



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-A
Date: 16 May 2011
Original: English

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A8576-A8568
16 May 2011

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BEFORE THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. John Hocking

Decision: 16 May 2011

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANUREVIĆ**

PUBLIC

**PUBLIC REDACTED VERSION OF 13 DECEMBER 2010
DECISION ON MOTION BY COUNSEL ASSIGNED TO MILAN
GVERO RELATING TO HIS PRESENT HEALTH CONDITION**

The Office of the Prosecutor:

Mr. Peter McCloskey
Mr. Peter Kremer

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Ms. Natacha Fauveau Ivanović and 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. The Appeals 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 (“Appeals Chamber” and “Tribunal” respectively) is seised of a motion filed by Counsel for Milan Gvero (“Counsel” and “Gvero”, respectively) on 30 September 2010 requesting: (i) an order to strike the Prosecution’s appeal against Gvero on the basis of his alleged incapacity to participate in appellate proceedings; or in the alternative, (ii) an order, pursuant to Rules 74*bis* and 107 of the Rules of Procedure and Evidence (“Rules”), for an independent medical and/or psychiatric report to assess Gvero’s capacity to participate in appellate proceedings; and (iii) a further extension of time to file Gvero’s notice of appeal “until the preliminary issue of Milan Gvero’s fitness to participate in appellate proceedings has been resolved.”¹ The Office of the Prosecutor (“Prosecution”) responded to the Motion on 7 October 2010.² Counsel filed a request for leave to reply and a reply on 13 October 2010.³

I. BACKGROUND

2. On 10 June 2010, Trial Chamber II (“Trial Chamber”) convicted Gvero pursuant to Article 7(1) of the Tribunal’s Statute (“Statute”) of committing persecutions and other inhumane acts (forcible transfer) as crimes against humanity.⁴ It imposed a single sentence of five years of imprisonment.⁵ The Trial Chamber also convicted Vujadin Popović (“Popović”), Ljubiša Beara (“Beara”) and Drago Nikolić (“Nikolić”) of genocide, crimes against humanity and war crimes;⁶ Ljubomir Borovčanin and Vinko Pandurević of crimes against humanity and war crimes;⁷ and Radivoje Miletić (“Miletić”) of crimes against humanity.⁸

3. On 18 June 2010, Popović, Beara, Nikolić, Miletić and the Prosecution filed a joint motion requesting “an extension of 60 days up to and including 8 September 2010 to file their respective notices” of appeal.⁹ On 25 June 2010, the Pre-Appeal Judge granted the Joint Motion and ordered “all parties wishing to appeal the Judgement to file their notices of appeal within 90 days of the date

¹ Motion by Counsel Assigned to Milan Gvero Relating to his Present Health Condition, 30 September 2010 (confidential with *ex parte* annexes) (“Motion”), paras 28, 29.

² Prosecution’s Response to “Motion by Counsel Assigned to Milan Gvero Relating to his Present Health Condition”, 7 October 2010 (confidential) (“Response”).

³ Motion for Leave to Reply and Reply to Prosecution Response to Motion by Counsel Assigned to Milan Gvero Relating to his Present Health Condition, 13 October 2010 (confidential) (“Reply”).

⁴ *Prosecutor v. Vujadin Popović, et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version) (“Trial Judgement”), vol. 2, para. 2109, pp. 830-831.

⁵ *Ibid.*, p. 831.

⁶ *Ibid.*, paras 2104-2106, pp. 826-828.

⁷ *Ibid.*, paras 2107, 2110, pp. 829, 831-832.

⁸ *Ibid.*, para. 2108, p. 830.

⁹ Joint Motion for an Extension of Time to File Notice of Appeal, 18 June 2010 (“Joint Motion”), para. 6. See also *ibid.*, para. 1.

of the Judgement, *i.e.*, no later than 8 September 2010.”¹⁰ On 28 June 2010, the President of the Tribunal granted Gvero early release.¹¹

4. On 3 September 2010, Counsel filed a motion requesting a further six-week extension of time to file Gvero’s notice of appeal stating that Counsel was unable to obtain instructions from Gvero concerning the preparation of his notice of appeal due to [REDACTED], which allegedly impaired Gvero’s ability to communicate [REDACTED].¹² On 7 September 2010, the Pre-Appeal Judge granted, in part, Gvero’s Motion for Further Extension of Time, and ordered Counsel to file a notice of appeal on behalf of Gvero no later than 30 September 2010 (“30 September 2010 Deadline”).¹³

II. SUBMISSIONS

5. Counsel submits that since 7 September 2010, members of Gvero’s Defence team have visited Gvero on several occasions in Belgrade, Serbia, and found him on each occasion to be [REDACTED].¹⁴ Annexed to the Motion is a medical report (“Medical Report”) prepared by neuro-psychiatrist Miroslav Kovačević (“Professor Kovačević”), in which he opines that:

