



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: 10 December 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: 10 December 2008

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

Office of the Prosecutor

Mr. Peter McCloskey

Government of the Republic of Serbia

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. Đorđe Sarapa for Vinko Pandurević

Government 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 Seeking the Provisional Release of Milan Gvero for Humanitarian Reasons During the December 2008 Recess”, filed confidentially on 25 November 2008 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. Since his voluntary surrender, Gvero has been granted provisional release several times,¹ with the last occasion being on 21 July 2008 (“Decision of 21 July 2008”).²
2. In the Motion, Gvero requests provisional release during the forthcoming recess in the proceedings.³ On 2 December 2008, the Prosecution filed confidentially the “Prosecution’s Response to Defence Motion Seeking the Provisional Release of Milan Gvero for Humanitarian Reasons During the December 2008 Recess” (“Response”) and on 3 December 2008, Gvero filed confidentially his “Request for Leave to Reply and Reply to Prosecution Response to Milan Gvero’s Application for Provisional Release During the Winter Break 2008” (“Reply”).

II. SUBMISSIONS OF THE PARTIES

A. Motion

3. Gvero requests provisional release during the period 19 December 2008 to 12 January 2009, for such time and with such conditions as deemed appropriate by the Trial Chamber.⁴
4. In the Motion, Gvero notes that he voluntarily surrendered to the custody of the Tribunal and has subsequently been granted provisional release on several occasions.⁵ He further notes that throughout all these periods of release, he has abided with the conditions imposed on him by the Trial Chamber.⁶

¹ Decision on Motion for Provisional Release, 19 July 2005; Decision on Joint Motion of the Accused Miletić and Gvero for Temporary Provisional Release from 15 July 2006 Until the Continuation of Trial, 13 July 2006; Decision 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 on Motions for Provisional Release During the Winter Judicial Recess, 7 December 2007.

² Decision on Gvero’s Motion for Provisional Release, 21 July 2008.

³ Motion, para. 1.

⁴ *Ibid.*, para. 20.

⁵ *Ibid.*, para. 2.

⁶ *Ibid.*, para. 3.

5. Gvero recalls that the Appeals Chamber Decision of 15 May 2008⁷ affirmed that Gvero had passed the legal threshold under Rule 65(B) for provisional release, notwithstanding that the case had passed the Rule 98 *bis* stage, save that no “compelling humanitarian justifications” were advanced on Gvero’s behalf.⁸ Gvero argues that insofar as the criteria under Rule 65(B) are concerned, nothing has changed since the rendering to the Appeals Chamber Decision of 15 May 2008 and the Decision of 21 July 2008.⁹ Therefore, although Gvero accepts that the Trial Chamber is under a duty to review and reconsider provisional release on each occasion an application is made, Gvero submits that the only real issue at hand is whether Gvero is able to advance compelling humanitarian reasons to support his provisional release.¹⁰

6. In support of the Motion, Gvero advances the state of his health as a humanitarian ground to justify his provisional release.¹¹ Gvero submits that his well-being has deteriorated during the course of the proceedings.¹² He notes that while on provisional release in August 2008, he attended the Medical Military Academy in Belgrade and saw a number of physicians, one of whom produced a report on the consultation dated 12 November 2008.¹³

7. Gvero refers to Dr. Jugović’s conclusions that Gvero clearly benefited from the relatively short period of provisional release that he was last granted and the opportunity to spend some time at home with his family would greatly enhance Gvero’s overall health.¹⁴ Gvero emphasises Dr. Jugović’s conclusion that if he is not granted provisional release, a worsening of his condition is likely.¹⁵

8. Gvero highlights that the Trial Chamber is approaching one of the most critical points in the trial for Gvero, namely the presentation of his own case, and stresses the importance for him to be able to participate in his own defence and “more particularly, his ability to be in top psychological condition during the course of his own case”.¹⁶ Gvero argues that these considerations will to a great extent be alleviated by the granting of a period of release.¹⁷ Gvero also indicates that he

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”).

⁸ Motion, para. 7.

⁹ *Ibid.*, para. 10.

