



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-06-90-T
Date: 18 July 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Kinis
Judge Elizabeth Gwaunza
Registrar: Mr Hans Holthuis
Decision of: 18 July 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

CONFIDENTIAL

DECISION ON IVAN ČERMAK'S MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor

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I. PROCEDURAL BACKGROUND

1. Mr Čermak was granted provisional release on 2 December 2004, and returned to the United Nations Detention Unit (“UNDU”) on 5 March 2008.¹ On 14 March 2008, the Chamber denied a motion by the Čermak Defence for provisional release, holding that although the specific requirements set out in Rule 65 (B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) for granting provisional release had been met, the commencement of trial on 11 March 2008 constituted both a relevant and material change in circumstances which justified the exercise of the Chamber’s discretion not to grant the request.²

2. On 30 June 2008, the Čermak Defence filed a confidential motion, with two confidential and *ex parte* annexes, requesting that the Chamber grant Mr Čermak provisional release pursuant to Rules 54 and 65 for the period immediately after 25 July 2008 until 22 August 2008.³

3. On 14 July 2008, the Prosecution filed its Response to the Motion.⁴ On 15 July 2008, the Čermak Defence requested leave to reply.⁵ On 16 July 2008, the Chamber granted the Čermak Defence leave to reply and the Prosecution leave to respond to this reply.⁶ On the same day, the Čermak Defence filed its Reply to the Prosecution’s Response.⁷ On 17 July 2008, the Prosecution filed its Response to the Čermak Defence’s Reply.⁸

II. SUBMISSIONS

4. The Čermak Defence submits that the Accused voluntarily surrendered to the Tribunal and has cooperated with the Tribunal by consenting to interviews with the Prosecution as well as not seeking additional time for his new Defence team to prepare for trial.⁹ The Čermak

¹ Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release, 2 December 2004 (“Decision on Interlocutory Appeal”), para. 44; Order Scheduling Start of Trial and Terminating Provisional Release, 6 February 2008.

² Decision on Motion for Provisional Release of Ivan Čermak, 14 March 2008 (“Decision on Provisional Release”), paras 10-11.

³ Ivan Čermak’s Motion for Provisional Release Pursuant to Rules 54 and 65, 30 June 2008 (confidential with confidential and *ex parte* annexes), (“Motion”), paras 1, 27.

⁴ Prosecution’s Response to Ivan Čermak’s Motion for Provisional Release during the Summer Recess (confidential), 14 July 2008, (“Response”).

⁵ Ivan Čermak’s Request for Leave to Reply to Prosecution’s Response to Ivan Čermak’s Motion for Provisional Release during the Summer Recess, 15 July 2008.

⁶ See T. 6594-6595.

⁷ Defence for Ivan Čermak’s Reply to Prosecution’s Response to Ivan Čermak’s Motion for Provisional Release during the Summer Recess, 16 July 2008 (“Reply”).

⁸ Prosecution’s Further Response Regarding Ivan Čermak’s Motion for Provisional Release during the Summer Recess, 17 July 2008 (“Response to the Reply”).

⁹ Motion, para. 3.

Defence also draws the Chamber's attention to Mr Čermak's "dignified and respectful" conduct in court and at the UNDU since the trial commenced, adding that a "significant amount of Prosecution evidence regarding his good character" has been heard.¹⁰ It is further argued that no evidence has been adduced which would undermine the Chamber's determination that if released, Mr Čermak would return for trial.¹¹ The Čermak Defence concludes that these factors are a relevant and material change in circumstances.¹²

5. According to Čermak Defence, the onus lies on the Prosecution to provide evidence that the provisional release of Mr Čermak "would represent a concrete risk of harm" to witnesses in Croatia or a concrete risk of undermining the public confidence in the administration of justice by the Tribunal.¹³ The Čermak Defence argues that the application of the legal standard of concrete risk precludes reliance by the Chamber on media reports and unsourced website comments.¹⁴ Moreover, the Čermak Defence assures the Chamber that it and Mr Čermak would take reasonable steps to eliminate, as far as possible, all media coverage connected with the latter's transportation from the UNDU to his residence in Croatia and back.¹⁵ In addition, the Čermak Defence submits that it will agree to the conditions of provisional release proposed by the Prosecution in its response to the Čermak Defence's previous motion for provisional release.¹⁶ The Čermak Defence finally submits that provisional release of Mr Čermak for the requested period would allow him to see his eleven-year-old son "to whom he is very close".¹⁷

6. In a letter addressed to the Čermak Defence and annexed to the Motion, Croatia expressed its readiness, in accordance with its domestic laws, to comply with any decision of the Tribunal which relates to Mr Čermak's reappearance before the Chamber.¹⁸ Moreover, Croatia confirmed that it will take all necessary steps to ensure that Mr Čermak appears before the Chamber, and that during his provisional release he does not in any way interfere with or pose a threat to witnesses, victims, or other persons.¹⁹ Finally, it gave assurances that

¹⁰ Motion, paras 8-9, 19.