[REDACTED].¹⁵

6. Counsel submits that due to [REDACTED], Gvero is unable to meaningfully participate in the appellate proceedings in this case.¹⁶ He further contends that filing the notice of appeal on behalf of Gvero under the aforementioned circumstances would violate Gvero’s rights pursuant to Article 21 of the Statute, and compromise Counsel’s professional obligations pursuant to the Code of Conduct for Counsel.¹⁷ Counsel thus requests that the Prosecution’s appeal against Gvero should

¹⁰ Decision on Joint Motion for Extension of Time to File Notice of Appeal, 25 June 2010, p. 2.

¹¹ *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010.

¹² Motion on Behalf of Milan Gvero for a Further Extension of Time to File Notice of Appeal, 3 September 2010 (public with confidential and *ex parte* annexes) (“Gvero’s Motion for Further Extension of Time”), paras 7-13. See also Notice to Include Annex III to the Motion on Behalf of Milan Gvero for a Further Extension of Time to File Notice of Appeal from the 3. September [*sic*] 2010, 6 September 2010 (confidential and *ex parte*); *Reponse de la D[é]fense de Radivoje Miletić [à] la requête de Milan Gvero aux fins d’obtenir une prorogation additionnelle du d[é]lai pour d[é]p[ô]t de l’acte d’appel*, 6 September 2010; Prosecution’s Response to Milan Gvero’s Request for a Further Extension of Time to File Notice of Appeal, 6 September 2010.

¹³ Decision on Motion on Behalf of Milan Gvero for a Further Extension of Time to File Notice of Appeal, 7 September 2010, p. 3. The Pre-Appeal Judge reasoned that the interim between the issue date of the Judgement, and the date on which [REDACTED], provided Counsel “with ample time in which to obtain and commence the implementation of instructions from Milan Gvero concerning his notice of appeal.” The Pre-Appeal Judge also noted that “an appellant may, subsequent to filing his or her notice of appeal, apply to vary the grounds of appeal therein, and that pursuant to Rule 108 the Appeals Chamber may, on good cause being shown, authorise a variation of the grounds of appeal.” See *ibid.*, p. 2.

¹⁴ Motion, para. 8.

¹⁵ *Ibid.*, para. 9, citing Medical Report, p. 3.

¹⁶ *Ibid.*, paras 7-10, 16.

¹⁷ *Ibid.*, paras 18-28, citing, *inter alia*, the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 REV.3, 22 July 2009 (“Code of Conduct for Counsel”), Articles 8, 12, 16.

be “struck out.”¹⁸ Alternatively, Counsel proposes that if “the Appeals Chamber is not minded to grant this relief”, it could order an independent medical examination of Gvero, pursuant to Rules 74*bis* and 107 of the Rules, in order to determine his “present medical condition and the consequent effect it has on his capacity to participate in appellate proceedings.”¹⁹ In this regard, Counsel requests a further extension of time to file a notice of appeal pending a determination by the Appeals Chamber on Gvero’s fitness to participate in appellate proceedings.²⁰

7. In response, the Prosecution states that Counsel’s request for the Prosecution notice of appeal against Gvero to be struck out is “inappropriate because, if Gvero is found unfit to participate in the appeals proceedings, the proper remedy is to stay the proceedings relating to him and not to strike a properly filed notice of appeal.”²¹ The Prosecution further submits that the documents produced by Counsel are “insufficient to show that Gvero is unfit to participate in the appeals proceedings or that he will continue to be unfit in the future.”²² The Prosecution notes that “Gvero has only been examined by Serbian doctors at the Military Medical Academy [...] in Belgrade and by a neurologist retained by Counsel.”²³ The Prosecution argues that Counsel’s request for an order to strike out the Prosecution’s appeal against Gvero is “premature” in the absence of an independent medical assessment of his medical condition.²⁴ According to the Prosecution, the only suitable course of action at the present stage is for the Appeals Chamber to order “an independent neurologist chosen from the Rule 74*bis* list” to examine Gvero.²⁵

8. With regard to Counsel’s failure to file a notice of appeal by the 30 September 2010 Deadline, the Prosecution submits that Counsel could have filed a notice of appeal on Gvero’s behalf, “with the caveat that Gvero could not be consulted on its final version and that variation of the grounds of appeal might have to be sought later.”²⁶ The Prosecution contends that this “would have been consistent with the adequate representation of Gvero contemplated by Article 16 of the Code of Conduct for Defence Counsel.”²⁷

9. Counsel requests leave, pursuant to Rule 126*bis* of the Rules, to reply to the Response on the basis that “the Appeals Chamber’s determination of the issues presented by the Motion would be assisted by a concise submission addressing the main points raised by the Prosecution.”²⁸ In his

¹⁸ Motion, paras 16, 29(a).

