

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-05-88-A
Date: 16 January 2013
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Mr. John Hocking

Decision of: 16 January 2013

PROSECUTOR

v.

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

PUBLIC

**PUBLIC REDACTED VERSION OF 30 NOVEMBER 2012
DECISION ON REQUEST TO TERMINATE APPELLATE
PROCEEDINGS IN RELATION TO MILAN GVERO**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for Defence:

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Mr. Vujadin Popović
Mr. John Ostojčić for Mr. Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Mr. Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Mr. 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 request filed confidentially and *ex parte* by Counsel for Milan Gvero (“Counsel” and “Gvero”, respectively) on 17 May 2011 for an order to terminate the appellate proceedings in relation to Gvero on the basis of his alleged incapacity to participate therein (“Request”).¹

I. BACKGROUND

2. On 10 June 2010, Trial Chamber II (“Trial Chamber”) rendered its Judgement (“Trial Judgement”), in which it found Gvero guilty of committing persecution and inhumane acts (forcible transfer) as crimes against humanity, and sentenced him to five years’ imprisonment.² On 25 June 2010, the Pre-Appeal Judge granted the parties an extension of time until 8 September 2010 to file notices of appeal.³ On 28 June 2010, the President of the Tribunal granted Gvero early release.⁴

3. On 3 September 2010, Counsel requested a further extension of time to file Gvero’s notice of appeal after Gvero suffered a stroke on 21 August 2010.⁵ On 7 September 2010, the Pre-Appeal Judge granted an extension of time and ordered Counsel to file a notice of appeal no later than 30 September 2010.⁶ On 8 September 2010, the Prosecution filed its notice of appeal, which included two grounds of appeal against Gvero.⁷

4. On 30 September 2010, Counsel submitted that Gvero lacked the state of health at that time to meaningfully participate in appellate proceedings due to neurological [REDACTED] resulting

¹ Defence Submission on Updated Expert Report by Registry Appointed Independent Neurologist Dr Jelis Boiten, 17 May 2011 (confidential and *ex parte*) (“Defence Submission of 17 May 2011”), para. 21. See also Defence Reply to Prosecution Response to Defence Submission on Updated Expert Report by Registry Appointed Independent Neurologist Dr. Jelis Boiten, 27 May 2011 (confidential and *ex parte*) (“Defence Reply of 27 May 2011”), para. 8. The Appeals Chamber notes that the relief sought in Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 30 September 2010 (confidential with *ex parte* annexes) (“Defence Motion of 30 September 2010”), para. 29(b)-(c), was granted in part in the Decision on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 13 December 2010 (confidential; public redacted version filed on 16 May 2011) (“Decision of 13 December 2010”), para. 15. The Appeals Chamber considers that the outstanding part of the Defence Motion of 30 September 2010 is subsumed in the Request.

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

³ Decision on Joint Motion for Extension of Time to File Notice of Appeal, 25 June 2010, p. 2.

⁴ *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010, para. 20.

⁵ 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), paras 7-13.

⁶ Decision on Motion on Behalf of Milan Gvero for a Further Extension of Time to File Notice of Appeal, 7 September 2010, pp. 2-3.

⁷ Prosecution’s Notice of Appeal, 8 September 2010, paras 30-34.

from the stroke,⁸ and filed a medical report in support of this contention prepared by neuro-psychiatrist Professor Miroslav Kovačević (“Dr. Kovačević’s Report”).⁹ On 13 December 2010, the Appeals Chamber ordered an independent verification of Gvero’s medical condition by a Tribunal-appointed neurologist and suspended appellate proceedings in relation to Gvero pending a determination of his capacity to meaningfully participate in appellate proceedings.¹⁰ On 21 December 2010, the Duty Judge allowed the Prosecution to omit the grounds of appeal concerning Gvero from its appeal brief.¹¹

5. On 1 March 2011, the Registry of the Tribunal (“Registry”) filed a medical report prepared by a Tribunal-appointed neurologist, Dr. Jelis Boiten (“Dr. Boiten’s Report”).¹² On 20 April 2011, the Appeals Chamber ordered Dr. Boiten to clarify his conclusions with respect to Gvero’s medical condition.¹³ On 3 May 2011, the Registry filed the clarification submitted by Dr. Boiten (“Boiten’s Clarification”).¹⁴ The Prosecution and Counsel filed submissions with respect to Boiten’s Clarification, as ordered by the Appeals Chamber.¹⁵

6. On 16 September 2011, the Appeals Chamber ordered an examination of Gvero’s medical condition by a Tribunal-appointed [REDACTED] neuro-psychiatrist.¹⁶ On 3 January 2012, the Registry filed a medical report prepared by the Tribunal-appointed neuro-psychiatrist, Dr. Joseph J. F. M. de Man (“Dr. de Man’s Preliminary Report”).¹⁷ The Prosecution and Counsel filed submissions with respect to Dr. de Man’s Preliminary Report.¹⁸

⁸ Defence Motion of 30 September 2010, para. 16.