¹⁰ *Ibid.*, para. 12.

¹¹ *Ibid.*, paras. 13–19.

¹² *Ibid.*, para. 13.

¹³ *Ibid.* See Annex A, filed confidentially and *ex parte*.

¹⁴ *Ibid.*, para. 15; see also Annex A, filed confidentially and *ex parte*.

¹⁵ *Ibid.*, para. 16; see also Annex A, filed confidentially and *ex parte*.

¹⁶ *Ibid.*, paras. 17–18.

¹⁷ *Ibid.*, para. 18.

intends to seek medical treatment in the Medical Military Academy in Belgrade in the event that he is granted provisional release.¹⁸

9. Gvero tenders a guarantee from the Government of the Republic of Serbia.¹⁹ The Trial Chamber also acknowledges receipt of correspondence from the Government of The Netherlands.²⁰

B. Response

10. The Prosecution opposes the Motion on the grounds that at this late stage of trial, there are no sufficiently compelling circumstances to justify Gvero's provisional release for any period.²¹

11. The Prosecution argues that since the Trial Chamber last assessed Gvero's circumstances in the Decision of 21 July 2008, the proceedings have advanced considerably.²² The Prosecution submits that the posture of the case has changed because four co-Accused have already completed their Defence cases.²³ It further submits that during the course of the Defence cases, the Prosecution's case against all members of the alleged joint criminal enterprise of which Gvero was a member has been strengthened through the introduction of favourable evidence.²⁴ The Prosecution argues that for these reasons, there is an increased risk of flight which must be carefully balanced in respect of the humanitarian reasons offered in the Motion.²⁵ Further, the material changes on the posture of the case and in its strength against the Accused, warrant the Trial Chamber's fresh assessment of Gvero's circumstances in relation to the requirements for provisional release.²⁶

12. The Prosecution submits that as regards the humanitarian grounds advanced in support of the Motion, the Trial Chamber's previous findings are not binding, and should not be adopted here.²⁷ The Prosecution notes that, from what appears in the Motion, the "sole documentation" provided in support of Gvero's request comprises a report based on an assessment conducted four months ago.²⁸ Since the Prosecution has not been provided with this report, it submits that the Trial Chamber should conduct a *de novo* assessment of Gvero's current health condition.²⁹

¹⁸ *Ibid.*, para. 19.

¹⁹ *Ibid.*, para. 11. *See also* Annex B, filed confidentially.

²⁰ Correspondence from Host Country Regarding the Provisional Release of General Milan Gvero, 1 December 2008.

²¹ Response, para. 1.

²² *Ibid.*, para. 4.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*, para. 5.

²⁸ *Ibid.*

²⁹ *Ibid.*

C. Reply

13. Gvero first requests leave to file a reply.³⁰ Gvero notes with surprise the Prosecution's assertion that the case against him has strengthened since the presentation of certain Defence cases, particularly in light of the fact that Gvero's case has not yet begun.³¹ Gvero strongly refutes the Prosecution's assertion in this regard, and expresses confidence that the Trial Chamber will conduct a *de novo* assessment and stresses that compelling circumstances exist to justify granting the Motion.³²

III. LAW

14. 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.³³ 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".

15. 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.³⁴ What these relevant factors are, as well as the weight to be attributed to them, depends upon the particular circumstances of each case,³⁵ since "decisions on motions for provisional release are fact intensive,

³⁰ Reply, para. 3.

³¹ *Ibid.*, para. 4.

³² *Ibid.*, paras. 4, 6.

³³ 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"), para. 5; Appeals Chamber Decision of 15 May 2008, para. 6; *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 ("Appeals Chamber Decision of 1 July 2008"), para. 7.

³⁴ 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 1 July 2008, para. 8.

³⁵ See, *inter alia*, Appeals Chamber Decision of 15 May 2008, para. 7; Appeals Chamber Decision of 1 July 2008, para. 8.

and cases are considered on an individual basis in light of the particular circumstances of the individual accused.”³⁶

16. 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.”³⁷ 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.”³⁸ 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).³⁹

17. 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.⁴⁰ 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”.⁴¹

IV. DISCUSSION

18. The Trial Chamber notes that Gvero voluntarily surrendered to the Tribunal upon notification of the charges against him and that he has been granted provisional release on a number of occasions.⁴² Gvero has always been compliant with the conditions imposed upon him during these previous periods of provisional release.⁴³ The most recent periods of provisional release were

³⁶ 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).

