IT-03-73-PT
D 5548 - D 5542
29 April 2004

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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-03-73-PT
		Date:	29 April 2004
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Jean Claude Antonetti
Judge Kevin Parker

Registrar: **Mr. Hans Holthuis**

Decision: **29 April 2004**

PROSECUTOR

v.

IVAN ČERMAK
MLADEN MARKAČ

DECISION ON IVAN ČERMAK'S AND MLADEN MARKAČ'S MOTIONS FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Mark Ierace
Ms. Laurie Sartorio

Counsel for the Accused:

Mr. Čedo Prodanović and Ms. Jadranka Sloković for Ivan Čermak
Mr. Miroslav Šeparović and Mr. Goran Mikuličić for Mladen Markač

A. Background

1. The indictment charges Ivan Čermak and Mladen Markač with crimes against humanity under Article 5 and violations of the laws and customs of wars under Article 3 of the Statute of the International Tribunal ("Statute") for offences allegedly committed in the Krajina Region of the Republic of Croatia between 4 August and 15 November 1995. The indictment was confirmed on 24 February 2004. On 9 March 2004 the President of the Tribunal assigned the case to Trial Chamber II. The two Accused were transferred to the seat of the Tribunal on 11 March 2004 and had their initial appearance on the following day.

2. On 12 March 2004 the defence for Ivan Čermak ("Čermak defence") and the defence for Mladen Markač ("Markač defence") filed motions pursuant to Rule 65 of the Rules of Procedure and Evidence requesting respectively the provisional release of Ivan Čermak and Mladen Markač. Both motions were supported by an annexed letter from the Croatian Minister of Justice which communicated guarantees of the Croatian government for the appearance of the two Accused. On 25 March 2004 the Office of the Prosecutor ("Prosecution") filed its response to the above motions. It submitted that the motions should be dismissed and the relief denied. Oral submissions were heard on 1 April 2004. On 13 April 2004 a letter from the Netherlands authorities was filed with the Registry. This indicated that the Host Country had no objection to the provisional release of the two Accused, provided that upon release they leave the Netherlands.

B. Arguments of the parties

3. In support of its motion the Čermak defence argues *inter alia* that there is no danger that the Accused will not appear for trial as he surrendered voluntarily to the custody of the Tribunal shortly after becoming aware that an indictment against him had been issued. It submits that there is no risk that, if released, the Accused will pose a danger to any victims or witnesses, as many of them live outside the territory of the Republic of Croatia and it is not suggested that he has tried to influence those who live in Croatia even though he has been in a position to do so since the commission of the alleged crimes. It maintains further that there is no risk that the Accused will obstruct

justice as he has cooperated with the Prosecution. It is suggested that proof of his cooperation is to be seen in the 3 interviews he has had with the Prosecution since 1998 and the 132 documents he had submitted in the course of the investigation.

4. The Markač defence submits *inter alia* that Mladen Markač surrendered voluntarily to the custody of the Tribunal after hearing that an indictment against him had been issued, that there is no risk that he may pose danger to victims or Prosecution witnesses as it is not suggested that he has taken such action even though he would have been able to do so before he was formally charged, and he has cooperated with the Prosecution in the course of the investigation. During oral argument it submitted that it would not be fair to the Accused to relate his case to another case arising from substantially the same circumstances, namely the case against Ante Gotovina, and to draw negative inferences from Gotovina's refusal to cooperate with the Tribunal. It is further submitted that pursuant to the practice of European countries and the jurisprudence of the European Court of Human Rights detention is the most serious measure that can be applied to an accused, so that it should be used selectively and where the effect of detention may be achieved by less restrictive measures, such measures should be used. Finally, it contended that the practice of the Tribunal has changed towards adopting less restrictive policies on provisional release as the previous requirement that provisional release be granted only in "exceptional circumstances" has been removed from the relevant provision of the Rules.

5. In its Response the Prosecution opposes the Motions *inter alia* on the grounds that each of the Accused is charged with extremely serious violations of international humanitarian law and may well face a prison sentence that would represent a significant portion of the remainder of their life. This, it is submitted, constitutes a sufficient reason for each Accused not to appear for trial. It further submits that in view of the Croatian government's inability to execute a warrant of arrest against Ante Gotovina, and in view of the fact that the Minister of Justice has publicly proclaimed the Accuseds' innocence, reservations should be held with respect to the government's commitment and its ability to honour the guarantees offered. The Prosecution contends that the Accuseds' positions of authority and, in the case of Ivan Čermak, also his wealth, would assist each Accused to be in a position to influence victims or witnesses. Further, in the light of the

significant evidence against each Accused, which will only now be disclosed to them, there is an increased likelihood that the Accused would not return voluntarily to the seat of the Tribunal should they be released at this stage.

6. The Minister of Justice of the Republic of Croatia, Mrs. Vesna Skare-Ozbolt, in the course of her oral submission, affirmed the commitment of the present Croatian government to cooperation with the Tribunal and submitted that evidence of this should be seen in the government's position with respect to the most recent indictments of the Tribunal concerning citizens of the Republic of Croatia. She further affirmed that the government would comply with orders of the Tribunal and would cover the costs and expenses related to the appearance of each of the Accused before the Tribunal. These are encouraging developments.

