



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: 14 September 2004
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. Hans Holthuis

Decision: 14 September 2004

PROSECUTOR

v.

**IVAN ČERMAK
MLADEN MARKAČ**

**DECISION ON IVAN ČERMAK'S AND MLADEN MARKAČ'S
SECOND 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. This decision of Trial Chamber II is in respect of Ivan Čermak's and Mladen Markač's second motions for provisional release pursuant to Rule 65 of the Rules of Procedure and Evidence ("Rules").

2. The Accused are charged jointly by an indictment confirmed on 24 February 2004, 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 two Accused were transferred to the seat of the Tribunal on 11 March 2004. 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 for the Accuseds' provisional release. By a Decision of 29 April 2004 Trial Chamber II denied the above motions.

3. On 23 July 2004 the Čermak defence and the Markač defence filed respectively "Ivan Čermak's Motion for Provisional Release" and "Mladen Markač's Motion for Provisional Release" ("Motions"). On 28 July 2004 the Office of the Prosecutor ("Prosecution") filed a response to the Motions. By a letter signed on 27 July 2004 the Host Country indicated that it had no objection to the provisional release of the Accused, provided that upon release they leave the Netherlands.

B. Arguments of the parties

4. The Čermak defence submits that in the light of the particular circumstances of this case it is more likely than not that Ivan Čermak will appear at the hearing of the trial and if released will not pose a danger to any victim, witness, or other person.¹ In support of the above assertion the Čermak defence relies, *inter alia*, on the Accused's voluntarily surrender to the custody of the Tribunal,² his cooperation with the Prosecution, before and after his initial appearance,³ on the fact that most of the potential Prosecution witnesses and victims of the alleged crimes live outside of the territory of the Republic of Croatia and that he has not posed a danger to any victim of the alleged crimes, or any potential Prosecution witness, still in the Republic of Croatia, even though he had the opportunity to do so before his surrender,⁴ and on Čermak's honesty as a businessman and a loyal citizen and his stand of keeping promises.⁵ Reliance is placed on the Republic of Croatia's

¹ Čermak's Motion, p. 2, para. 5.

² Čermak's Motion, p. 4, para 11.

³ Čermak's Motion, p. 4, para 12 and p. 6, para. 13.

⁴ Čermak's Motion, p. 6, para 12,

⁵ Čermak's Motion, p. 6, para 13.

Guarantee for Ivan Čermak's provisional release, issued on 6 July 2004 and enclosed with the Motion.⁶ It is suggested that presently there is no risk that the Republic of Croatia will not comply with orders of the Tribunal as this is acknowledged in the addresses of the Prosecutor and the President of the Tribunal to the United Nations Security Council of 29 June 2004.⁷

5. The Markač defence submits that the conditions of Rule 65 have been met with respect to Mladen Markač. In particular, it is submitted that he surrendered voluntarily to the custody of the Tribunal,⁸ that the Accused cooperated with the Prosecution before and after his surrender,⁹ that most of the potential Prosecution witnesses and victims of the alleged crimes live outside of the territory of the Republic of Croatia and those who are still in the Republic of Croatia were available to Mladen Markač but he has not posed a danger to any of them.¹⁰ The Markač defence further seeks to rely on the enclosed Guarantee of the Republic of Croatia for Mladen Markač's provisional release of 6 July 2004 and, similarly to the Čermak defence, submits that in light of the recent statements of the Prosecutor and the President of the Tribunal before the United Nations Security Council concerning the Republic of Croatia's cooperation with the Tribunal, presently there is no risk that it will not cooperate with the Tribunal.¹¹

6. The Prosecution's brief response is less than satisfactory. The Prosecution concludes that it "does not oppose" the Accused's request for the provisional release.¹² However, elsewhere in the response, the Prosecution states that it does not oppose the request, "but equally, does not advocate their release".¹³ The Prosecution does recognize that each Accused has submitted to a further interview and observes in light of its policy in relation to provisional release, that no further purpose is served in the continued detention of the Accused.¹⁴ At the same time, the Prosecution submits that it "is mindful" of the reasons expressed by this Trial Chamber when it refused the earlier request for provisional release, reasons which were substantially those then strongly advocated by the Prosecution, and observes that the relations with the Government of the Republic of Croatia have significantly improved, adding by way of apparent qualification that the accused General Ante Gotovina still remains at large.¹⁵ The Prosecution furthermore observes that the motions challenging the form of the indictment are still outstanding and that these motions should be decided upon before the present motions on the provisional release. Finally, it makes the

⁶ Čermak's Motion, p. 5, para 13.

