proceedings, 25 February 2008 (“Reply”), paras. 3, 16.

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*, paras. 5–6.

¹⁰ *Ibid.*, para. 11.

¹¹ *Ibid.*, para. 7.

¹² *Ibid.*, para. 9. Gvero points out that he was also released during the pre-trial stage from 22 July 2005 until 4 July 2006 and from 15 July 2006 until 14 August 2006. *Ibid.*, para. 8.

¹³ *Ibid.*, para. 17.

¹⁴ *Ibid.*, paras. 12–13. Gvero submits that the initial grant of his provisional release during the pre-trial stage was upheld by the Appeal Chamber and that thereafter the Prosecution did not seek to stay or to appeal the decisions which

released the opportunity to be heard and only if it is satisfied that the following two requirements are met: (i) the accused will appear for trial, and (ii) if released, the accused will not pose a danger to any victim, witness or other person. 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”.

10. The Appeals Chamber’s jurisprudence emphasizes that 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 the relevant factors and the weight given to them. What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case and individual accused, including the present context of the proceedings of the case.¹⁵ In this regard, the Trial Chamber further notes the holding of the Appeals Chamber 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.”¹⁶

III. DISCUSSION

11. The Trial Chamber notes that since his voluntary surrender, Gvero has been granted provisional release several times¹⁷ with the last occasion being 7 December 2007.¹⁸ Since that time, the Prosecution has rested its case,¹⁹ and most importantly, the Trial Chamber rendered orally its decision on the Accused’s submissions made pursuant to Rule 98 *bis* (“Rule 98 *bis* Decision”),²⁰ in

granted his requests for provisional release, and “did not even oppose at all the provisional release application for the 2007 Summer recess.” *Ibid*, para. 12. *See also* paras. 14–15.

¹⁵ *Prosecutor v. Prlić, Stojić, Praljak, Petković, Ćorić, and Pušić*, 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 2007 (“*Prlić Appeal Decision*”), paras. 7, 19; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal On Provisional Release, 27 July 2007 (“*Boškoski and Tarčulovski Appeal Decision*”), para. 6.

¹⁶ *Prlić Appeal Decision*, paras. 19–20.

¹⁷ Decision Concerning Motion for Provisional Release of Milan Gvero, 19 July 2005; Decision on Join Motion of the Accused Miletić and Gvero for Temporary Provisional Release from 15 July 2006 Until the Continuation of Trial, 13 July 2006; Decision on Defence Motions for Provisional Release of Radivoje Miletić and Milan Gvero, 7 December 2006; Decision on Motion for Provisional Release from 21 July 2007 Until the Resumption of Trial, 13 July 2007; Decision of 7 December 2007.

¹⁸ Decision of 7 December 2007.

¹⁹ T. 21222 (7 February 2008)

²⁰ T. 21460–21473 (3 March 2008).

which the Trial Chamber declined to enter a judgement of acquittal with reference to any of the Accused after the close of the Prosecution case.²¹

12. As noted above, the Appeals Chamber has found that a ruling under Rule 98 *bis* constitutes “a significant enough change in circumstance to warrant the renewed and explicit consideration by the Trial Chamber of the risk of flight posed by the Accused”.²² Therefore the Trial Chamber must consider afresh the question of the provisional release of Gvero with particular emphasis on the effect of its Rule 98 *bis* Decision on the risk of flight of the Accused.²³

13. In relation to Gvero, only one legal argument was advanced at the Rule 98 *bis* stage, with his counsel explaining:

We do assert strongly that General Gvero is an innocent man in relation to the allegations made against him [...] but we appreciate that our time to deal with these particular matters, our time for rhetoric, for speeches, for assertions of that sort, will come later.²⁴

14. The Trial Chamber decided to defer any decision on the legal argument made by Gvero given that the issue raised is currently pending before the Appeals Chamber.²⁵ The counts against Gvero passed scrutiny under the Rule 98 *bis* standard. As a result it is clear that the Prosecution case against Gvero has advanced to a different stage with a finding that, for the purposes of Rule 98 *bis*, there is evidence to support each count in relation to the Accused.²⁶ At the same time, however, the Trial Chamber notes that the standard applied in its Rule 98 *bis* Decision is much different than that by which the Accused will be judged ultimately. As outlined in the Rule 98 *bis* Decision the test is:

[W]hether there is evidence upon which, if accepted, a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the particular accused on the count in question. The test is not whether a Trial Chamber would, in fact, convict beyond reasonable doubt but, rather, whether it could do so. [...] A ruling now that there is sufficient evidence to sustain a conviction on a particular count does not mean that the Trial Chamber will, at the end of the case, return a conviction.²⁷

Importantly the determination was reached without assessing the credibility of the evidence adduced or the weight to be given to it. In addition, the Trial Chamber notes that it made no findings as to the strength of the case against Gvero in its Rule 98 *bis* Decision.

²¹ T. 21473 (3 March 2008).