⁹ Defence Motion of 30 September 2010, Annex I (Specialist Report of Professor Miroslav Kovačević, dated 9 September 2010). See also Defence Motion of 30 September 2010, Annex II.

¹⁰ Decision of 13 December 2010, paras 14-15.

¹¹ Decision on Prosecution’s Motion Seeking Clarification on Decision Relating to Gvero’s Health Condition, 21 December 2010 (confidential), p. 2.

¹² “Neurological report of the examination of Mr. Milan Gvero on behalf of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY)” dated 28 February 2011, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Neurologist Report, 1 March 2011 (confidential and *ex parte*).

¹³ Decision on Prosecution’s Motion Seeking Clarification of Neurologist’s Conclusions, 20 April 2011 (confidential and *ex parte*) (“Decision of 20 April 2011”), p. 4.

¹⁴ “Clarification of the Neurological report of the examination of Mr. Milan Gvero on behalf of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY)” dated 28 April 2011, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Neurologist Report, 3 May 2011 (confidential and *ex parte*).

¹⁵ Defence Submission of 17 May 2011; Prosecution’s Response to Defence Submission on Updated Neurologist’s Report, 23 May 2011 (confidential and *ex parte*); Defence Reply of 27 May 2011.

¹⁶ Further Decision on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 16 September 2011 (confidential) (“Decision of 16 September 2011”), pp. 3-4. See also Order Releasing Confidential and *Ex Parte* Medical Reports Concerning Milan Gvero to [REDACTED] Neuro-Psychiatrist, 23 November 2011 (confidential); Corrigendum to “Order Releasing Confidential and *Ex Parte* Medical Reports Concerning Milan Gvero to [REDACTED] Neuro-Psychiatrist”, 25 November 2011 (confidential).

¹⁷ “Neuropsychiatric evaluation for the purpose of the administration of international criminal justice regarding Mr. Milan Gvero” dated 30 December 2011, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Independent Medical Expert, 3 January 2012 (confidential and *ex parte*).

¹⁸ Defence Submission Regarding the Report of Dr de Man, 16 January 2012 (confidential and *ex parte*) (“Defence Submission of 16 January 2012”); Prosecution’s Response to Defence Submission Regarding the Report of Dr. de Man,

7. On 17 April 2012, the Appeals Chamber ordered a supplementary examination of Gvero's medical condition by a Tribunal-appointed [REDACTED] neuro-psychologist, within the framework of Dr. de Man's examination.¹⁹ On 17 August 2012, the Registry filed the results of the supplementary neuro-psychological examination prepared by the Tribunal-appointed [REDACTED] neuro-psychologist, Dr. Daniel A. Martell ("Dr. Martell's Evaluation").²⁰ On 14 September 2012, the Registry filed a final medical report prepared by Dr. de Man ("Dr. de Man's Final Report").²¹ The Prosecution and Counsel filed submissions with respect to Dr. Martell's Evaluation and Dr. de Man's Final Report, as ordered by the Pre-Appeal Judge.²² Counsel further filed an uninvited reply, which the Appeals Chamber has disregarded.²³

II. MEDICAL REPORTS

8. Dr. Kovačević's Report of 9 September 2010 indicated that Gvero had suffered [REDACTED] due to the stroke.²⁴ According to Professor Kovačević, it was impossible to say at that time whether [REDACTED] Gvero would react to treatment in the months and years ahead.²⁵ He believed that Gvero was unable to direct his defence team and to take part or follow the appellate proceedings at the Tribunal.²⁶

9. Dr. Boiten examined Gvero on 4 February 2011 with the assistance of an interpreter.²⁷ According to Dr. Boiten's Report, Gvero's neurological condition had improved and he was diagnosed as having [REDACTED].²⁸ Nonetheless, Dr. Boiten did not expect any further

20 January 2012 (confidential and *ex parte*) ("Prosecution Response of 20 January 2012"); Defence Reply to Prosecution's Response to Defence Submission Regarding the Report of Dr de Man, 24 January 2012 (confidential and *ex parte*).