⁷ Čermak's Motion, p. 5, para 13.

⁸ Markač's Motion, p. 4, para. 11.

⁹ Markač's Motion, p. 4, para. 12.

¹⁰ Markač's Motion, p. 6, para. 12.

¹¹ Markač's Motion, p. 5, para. 13.

¹² Prosecution's Response, p. 6, para. 11.

¹³ Prosecution's Response, o. 5, para. 8.

¹⁴ Prosecution's Response, p. 5, para. 8.

¹⁵ Prosecution's Response, p. 5, para. 9.

unnecessary and unhelpful submission that it is a matter for the Chamber what determination should be made in respect of these applications.¹⁶

C. Discussion

7. Pursuant to Rule 65 of the Rules a Chamber may order a release of an accused *inter alia*, only if the Chamber is satisfied that: (i) the accused will appear for trial; and (ii) if released, the accused will not pose a danger to any victim, witness or other person. Release may be granted if a Chamber is satisfied that the above conditions are met and if it is also satisfied that release is appropriate in a particular case. The Trial Chamber's discretion under Rule 65 must be exercised in light of all the circumstances of the case. 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.¹⁷

8. In the present case, the Trial Chamber observes that practically all arguments now advanced by the Čermak and Markač defence already have been put in support of Ivan Čermak's and Mladen Markač's motions for provisional release of 12 March 2004. The Trial Chamber has already considered each of these arguments and found that they did not justify the Accuseds' provisional release at that time. These arguments need not be rehearsed again in these reasons. The only two new matters relied on by the defence in the present Motions are that both Accused have now submitted themselves to new interviews with the Prosecution after their initial appearance, and that both the President and the Prosecutor of the Tribunal have reported to the Security Council in New York on 29 June 2004 that cooperation with the Republic of Croatia has improved significantly.

9. The Trial Chamber observes that, notwithstanding the substantially repetitive character of the present Motions, the Prosecution has taken a rather ambiguous position in its response to the Motions. In relation to the first Motions of 12 March 2004, the Prosecution firmly opposed these Motions, pointing out, *inter alia*, the seriousness of the alleged offences, the insufficient cooperation from the Government of Croatia, in particular the failure to deliver General Ante Gotovina to the Tribunal, the strength of the evidence against the Accused, and the failure of the Accused to establish that they will not pose a danger to any victim, witness or other person, especially because of their high and influential position within Croatian society. It has not been demonstrated to the Chamber, on what basis the Prosecution now has rather equivocally expressed itself as not opposed to the provisional release of the two Accused, while not advocating it. Nothing

¹⁶ Prosecution's Response, pp. 5/6, para. 10.

is advanced to indicate that the matters enumerated, on which the Prosecution previously relied, have now changed, apart from the two identified matters. The charges against the Accused remain equally serious. Although there has been an encouraging improvement in the level of cooperation of the Republic of Croatia, that is a very recent development, in which the Tribunal obviously will develop greater confidence with time. At present, notwithstanding the encouraging improvement, the accused General Ante Gotovina has still not been arrested. This was emphasised both by the Prosecutor and the President of the Tribunal during their presentations to the Security Council on 29 June 2004, on which each Accused relies.¹⁸ Moreover, no new material or persuasive arguments have been presented which impact on the assessment of the possible danger that each Accused may pose to victims, witnesses or other persons. This remains a significant issue.

10. The Trial Chamber is furthermore not assisted by the Prosecution's observation that it is "mindful" of the reasons expressed by this Chamber in its earlier decision on the requests for provisional release. The Chamber was largely persuaded by the Prosecution's then submissions in support of most of these reasons. It needs to be satisfied that there has been some significant change which justifies a change of position. The matters relied on by each Accused are not of sufficient force to do so, and the Prosecution has not dealt with this.

11. In conclusion, the Trial Chamber is not persuaded that there has been a material change of circumstances that would justify a change from its Decision on the Motions for Provisional Release of 29 April 2004.

12. For these reasons the present Motions are denied.

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

Dated this 14th day of September 2004
At The Hague
The Netherlands



For the Presiding Judge
Kevin Parker

[Seal of the Tribunal]

¹⁷ See for example *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-PT, Decision on Ivan Čermak's and Mladen Markač's Motions for Provisional Release, 29 April 2004.

¹⁸ Čermak's Motion, p. 5, para 13 and Markač's Motion, p. 5, para. 13.