¹⁹ *Ibid.*, para. 17. See also *ibid.*, para. 29(b).

²⁰ *Ibid.*, paras 28, 29(c).

²¹ Response, para. 1.

²² *Ibid.*, para. 4.

²³ *Ibid.*

²⁴ *Ibid.*, paras 1, 4.

²⁵ *Ibid.*, para. 5.

²⁶ *Ibid.*, para. 9.

²⁷ *Ibid.*

²⁸ Reply, para. 1.

Reply, Counsel contends that the Prosecution fails to cite any authorities in support of its assertion that, should Gvero be found unfit to participate in the instant appeal proceedings, the only appropriate remedy would be to suspend the appellate proceedings against him.²⁹ Counsel further submits that as Gvero's circumstances are entirely unprecedented before the Tribunal, he is unable to cite any authorities in support of his request that the Prosecution's appeal against Gvero be struck out.³⁰ However, Counsel argues that "logic" dictates that the appeal proceedings against Gvero "must be terminated" in the event that he is found unfit to participate in them.³¹ Counsel further states that in view of Professor Kovačević's medical assessment, his request that the notice of appeal be struck out is not premature.³² Counsel nonetheless indicates that he is prepared to "comply promptly with an order issued by the Appeals Chamber to file a Notice of Appeal in the manner specified by the Prosecution" should the Appeals Chamber reject the request for an extension of time to file the notice of appeal.³³ Finally, Counsel concurs with the Prosecution's suggestion that appellate proceedings against Gvero be suspended, pending the determination of his fitness to participate. He submits that such a suspension "would also protect Milan Gvero's interests and would be consistent with the professional conduct obligations of counsel."³⁴

III. DISCUSSION

A. Preliminary Matter

10. The Appeals Chamber notes Counsel's request, pursuant to Rule 126*bis* of the Rules, for leave to reply to the Response. Rule 126*bis* of the Rules provides that a reply to a response "if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber." However, the Appeals Chamber recalls that the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal ("Practice Direction")³⁵ does not require the moving party in a motion filed during an appeal from judgement to seek leave prior to filing a reply, and that it was therefore unnecessary for Counsel to do so.³⁶ However, pursuant to paragraph 14 of the Practice Direction, a reply shall be filed "within four days of the filing of the response." In the instant case, Counsel filed the Reply six days after the Prosecution filed its Response. However, given the significance of the issues with which the Motion

²⁹ *Ibid.*, para. 1(A). The Appeals Chamber notes that this paragraph is not numbered, but will refer to it as paragraph 1(A).

³⁰ *Ibid.*, para. 2

³¹ *Ibid.*

³² *Ibid.*, para. 3.

³³ *Ibid.*, para. 5.

³⁴ *Ibid.*

³⁵ IT/155 Rev. 3, 16 September 2005.

³⁶ *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on "Defence Request to File a Reply to Confidential 'Prosecution Response to Šainović's Second Motion to Admit Additional Evidence'", 12 July 2010, p. 1 and references cited therein.

and Response are concerned, the Appeals Chamber considers it in the interests of justice to exercise its discretion, pursuant to paragraph 19 of the Practice Direction, to recognise the Reply as validly filed.³⁷

B. Gvero's Fitness to Participate in Appellate Proceedings

11. Article 21(4)(b) of the Statute provides that an accused shall be entitled “to have adequate time and facilities for the preparation of his defence *and to communicate with counsel of his own choosing*.”³⁸ The rights articulated under Article 21(4)(b) of the Statute apply equally to both trial and appellate proceedings. However, an appellant’s ability to participate is clearly contingent upon whether he possesses the mental capacity to understand the essentials of the appellate proceedings, and the mental and/or physical capacity to communicate, and thus consult, with his counsel. Indeed, the Appeals Chamber has expressly acknowledged that an accused’s capacity to instruct counsel was among a non-exhaustive list of rights “essential for determination of an accused’s fitness to stand trial.”³⁹ In this regard, the Appeals Chamber recalls the standard governing an accused’s fitness to stand trial before the Tribunal (“Standard of Fitness”), specifically:

[...] meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings. [...] A]n accused’s fitness to stand trial should turn on whether his capacities, “viewed overall and in a reasonable and commonsense manner, [are] at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights”.⁴⁰

The Appeals Chamber considers that the Standard of Fitness applicable to trial proceedings also applies *mutatis mutandis* with regard to an appellant’s fitness to exercise his right to consult with counsel concerning the preparation of his appellate submissions.