¹⁹ Further Order on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 17 April 2012 (confidential), pp. 3-5.

²⁰ "Supplementary Neuropsychological Examination of Milan Gvero" dated 10 August 2012, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Independent Medical Expert, 17 August 2012 (confidential and *ex parte*).

²¹ "Neuropsychiatric Evaluation for the Purpose of the Administration of International Criminal Justice Regarding Mr. Milan Gvero" dated 12 September 2012, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Independent Medical Expert, 14 September 2012 (confidential and *ex parte*).

²² Gvero Defence Submissions Concerning Two Medical Reports, 1 October 2012 (confidential and *ex parte*) ("Defence Submission of 1 October 2012"); Prosecution Response to Gvero Defence Submissions Concerning Two Medical Reports, 8 October 2012 (confidential and *ex parte*) ("Prosecution Submission of 8 October 2012"); Decision on Request by Counsel for Milan Gvero for Access to Tribunal-Appointed Expert's Supplemental Examination and for Leave to File Related Submissions, 20 September 2012 (confidential) ("Decision of 20 September 2012"), p. 2; Corrigendum to "Decision on Request by Counsel for Milan Gvero for Access to Tribunal-Appointed Expert's Supplemental Examination and for Leave to File Related Submissions", 21 September 2012 (confidential).

²³ Reply to Prosecution Response to Gvero Defence Submissions Concerning Two Medical Reports, 12 October 2012 (confidential and *ex parte*). See Decision of 20 September 2012, p. 2.

²⁴ Dr. Kovačević's Report, pp. 1, 3.

²⁵ Dr. Kovačević's Report, p. 3.

²⁶ Dr. Kovačević's Report, p. 3.

²⁷ Dr. Boiten's Report, pp. 1, 5.

²⁸ Dr. Boiten's Report, pp. 4-6.

significant improvement of Gvero's neurological condition since, in his opinion, nearly all recovery takes place in the first six months following a stroke.²⁹ Dr. Boiten concluded that Gvero would not be able to meaningfully understand or participate in appellate proceedings or instruct his counsel with respect to an appeal.³⁰

10. Dr. de Man examined Gvero on 25 November 2011 with the assistance of an interpreter/language assistant.³¹ According to Dr. de Man's Preliminary Report, Gvero had shown "significant recovery in the period between neurological and neuropsychiatric evaluation",³² and his cognitive functions were "intact".³³ Dr. de Man found that there was "no significant disturbance of [REDACTED]".³⁴ Dr. de Man's Preliminary Report noted that although "some residual [REDACTED]" remained, the symptoms were minimal and no therapy seemed warranted.³⁵ Dr. de Man also observed that Gvero's occasional use of [REDACTED] would not form a structural problem in communicating with counsel, as he was [REDACTED].³⁶ Dr. de Man concluded that Gvero had made good recovery from his stroke and should be able to perform the functions of understanding the substance of the Trial Judgement, the appeals process and its possible consequences, the substance of the Prosecution's grounds of appeal against him, and instructing his counsel with regard to filing an appeal on his behalf.³⁷ Dr. de Man added that further diagnostic certainty could be gained through a neuro-psychological evaluation.³⁸

11. Dr. Martell examined Gvero on 17 and 18 July 2012 with the assistance of an interpreter.³⁹ Dr. Martell's Evaluation details the results of a series of tests and procedures, including tests [REDACTED].⁴⁰ Dr. Martell concluded that Gvero presented [REDACTED].⁴¹ Dr. Martell furthermore reached the following conclusions regarding Gvero's neuro-behavioural strengths and weaknesses:

[REDACTED]

²⁹ Dr. Boiten's Report, p. 5.

³⁰ Dr. Boiten's Report, p. 6; Dr. Boiten's Clarification, pp. 2-3.

³¹ Dr. de Man's Preliminary Report, pp. 4-5, 7.

³² Dr. de Man's Preliminary Report, p. 7.

³³ Dr. de Man's Preliminary Report, p. 5.

³⁴ Dr. de Man's Preliminary Report, p. 8. See also Dr. de Man's Preliminary Report, p. 6, where Gvero's treating neurologist observes that [REDACTED].

³⁵ Dr. de Man's Preliminary Report, p. 8. See also Dr. de Man's Preliminary Report, p. 5.

³⁶ Dr. de Man's Preliminary Report, p. 8.

³⁷ Dr. de Man's Preliminary Report, p. 8.