²² *Prlić* Appeal Decision, paras. 19–20.

²³ The submissions of the parties with respect to this Motion were filed prior to the rendering of the Rule 98 *bis* Decision and therefore do not explicitly address it.

²⁴ T. 21342 (15 February 2008).

²⁵ T. 21462–21463 (3 March 2008).

²⁶ T. 21473 (3 March 2008).

15. The effect of the Rule 98 *bis* Decision must then be considered with reference to the particular circumstances of the Accused Gvero in terms of risk of flight. Gvero was a General of the Main Staff of the VRS at the relevant time. He is indicted for crimes against humanity and war crimes in relation to allegations of murder by way of opportunistic killings, persecution, forcible transfer and deportation.²⁸ He is 70 years of age. He voluntarily surrendered to the Tribunal when the charges against him became known. He has been released provisionally on several occasions since his surrender, and each time he has abided by all conditions imposed and has returned as and when ordered by the Trial Chamber to do so.²⁹

16. Weighing all of these factors while it is acknowledged that a Rule 98 *bis* Decision can increase the flight risk of a particular Accused, the Trial Chamber is satisfied that this is not the case with the Accused Gvero because of his personal circumstances, the nature of the case against him and his behaviour to date. Further, in this specific case, any risk of flight posed by the Rule 98 *bis* Decision is mitigated by the fact that in the Rule 98 *bis* Decision (1) the Trial Chamber did not assess the weight or strength of the evidence against Gvero; (2) Gvero's defence counsel explicitly deferred most arguments and issues to the close of the case; (3) the Trial Chamber explicitly deferred the legal argument Gvero raised to the close of the case; and (4) the Trial Chamber carefully explained that the finding of sufficiency under the Rule 98 *bis* standard does not mean the Trial Chamber will ultimately enter a judgment of conviction.

17. Furthermore, based again on Gvero's particular circumstances and history of compliance, the Trial Chamber is satisfied that, though the Prosecution has rested its case and Gvero has heard the evidence against him, he is not a flight risk nor does he pose a threat to witnesses, victims or other persons in the case. Gvero still enjoys the presumption of innocence pursuant to Article 21 of the Statute of this Tribunal, and through his defence counsel he has explicitly expressed his wish to pursue his defence case.³⁰

18. Applying the test in Rule 65(B), the Trial Chamber is satisfied with the guarantees provided by the Republic of Serbia, and is in receipt of written confirmation from the host country that it has no objection to release.³¹ Further, in all the particular circumstances of this Accused, the Trial Chamber is convinced that he will return for the continuation of his trial and that he poses no threat to witnesses, victims or any other person in this case. The Trial Chamber, however, noting the advanced stage of the proceedings and the length of time granted for preparation of the defence

²⁷ T. 21461 (3 March 2008).

²⁸ Indictment, counts 4–8.

²⁹ See fn. 17 above.

³⁰ T. 21342 (15 February 2008).

case, is of the opinion that provisional release is justified only for a limited period of 14 days under the conditions specified below.

IV. DISPOSITION

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

a) **GRANTS** leave to Gvero to reply to the Response;

b) **GRANTS** the Motion, and **ORDERS** the provisional release of Gvero on the following terms and conditions:

1) Gvero shall be provisionally released for a period not exceeding 14 days; the exact dates of his provisional release shall be determined in consultations between the the United Nations Detention Unit (“UNDU”), the Registrar and a representative of the Trial Chamber;

2) Gvero shall be transported to Schiphol airport in The Netherlands by the Dutch authorities as soon as practicable;

3) 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 therein;

4) 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:

i. 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;

ii. to remain within the confines of the municipality of Belgrade;

iii. to surrender his passport to the relevant authorities of the Republic of Serbia;

iv. to report each day to the police in Belgrade at a local police station to be designated by the authorities of the Republic of Serbia;

³¹ Correspondence from Host Country Regarding the Provisional Release of Milan Gvero, 13 February 2008.

v. to consent to having the Ministry of Internal Affairs of the Republic of Serbia check with the local police about his presence and to the making of occasional, unannounced visits by the same Ministry or by a person designated by the Registrar of the Tribunal;

vi. not to have any contact with the co-accused in the case;

vii. 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;

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

ix. 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 guarantees;

x. to comply strictly with any further order of the Tribunal varying the terms of or terminating his provisional release;

5) Gvero shall return to UNDU no later than 16 May 2008, 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:

1) 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 respective place of residence, and notifying, as soon as practicable, the Trial Chamber and the Registrar of the Tribunal of the name of the designated officials;

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

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

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

- 5) 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;
 - 6) to arrest and detain Gvero immediately if he should breach any of the conditions of this Decision; and
 - 7) 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:
- 1) to hold Gvero in custody for any time he will spend in transit at the airport;
 - 2) 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;
- g) **GRANTS** the Prosecution request and **ORDERS** a stay of the decision pending an appeal.

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



Carmel Agius
Presiding

Dated this ninth day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]