³⁷ *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 Čorić, 11 March 2008 (“*Prlić Appeals Chamber Decision of 11 March 2008*”), paras. 19–20.

³⁸ *See, for example, Appeals Chamber Decision of 15 May 2008, para. 24.*

³⁹ *See, for example, Decision on Gvero’s Motion for Provisional Release, 21 July 2008, para. 15.*

⁴⁰ Appeals Chamber Decision of 15 May 2008, paras. 18, 32.

⁴¹ Appeals Chamber Decision of 15 May 2008, para. 18.

⁴² *See supra*, fn. 1 and 2. *See also, Decision of 21 July 2008, para. 17.*

⁴³ *See Decision of 21 July 2008, para. 17.*

granted by this Trial Chamber in April and July 2008,⁴⁴ after the Trial Chamber orally rendered its decision pursuant to Rule 98 *bis* (“Rule 98 *bis* Decision”), in which the Trial Chamber declined to enter a judgement of acquittal with reference to any of the accused after the conclusion of the Prosecution case.⁴⁵ Though the Appeals Chamber ultimately reversed the decision of 9 April 2008, it held that the Trial Chamber did not err “when it concluded that the 98*bis* Decision did not increase Gvero’s flight risk”.⁴⁶

19. The Trial Chamber, when granting Gvero’s provisional release on both of these occasions, conducted a clear assessment of the risk of flight posed by Gvero in light of the Rule 98 *bis* Decision.⁴⁷ In its Decision of 9 April 2008, the Trial Chamber considered, *inter alia*, the nature of the case against him, his personal circumstances, his voluntary surrender and the fact that he has been provisionally released on several occasions and always abided by all conditions imposed by the Trial Chamber.⁴⁸ 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.⁴⁹

20. The Trial Chamber acknowledges that four of the Accused in the present trial have completed the presentation of their respective cases, and that Miletić’s defence team is currently presenting its case. Because of this new circumstance, the Trial Chamber must consider the requirements of Rule 65 anew. The more advanced stage of the proceedings and the subsequent introduction of additional evidence on the trial record must be considered with reference to the particular circumstances of Gvero in terms of risk of flight. Weighed against Gvero’s surrender, the case against him, his previous compliance with provisional release conditions, and the fact that the presentation of his own case has yet to start, the Trial Chamber is of the view that the mentioned development of the proceedings does not alter Gvero’s risk of flight or the threat posed to persons associated with the case in any material way. The Trial Chamber is therefore satisfied that Gvero does not pose a flight risk or a threat to any victim, witness or person associated with this case.

21. The Trial Chamber will now turn to the humanitarian grounds advanced by Gvero in support of his Motion, namely his fragile state of health.⁵⁰ The Trial Chamber recalls its finding in its

⁴⁴ Decision on Gvero’s Motion for Provisional Release During a Break in the Proceedings, 9 April 2008 (“Decision of 9 April 2008”); Decision of 21 July 2008.

⁴⁵ T. 21460-21473 (3 March 2008).

⁴⁶ Appeals Chamber Decision of 15 May 2008, para. 23.

⁴⁷ Decision of 9 April 2008, paras. 11–16; Decision of 21 July 2008, paras. 18–19.

⁴⁸ Decision of 9 April 2008, paras. 15–16; Decision of 21 July 2008, paras. 18–19.

⁴⁹ Decision of 9 April 2008, paras. 15–16; Decision of 21 July 2008, paras. 18–19.

⁵⁰ Motion, paras. 13–16.