³⁸ Dr. de Man's Preliminary Report, pp. 7-8.

³⁹ Dr. Martell's Evaluation, pp. 3-4.

⁴⁰ Dr. Martell's Evaluation, pp. 4-13.

⁴¹ Dr. Martell's Evaluation, p. 13.

[REDACTED].⁴²

12. In Dr. de Man's Final Report, Dr. de Man reviewed the findings of Dr. Martell, and determined that his own previous conclusions remained unchanged, as they found sufficient support in the results of Dr. Martell's Evaluation.⁴³

III. SUBMISSIONS

A. Submissions on Dr. de Man's Preliminary Report

13. Counsel submit that although it is "certainly possible" that Gvero could have made remarkable progress or a dramatic recovery since the time of Dr. Boiten's examination, they have concerns that the conclusions in Dr. de Man's Preliminary Report are based on "misunderstandings resulting from translation issues and/or an inappropriate reliance on the views" of the staff neurologist and interpreter present for the examination.⁴⁴ Counsel rely on personal experience communicating with Gvero to submit that he has "made no such rapid recovery",⁴⁵ and offer an example whereby they contend that [REDACTED] the names and nationalities of members of his defence team.⁴⁶

14. The Prosecution responds that Counsel overstate and place undue weight on the purported disparity between the identity of the members of [REDACTED] to Dr. de Man.⁴⁷ The Prosecution further argues that Dr. de Man did not inappropriately rely on the attending neurologist or interpreter, but rather based his evaluation of Gvero's level of fitness on the substance of his communication with Gvero.⁴⁸

B. Submissions on Dr. Martell's Evaluation and Dr. de Man's Final Report

15. Counsel submit that Dr. de Man's Final Report does not properly address Dr. Martell's findings,⁴⁹ offering no comment on observations that indicate "Gvero's [REDACTED] communicate generally as well as the clear [REDACTED] difficulties which plagued his diagnostic sessions with Dr Martell"⁵⁰ and "that Milan Gvero's neurological condition, albeit improved since his 2010 stroke, is still insufficient for him to be able to effectively exercise his fundamental

⁴² Dr. Martell's Evaluation, pp. 13-14.

⁴³ Dr. de Man's Final Report, pp. 3-5, repeating the conclusions contained in Dr. de Man's Preliminary Report, p. 8. See *supra* para. 10.

⁴⁴ Defence Submission of 16 January 2012, para. 3. See also Defence Submission of 16 January 2012, paras 6-8.

⁴⁵ Defence Submission of 16 January 2012, para. 3.

⁴⁶ Defence Submission of 16 January 2012, para. 4.

⁴⁷ Prosecution Response of 20 January 2012, paras 4-6.

⁴⁸ Prosecution Response of 20 January 2012, paras 7-12.

⁴⁹ Defence Submission of 1 October 2012, paras 2-8, 13.

rights”.⁵¹ According to Counsel, Dr. de Man failed to consider the potential impact on his previous conclusions of the new phenomena found by Dr. Martell.⁵² Counsel also submit that their “concerns as to Mr Gvero’s ability to issue [REDACTED] instructions to them with respect to the substance of the appeals process” are substantiated by the findings in Dr. Martell’s Evaluation regarding Gvero’s [REDACTED].⁵³

16. Counsel request that the Appeals Chamber order Dr. Martell to provide his opinion on whether Gvero is fit to participate in the appellate proceedings, considering what they deem to be the quality of Dr. Martell’s work and the failings of both Dr. de Man’s reports.⁵⁴ Counsel submit that Gvero’s condition [REDACTED], that Dr. de Man reaches conclusions which differ from those of Dr. Boiten and Dr. Martell, and that their conclusions appear to differ by field of expertise.⁵⁵ Counsel consequently request that the Appeals Chamber order Dr. Boiten to provide an updated expert neurological report.⁵⁶ Finally, Counsel request an oral hearing on Gvero’s fitness, so as to allow the parties to cross-examine Dr. Boiten, Dr. de Man and Dr. Martell.⁵⁷

17. The Prosecution responds that the reports by Dr. de Man and Dr. Martell are “largely compatible”⁵⁸ and provide a sufficient basis to determine that Gvero is now fit to participate in the appellate proceedings.⁵⁹ It submits that Dr. de Man is appropriately qualified to give an expert opinion on the matter,⁶⁰ and that having sought the neuropsychological examination and confirmed his own findings set out comprehensively in his initial report, there was no need for him to address each observation of Dr. Martell in detail.⁶¹ Therefore, according to the Prosecution, there is no need for further reports from Dr. Boiten and Dr. Martell or an oral hearing, which would merely lead to further delays in the proceedings.⁶² The Prosecution concludes that it is time for the Appeals Chamber to resume the proceedings against Gvero.⁶³

⁵⁰ Defence Submission of 1 October 2012, para. 3.