C. Discussion

7. The Trial Chamber does accept that there is evidence of an improvement in the level of cooperation between the Croatian government and the Tribunal in recent times. The presence of the Minister of Justice at the oral hearing with respect to the Motions for Provisional Release in this case is but one example. However, the Trial Chamber must bear in mind that this is a quite recent development and there is much room for further experience over time, and in a number of cases, before the position can be viewed with real confidence. The Trial Chamber is also conscious that another accused indicted for crimes allegedly arising from the same factual circumstances as those that form the basis of the indictment against Ivan Čermak and Mladen Markač, namely Ante Gotovina, is still at large despite the efforts of the Croatian authorities to effect his arrest. The recent experience in the Gotovina case serves to illustrate that there is some force in the proposition urged on the Trial Chamber by the Prosecution that the extent to which there can be confidence in the effectiveness with which the Croatian government can fulfil the undertakings it offers must be approached with some caution in the present circumstances.

8. The Defence sought to rely on the amendment to Rule 65 which deleted the previous express requirement of "exceptional circumstances," and argues that the practice of the Tribunal on provisional release has changed as a consequence. While the

requirement for "exceptional circumstances" indeed has been deleted from the Rule, the Trial Chamber does not accept the argument that this amendment reflects or has resulted in a change of practice. The general effect of the present Rule is that an accused may not be released once detained, except on an order of a Chamber. Release may be ordered by a Chamber *inter alia*, only if the Chamber is satisfied that:

- the Accused will appear for trial, and
- if released, the accused will not pose a danger to any victim, witness or other person.

It is not the effect or operation of the Rule that release will or must be ordered if a Chamber is satisfied about those matters. The Rule, relevantly, operates to *preclude* an order for release *unless* the Chamber is satisfied about those matters. If so satisfied, (and if the other requirements are also satisfied), it then becomes a matter for the exercise of the discretion of the Chamber. That discretion must be exercised in light of all the circumstances of the case. These circumstances must be evaluated by the Chamber. They must persuade the Chamber that provisional release is appropriate in that particular case. If the Chamber is not so persuaded release will not be ordered. Thus, while the amendment to Rule 65 has repealed what had been a further express requirement that there must also be "exceptional circumstances" before release could be ordered, it remains necessary for an Accused to satisfy the Chamber that release is appropriate in a particular case.

9. It has been noted that reference was made to the current practice of European States and the jurisprudence of the European Court of Human Rights. Of course, the fundamental legal structure within which that Court and the Courts of European States function is not that which applies to this Tribunal. Even so, underlying principles, in particular concern for the liberty of an individual and the need to hold this in balance with the need to effectively administer justice by trying those charged with offences, is common to all. The practice of the European Court of Human Rights has been

considered in this Tribunal.[1] While it is accepted that detention is the most severe measure that can be imposed on an accused and is to be used only when no other measures can achieve the effect of detention, it is recognized that this does not preclude the use of detention in an appropriate case.[2]

10. Importantly, it must be born in mind that this Tribunal has a jurisdiction which is directed specifically to offences involving serious violations of international humanitarian law, especially grave breaches of the Geneva Conventions of 1949, genocide, serious violations of the laws or customs of war and crimes against humanity. The nature and the circumstances of the offences tried before this Tribunal are of their very nature grave. The likelihood is that, in the event of conviction, the appropriate punishment will be severe. This is to be contrasted to some degree with that of national Courts which typically have a jurisdiction which also extends to a wide range of less serious offences.

11. Further, while national courts have the support of police and other agencies within the State of which they are part, and there are in existence established means to ensure the enforcement of their orders within that State, this Tribunal is not in that situation. This Tribunal is dependant on the effective cooperation and support of governments and agencies of States. Hence, for this Tribunal, the prospect of provisional release pending trial and the potential risks which that involves for victims, witnesses and the administration of justice, can have a significance which may differ in some material respects from that usually faced by a national court.

12. The Chamber further notes, in particular, that the nature of the charges alleged against each of the Accused in this particular case are, on their face, indeed grave. The nature and detail of the evidence on which the Prosecution intends to rely is yet to be provided to each of the Accused under the processes of the Tribunal. Their appreciation of the strength of the Prosecution case and of their prospects in the proceedings may well

[1] *See* for example *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT Decision granting provisional release to Amir Kubura, 19 December 2001; *see also Prosecutor v. Rahim Ademi*, Case No.: IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002.

change as they learn more about these matters. Hence, their past conduct may not provide a reliable guide to their future conduct in respect of the proceedings.

13. In all the circumstances of this case as they are known to the Trial Chamber, in particular having regard to the apparent seriousness of the charges against each of the Accused, the Trial Chamber is not satisfied in respect of either Accused that, if released, the Accused will appear for trial and that he will not pose a danger to any victim or witness. The Trial Chamber is not persuaded that either Accused should be provisionally released.

14. For these reasons the Motions are denied.

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

Dated this twenty-ninth day of April 2004
At The Hague
The Netherlands

Carmel Agius
Presiding

[Seal of the Tribunal]