Decision of 21 July 2008 that Gvero is 70 years old, suffers from a variety of ailments, and has shown signs of deterioration throughout the proceedings.⁵¹

22. In addition, the Trial Chamber notes the conclusions of Gvero's treating doctor in Belgrade, whom Gvero visited during his most recent period of provisional release.⁵² In particular, the Trial Chamber notes the opinion that previous periods of provisional release have been of great benefit to Gvero's health, and that a denial of provisional release on this occasion may cause deterioration in Gvero's condition.⁵³ The Trial Chamber also notes the apparent benefit Gvero derived from this consultation in Belgrade, and his intention to return for further treatment should he be granted provisional release on this occasion.⁵⁴

23. Finally, the Trial Chamber notes that Gvero will begin presentation of his Defence case shortly upon resumption of the trial following the winter recess.⁵⁵ The Trial Chamber reiterates the importance of Gvero's meaningful participation in these proceedings, especially his ability to contribute to the presentation of his own Defence case.

24. The Trial Chamber is therefore satisfied, in the particular circumstances of the case and of Gvero himself, that these grounds amount to compelling humanitarian reasons that justify the granting of provisional release on this occasion.

25. Applying the test in Rule 65(B), considering all the particular circumstances of Gvero, the Trial Chamber is convinced that he will return for the continuation of his trial and that he poses no threat to witnesses, victims or any other person in this case. The Trial Chamber, however, noting the advanced stage of the proceedings and the time required to satisfy the humanitarian grounds upon which the Motion is based, is of the opinion that provisional release is justified only for a limited period of 7 days (excluding travel time) under the conditions specified below. The Trial Chamber is satisfied with the guarantee provided by the Republic of Serbia,⁵⁶ and is in receipt of written confirmation from the host country of the Netherlands that it has no objection to release.⁵⁷

⁵¹ Decision of 21 July 2008, para. 21, referring also to T. 21523–21524 (22 May 2008),

⁵² Motion, Annex A, filed confidentially and *ex parte*.

⁵³ Motion, Annex A, filed confidentially and *ex parte*.

⁵⁴ Motion, para. 19.

⁵⁵ Motion, para. 17.

⁵⁶ Motion, Annex B, filed confidentially.

⁵⁷ Correspondence from Host Country, 1 December 2008.

V. DISPOSITION

26. 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 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 7 days (excluding travel time); the exact dates of his provisional release shall be determined in consultations between the United Nations Detention Unit (“UNDU”), the Registrar and a representative of the Trial Chamber;
 - (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 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 to the police in Belgrade at a local police station to be designated by the authorities of the Republic of Serbia;

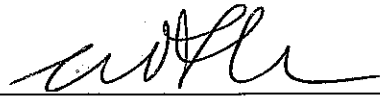
5. to consent to having the Ministry of Internal Affairs of the Republic of Serbia check with the local police about his presence and to the making of occasional, unannounced visits by the same Ministry or by a person designated by the Registrar of the Tribunal;
 6. not to have any contact with the co-accused in the case;
 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 guarantees;
 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 8 January 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, and notifying, as soon as practicable, the Trial Chamber and the Registrar of the Tribunal of the name of the designated officials;
- (ii) for the personal security and safety of Gvero while on provisional release;

- (iii) for all expenses concerning transport of Gvero from Schiphol airport to Belgrade and back;
 - (iv) for all expenses concerning accommodation and security of Gvero while on provisional release;
 - (v) at the request of the Tribunal, or the parties, to facilitate all means of cooperation and communication between the parties and to ensure the confidentiality of any such communication;
 - (vi) to arrest and detain Gvero immediately if he should breach any of the conditions of this Decision; and
 - (vii) to report immediately to the Trial Chamber any breach of the conditions set out above;
- (d) **INSTRUCTS** the Registrar to consult with the Ministry of Justice of the Kingdom of the Netherlands as to the practical arrangements for the provisional release of Gvero;
- (e) **REQUESTS** the authorities of all states through which Gvero will travel:
- (i) to hold Gvero in custody for any time he will spend in transit at the airport;
 - (ii) to arrest and detain Gvero pending his return to the UNDU, should he attempt to escape;
- (f) **ORDERS** that Gvero shall be immediately detained should he breach any of the foregoing terms and conditions of his provisional release.

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



Carmel Agius
Presiding

Dated this tenth day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]