⁵¹ Defence Submission of 1 October 2012, para. 4.

⁵² Defence Submission of 1 October 2012, paras 2, 6, 8.

⁵³ Defence Submission of 1 October 2012, para. 7. See also Defence Submission of 1 October 2012, para. 17.

⁵⁴ Defence Submission of 1 October 2012, paras 9-11, 17-19(i).

⁵⁵ Defence Submission of 1 October 2012, paras 10, 12-14.

⁵⁶ Defence Submission of 1 October 2012, paras 14, 18, 19(ii).

⁵⁷ Defence Submission of 1 October 2012, paras 15-16, 19(iii).

⁵⁸ Prosecution Submission of 8 October 2012, para. 15.

⁵⁹ Prosecution Submission of 8 October 2012, paras 1, 3-4, 12-14, 16-19, 21, 24.

⁶⁰ Prosecution Submission of 8 October 2012, paras 2, 5, 24.

⁶¹ Prosecution Submission of 8 October 2012, paras 1-2, 6-11.

⁶² Prosecution Submission of 8 October 2012, paras 3, 20-24.

⁶³ Prosecution Submission of 8 October 2012, para. 24.

IV. DISCUSSION

A. Challenges to the Premises of Dr. de Man's Conclusions

18. Counsel has submitted that “translation issues” may have led Dr. de Man to draw incorrect conclusions.⁶⁴ The Appeals Chamber notes that the examination of Gvero required interpretation from English into BCS and *vice versa*,⁶⁵ and that Dr. de Man was alert to the associated risks involved.⁶⁶ Dr. de Man’s Preliminary Report does not indicate any difficulty with interpretation during the two-and-a-half hour examination,⁶⁷ and indeed the report contains a number of detailed and comprehensible quotes from Gvero.⁶⁸ The argument of Counsel is based on nothing more than speculation. The Appeals Chamber therefore finds that Counsel have failed to substantiate any allegation in this regard.

19. The Appeals Chamber is equally unconvinced by Counsel’s argument that Dr. de Man inappropriately relied on the staff neurologist and interpreter during his examination of Gvero. According to Dr. de Man’s Preliminary Report, the neurologist was Colonel Toplica Lepić MD, a member of the medical staff of Belgrade Military Medical Academy (“Neurologist”), and the interpreter was Maša Radonić MA, a language assistant (“Interpreter”). Dr. de Man’s Report clearly states that the Neurologist did not take part in the interview with Gvero.⁶⁹ Dr. de Man indicates that, in addition to his interview with Gvero, he sought the opinion of the Neurologist and Interpreter, both of whom had been present at the time of the neurological evaluation by Dr. Boiten.⁷⁰ He sought the opinion of the Neurologist in the capacity of treating physician and the opinion of the Interpreter on the specific subject of verbal communication.⁷¹ Indeed, Dr. de Man reported that both the Neurologist and Interpreter concurred with his opinion that “major progress had been made since February.”⁷² The Appeals Chamber considers it appropriate for Dr. de Man to have access to the relevant medical history of Gvero for the purposes of conducting his examination,⁷³ and this obviously extends to consultation with medical staff present for a previous examination ordered by the Appeals Chamber. In any event, the Appeals Chamber considers that it has not been

⁶⁴ Defence Submission of 16 January 2012, para. 3.

⁶⁵ Dr. de Man’s Preliminary Report, pp. 4-5.

⁶⁶ Dr. de Man’s Preliminary Report, p. 5 fn. 1 (“Simultaneous [interpretation] is actually unwanted in an examination situation such as this as it gives the examining physician insufficient opportunity to evaluate the answers given on questioning.”).

⁶⁷ Dr. de Man’s Preliminary Report, p. 4.

⁶⁸ Dr. de Man’s Preliminary Report, pp. 5-6.

⁶⁹ Dr. de Man’s Preliminary Report, p. 4.

⁷⁰ Dr. de Man’s Preliminary Report, p. 6.

⁷¹ Dr. de Man’s Preliminary Report, pp. 6-7.

⁷² Dr. de Man’s Preliminary Report, p. 7.

demonstrated that Dr. de Man inappropriately relied upon either the Neurologist or the Interpreter in reaching his conclusions.