12. In the instant case, the Appeals Chamber considers that any determination concerning Gvero’s capacity to participate in the appeal proceedings in this case, and whether the Prosecution appeal against him should be set aside, would be premature at present, in the absence of a medical examination of Gvero by an expert neurologist independently appointed by the Tribunal. In this regard, the Appeals Chamber recalls that Rule 74*bis* of the Rules provides that “[a]. Trial Chamber may, *proprio motu* or at the request of a party, order a medical, psychiatric or psychological examination of the accused” and that “[i]n such a case, unless the Trial Chamber otherwise orders, the Registrar shall entrust this task to one or several experts whose names appear on a list

³⁷ Paragraph 19 of the Practice Direction provides, *inter alia*, that “[...] the Appeals Chamber or Pre-Appeal Judge may vary any time-limit prescribed under this Practice Direction or recognise as validly done any act done after the expiration of a time-limit so prescribed.”

³⁸ Emphasis added.

³⁹ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008, paras 41 and 55.

previously drawn up by the Registry and approved by the Bureau.” The Appeals Chamber also recalls that Rule 107 of the Rules provides that “[t]he rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.” Accordingly, the Appeals Chamber considers it appropriate to order the appointment of an expert neurologist pursuant to Rules 74*bis* and 107 of the Rules (“Neurologist”) to examine Gvero’s medical condition.⁴¹

C. Defence’s Failure to File a Notice of Appeal On Behalf of Gvero in Compliance with the 30 September 2010 Deadline

13. The Appeals Chamber notes the approximate two-month interval between the rendering of the Trial Judgement on 10 June 2010, and the date on which [REDACTED]. The Appeals Chamber further observes that although this period provided Counsel with ample time in which to obtain instructions from Gvero concerning the preparation of his notice of appeal, Counsel apparently failed to do so. In this context, the Appeals Chamber also recalls the Prosecution submission that a notice of appeal could be filed on Gvero’s behalf, on the basis that a variation of the grounds of appeal might be sought later in light of Gvero’s alleged present incapacity.⁴²

14. Notwithstanding the above considerations, the Appeals Chamber observes that the Motion and Medical Report call into question Gvero’s capacity to exercise his right to communicate with counsel, and thus meaningfully participate in the appeal proceedings in this case, [REDACTED].⁴³ The Appeals Chamber therefore considers it appropriate to suspend the appeal proceedings against Gvero, including the requirement to file a notice of appeal, pending the independent verification of Gvero’s medical condition by the Tribunal-appointed Neurologist, and the Appeals Chamber’s subsequent determination of Gvero’s capacity based on the Neurologist’s findings.

IV. DISPOSITION

15. In view of the foregoing, the Appeals Chamber **GRANTS** the Motion **IN PART** and:

(A) **ORDERS**, pursuant to Rules 74*bis* and 107 of the Rules:

(1) that Gvero be medically examined by a Neurologist;

⁴⁰ *Ibid.*, para. 55, citing *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004, para. 37.

⁴¹ Motion, paras 17, 28-29(b).

⁴² Response, para. 9.

⁴³ Motion, para. 9, citing Medical Report, p. 3.

- (2) the Neurologist to submit a written report to the Appeals Chamber (“Written Report”):
 - (a) detailing Gvero’s current state of health,
 - (b) indicating:
 - (i) the current course of treatment being administered to Gvero and its effectiveness;
 - (ii) recommendations, if any, concerning the optimal course of treatment for Gvero;
 - (c) assessing Gvero’s present and future capacity to:
 - (i) understand the substance of the Trial Judgement against him,
 - (ii) understand the appeals process and its possible consequences,
 - (iii) understand the substance of the Prosecution’s grounds of appeal against him, and
 - (iv) instruct his Counsel with regard to filing an appeal on his behalf,
 - (d) providing specific or estimated time-frames projecting Gvero’s future capacity to perform the functions enumerated in paragraph 15(A)(2)(c)(i) to (iv) above;
- (3) the Neurologist to apply the above-stated Standard of Fitness in conducting the assessment and preparing the Written Report, pursuant to paragraph 15(A)(2) above;
- (4) that should the Neurologist be unable, from his or her initial examination of Gvero, to provide any or all of the information required under paragraph 15(A)(2), s/he shall indicate when the provision of the information in question would be possible, whether follow-up visits would be necessary in this regard, and the frequency of any such follow-up visits;
- (5) that the Written Report be submitted to the Appeals Chamber no later than 6 weeks from the date of the Neurologist’s appointment by the Registry; and

- (B) **ORDERS** the suspension of appeal proceedings against Gvero, pending further order by the Appeals Chamber.

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



Judge Patrick Robinson
Presiding

Dated this 16th day of May 2011,
At The Hague,
The Netherlands

[Seal of the Tribunal]