20. The Appeals Chamber observes that many of Counsel's arguments focus on questioning Dr. de Man's reports and conclusions, yet they fail to show that Dr. de Man's conclusions are unreliable. Even assuming that both Dr. de Man's reports would have benefited from further detailing, it still does not follow that his conclusions are insufficiently founded. The relative brevity of Dr. de Man's Final Report is understandable in light of the supplementary nature of Dr. Martell's Evaluation and the fact that the conclusions of Dr. Martell do not undermine those contained in Dr. de Man's Preliminary Report.⁷⁴ In this regard, Dr. de Man's Final Report clearly reflects that he took into consideration the observations of Dr. Martell.⁷⁵ In sum, the Appeals Chamber is not convinced by Counsel's contention that Dr. de Man's conclusions are unreliable, particularly considering that the Appeals Chamber also has Dr. Martell's Evaluation before it, and is thus in a position to compare the findings of these two medical experts appointed by the Tribunal.

B. Standard of Fitness

21. The Appeals Chamber has held that an appellant's ability to participate in the appellate proceedings is contingent upon whether he possesses the mental capacity to understand their essentials, and the mental and/or physical capacity to communicate, and thus consult, with his counsel.⁷⁶ It has further clarified that the following standard of fitness ("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:

[...] 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. [...] An 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".⁷⁷

⁷³ See Order Releasing Confidential and *Ex Parte* Medical Reports Concerning Milan Gvero to [REDACTED] Neuro-Psychiatrist, 23 November 2011 (confidential); Corrigendum to "Order Releasing Confidential and *Ex Parte* Medical Reports Concerning Milan Gvero to [REDACTED] Neuro-Psychiatrist", 25 November 2011 (confidential).

⁷⁴ See *infra* paras 22-26.

⁷⁵ See, e.g., Dr. de Man's Final Report, p. 4: "I would however like to point out [Dr. Martell's] conclusions describing Mr. Gvero as (3) 'being able to make his thoughts[, feelings] and wishes known' and (4) 'being able to communicate and cooperate with others effectively [REDACTED]' as they seem particularly relevant to the questions at hand". See also Dr. de Man's Final Report, p. 3.

⁷⁶ Decision of 13 December 2010, para. 11.

⁷⁷ Decision of 20 April 2011, p. 3; Decision of 13 December 2010, para. 11; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement"), para. 55.

An appellant claiming to be unfit to participate in the proceedings bears the burden of so proving by a preponderance of the evidence.⁷⁸

C. Gvero's Fitness

22. The Appeals Chamber turns first to the question of Gvero's mental capacity to understand the essentials of the proceedings. Counsel rely on certain findings in Dr. Martell's Evaluation in support of their contention that Gvero would have difficulties understanding the appeals process.⁷⁹ The Appeals Chamber agrees that Dr. Martell's observations indicate that Gvero's ability [REDACTED]. Most notably, Dr. Martell concluded that Gvero has [REDACTED].⁸⁰ However, in this regard the Standard of Fitness focuses on an appellant's ability to understand the *essentials* of the appellate proceedings. Processing the wealth of complex information inherent in international criminal proceedings is the role of defence counsel, in order to advise their clients. Indeed, the Standard of Fitness indicates that a defendant may sometimes require assistance to participate in the proceedings.⁸¹ Thus, Gvero's condition does not affect his ability to *effectively* participate in the appellate proceedings, as his ability to understand their essentials is not impaired. In this sense, the Appeals Chamber considers that Dr. Martell's conclusion is in line with Dr. de Man's conclusion, applying the Standard of Fitness,⁸² that "[o]n psychiatric evaluation no *significant* disturbance of comprehension was found".⁸³ The Appeals Chamber is therefore not convinced that Gvero's cognitive difficulties render him unfit to participate in the appellate proceedings.

23. Regarding Gvero's capacity to communicate and consult, Counsel emphasise certain aspects of Dr. Martell's observations,⁸⁴ but ignore his overall conclusion on this point. In his conclusion, Dr. Martell noted Gvero's [REDACTED].⁸⁵ Dr. Martell further stated that Gvero was "able to make his thoughts, feelings and wishes known" and "to communicate and cooperate with others effectively [REDACTED]."⁸⁶ Finally, Dr. Martell found that Gvero's "cognitive processing speed is intact, as are his semantic fluency and confrontation naming ability, and his general capacity for verbal discourse."⁸⁷ These conclusions are in line with Dr. de Man's conclusion [REDACTED] will

⁷⁸ See *Strugar* Appeal Judgement, para. 56.

⁷⁹ Defence Submission of 1 October 2012, para. 7, referring to Dr. Martell's Evaluation, pp. 11, 14.

⁸⁰ Dr. Martell's Evaluation, p. 14. See also *supra* para. 11.

⁸¹ See *supra* para. 21: "[...] possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights".

⁸² Dr. de Man's Preliminary Report, pp. 2-3; Dr. de Man's Final Report, pp. 2-3. See also Decision of 16 September 2011, pp. 2-3.

⁸³ Dr. de Man's Preliminary Report, p. 8 (emphasis added); Dr. de Man's Final Report, p. 5 (emphasis added).

⁸⁴ Defence Submission of 1 October 2012, paras 3-4, referring to Dr. Martell's Evaluation, pp. 4, 6-7.

⁸⁵ Dr. Martell's Evaluation, pp. 13-14. See also *supra* para. 11.

⁸⁶ Dr. Martell's Evaluation, p. 13. See also *supra* para. 11.

⁸⁷ Dr. Martell's Evaluation, p. 13. See also *supra* para. 11.

not form a structural problem in communicating with counsel”.⁸⁸ The Appeals Chamber is therefore not convinced that Gvero’s communicative difficulties render him unfit to participate in appellate proceedings.

24. The Appeals Chamber also considers that Dr. de Man made further positive medical findings with regard to Gvero’s communication and comprehension.⁸⁹ Dr. de Man found, *inter alia*, that Gvero: (1) was well oriented with regard to time, place and person;⁹⁰ (2) had no disturbances of thought or perception;⁹¹ (3) was “quite sharp-witted and obviously highly intelligent”;⁹² and (4) confirmed his ability to communicate well with Counsel.⁹³ Most importantly, Dr. de Man confirmed the ability of Gvero to understand the substance of the Trial Judgement against him, the appeals process and its possible consequences, and the substance of the Prosecution’s grounds of appeal against him, and to instruct his counsel with regard to filing an appeal on his behalf.⁹⁴ Additionally, the Appeals Chamber notes that after reviewing Dr. Martell’s Evaluation within the framework of his own assessment, Dr. de Man concludes that his conclusions in his preliminary report find “sufficient support in Dr. Martell’s report to remain unchanged”.⁹⁵

25. Counsel offer as a counterweight to Dr. de Man’s observations on Gvero’s recovery [REDACTED] the names and nationalities of his defence team. Counsel refer to the following statement which Dr. de Man’s Preliminary Report attributes to Gvero: [REDACTED].⁹⁶ Noting the Prosecution’s response that this description of the composition of Gvero’s defence team was in fact largely accurate,⁹⁷ and considering the totality of observations in Dr. de Man’s Preliminary Report and Dr. Martell’s Evaluation regarding Gvero’s clearly improved [REDACTED], the Appeals Chamber is satisfied that this argument is without merit and any discrepancies identified are minor and insufficient to call into question the expert opinion and conclusions of Dr. de Man.

26. Counsel do not explain clearly how Dr. Martell and Dr. de Man supposedly arrive at different conclusions.⁹⁸ With due consideration to the different specialisations, methodologies and mandates of these two medical experts, the Appeals Chamber considers that their results converge

⁸⁸ Dr. de Man’s Preliminary Report, p. 8; Dr. de Man’s Final Report, p. 5.

⁸⁹ See *supra* para. 10.

⁹⁰ Dr. de Man’s Preliminary Report, p. 5.

⁹¹ Dr. de Man’s Preliminary Report, p. 5.

⁹² Dr. de Man’s Preliminary Report, p. 5.

⁹³ Dr. de Man’s Preliminary Report, p. 7.

⁹⁴ Dr. de Man’s Preliminary Report, p. 8.

⁹⁵ Dr. de Man’s Final Report, p. 4. See also *supra* para. 12.

⁹⁶ Defence Submission of 16 January 2012, para. 4, referring to Dr. de Man’s Preliminary Report, p. 6. Dr. de Man’s Preliminary Report refers to “Iwan” rather than “Ivan”. See Dr. de Man’s Preliminary Report, p. 6.

⁹⁷ See Prosecution Response of 20 January 2012, paras 4-5.

⁹⁸ See Defence Submission of 1 October 2012, para. 13.

far more than they diverge.⁹⁹ It is rather Dr. Boiten’s conclusions that differ significantly from those of the other two experts. Counsel submit that Gvero’s condition [REDACTED], thereby stressing the importance of the opinions of Dr. Boiten, a neurologist.¹⁰⁰ The Appeals Chamber considers the specialisations of all the Tribunal-appointed medical experts to be relevant to establishing whether Gvero meets the Standard of Fitness. Further, it considers that Dr. de Man – who prepared his reports with the benefit of having access to the relevant medical history of Gvero, including Dr. Boiten’s Report and Dr. Martell’s Evaluation – is sufficiently qualified and has an appropriate expertise to assist the Appeals Chamber in its determination of Gvero’s ability to participate in appellate proceedings.

27. The Appeals Chamber considers the differing opinion of Dr. Boiten to be a reflection of the timing and nature of his examination, and best viewed in light of the relative improvement over time of Gvero’s medical condition. Following Dr. Kovačević’s Report, Dr. Boiten was able to report that Gvero’s neurological condition had improved.¹⁰¹ Dr. de Man examined Gvero almost ten months after Dr. Boiten’s examination, and indicated that Gvero showed “significant recovery”.¹⁰² Dr. Martell, who examined Gvero almost eight months later, made the following observation:

[REDACTED].¹⁰³

For these reasons, the Appeals Chamber considers Dr. Boiten’s Report to be of relatively limited assistance at this stage of Gvero’s recovery.

28. In light of the foregoing, the Appeals Chamber sees no need for Dr. Martell to provide his opinion on whether Gvero is fit to participate in the appellate proceedings, or for an updated expert neurological report from Dr. Boiten. Considering that the Appeals Chamber has before it all the medical reports needed to reach a decision on the Request, and that it can perceive no serious doubt at the present stage of Gvero’s recovery with regard to his fitness to participate in the appellate proceedings, the Appeals Chamber further finds that there is no need to hold an oral hearing on Gvero’s fitness.

⁹⁹ See *supra* paras 22-25.

¹⁰⁰ See Defence Submission of 1 October 2012, paras 10, 13.

¹⁰¹ Dr. Boiten noted an “explicit improvement of [Gvero’s] neurological condition” since the situation described in Dr. Kovačević’s Report, and did not exclude that further recovery could take place. See Dr. Boiten’s Report, p. 5. See also Dr. Boiten’s Report, p. 4.

¹⁰² Dr. de Man’s Preliminary Report, p. 7.

¹⁰³ Dr. Martell’s Evaluation, p. 7 (emphasis added).

D. Conclusion

29. Having considered Dr. Kovačević's Report, Dr. Boiten's Report, Dr. Boiten's Clarification, Dr. de Man's Preliminary Report, and Dr. de Man's Final Report (taking into account Dr. Martell's Evaluation), the Appeals Chamber finds that Gvero has sufficiently recovered from his stroke to enable him to participate in appellate proceedings without infringing on his rights. The Appeals Chamber is satisfied that Gvero has the ability to understand the substance of the Trial Judgement against him, understand the appeals process and its possible consequences, understand the substance of the Prosecution's grounds of appeal against him, and instruct his counsel with regard to filing an appeal on his behalf. The Appeals Chamber is satisfied that Gvero meets the Standard of Fitness.

V. DISPOSITION

30. In light of the foregoing, and considering Rules 107 and 127 of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Appeals Chamber:

DENIES the Request;

REVOKES the suspension of the appellate proceedings against Gvero;

ORDERS, pursuant to Rule 108 of the Rules, Counsel, to the extent that they wish to pursue Gvero's right of appeal, to file a notice of appeal no later than fifteen (15) days from the date of filing of the present decision;

ORDERS, pursuant to Rule 111 of the Rules, Counsel and the Prosecution, to the extent that they wish to pursue their appeals, to file their respective appeal briefs within thirty (30) days of the filing of Gvero's notice of appeal, if any;

ORDERS, pursuant to Rule 112 of the Rules, Counsel and the Prosecution to file their respective response briefs, if any, within fifteen (15) days of the filing of their respective appeal briefs;

ORDERS, pursuant to Rule 113 of the Rules, Counsel and the Prosecution to file their respective reply briefs, if any, within seven (7) days of the filing of their respective response briefs;

INVITES Counsel and the Prosecution to indicate within seven (7) days of the filing of the present decision what portions thereof should, in their submission, remain confidential and/or *ex parte*.

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



Judge Patrick Robinson
Presiding

Dated this sixteenth day of January 2013,
At The Hague,
The Netherlands.

[Seal of the Tribunal]