¹¹ Motion, paras 9, 19.

¹² Motion, paras 8-12, 19.

¹³ Motion, paras 14, 19.

¹⁴ Motion, para. 14.

¹⁵ Motion, para. 16.

¹⁶ Motion, para. 17.

¹⁷ Motion, para. 18.

¹⁸ Motion, Confidential Annex A.

¹⁹ *Ibid.*

Croatia, in accordance with its laws, would extend additional assistance or additional guarantees in support of Čermak Defence's request for provisional release of the Accused.²⁰

7. On 2 July 2008, The Netherlands, in its capacity as the host country and limiting itself to the practical consequences of a possible provisional release, filed a letter pursuant to Rule 65 (B) stating that it has no objection to the Motion being granted.²¹ The Netherlands understood from the Motion that upon provisional release Mr Čermak would leave Dutch territory.²²

8. The Prosecution submits that the Accused has not demonstrated a material change in circumstances in the four months since the Chamber denied his previous request for provisional release.²³ The Prosecution further submits that the Accused's total time in detention since the Chamber's previous decision on provisional release has been brief and as such does not constitute a material change in his personal circumstances.²⁴ The Prosecution also submits that even if the Accused had established a material change in circumstances, he has not met his burden of establishing that his temporary release during the requested period would be appropriate.²⁵ According to the Prosecution, the Accused's desire to be reunited with his family does not constitute an acute humanitarian ground justifying the grant of the request.²⁶ Moreover, the Prosecution disputes the characterization of the evidence concerning the Accused's "good character" in the Motion.²⁷ The Prosecution submits that the Accused's return to Croatia in the prevailing settings could fuel the atmosphere of hostility towards Prosecution witnesses and increase the existing fear of many Prosecution witnesses yet to testify.²⁸ It submits that the high profile nature of the trial and the Accused in Croatia would render it "virtually impossible" for him to travel to Croatia, remain there for a number of weeks and return to The Hague unnoticed.²⁹

9. The Prosecution requests that the Chamber deny the Motion.³⁰ In the event the request is granted, the Prosecution requests that the Chamber impose the same conditions on the release as requested by the Prosecution in its response to the Čermak Defence's previous

²⁰ Ibid.

²¹ Correspondence from Host Country Regarding Request for Provisional Release, 2 July 2008 (confidential).

²² Ibid.

²³ Response, paras 1-2, 11.

²⁴ Response, paras 4, 12.

²⁵ Response, para. 11.

²⁶ Response, para. 3, 12.

²⁷ Response, paras 8-10.

²⁸ Response, para. 12.

²⁹ Response, para. 13.

³⁰ Response, para. 18.

provisional release request, and grant a stay of the Decision in order to allow the Prosecution the opportunity to appeal.³¹ The Prosecution also requests that the Chamber order a change in the status of annexes B and C to the Motion from *ex parte* to *inter partes* due to the Prosecution's legitimate interest in knowing the precise location of the Accused during the provisional release.³²

10. The Čermak Defence replies that Mr Čermak's desire to be reunited with his family is not a humanitarian ground but rather a "personal circumstance" that the Chamber should consider in exercising its discretion pursuant to Rule 65 of the Rules.³³ The Čermak Defence adds that the existence of humanitarian grounds is not a requirement for the granting of provisional release and that Mr Čermak's application should not be prejudiced by either prior media coverage or the unauthorized dissemination of confidential filings by persons or entities with whom Mr Čermak has no connection.³⁴ The Čermak Defence requests that the Chamber consider that Mr Čermak has been in detention for a period of four months and the evidence of his good character as relevant factors when exercising its discretion pursuant to Rule 65 of the Rules.³⁵ The Čermak Defence finally argues that Mr Čermak requires various comprehensive medical examinations which he plans to undergo while on provisional release.³⁶

11. In its Response to the Reply, the Prosecution submits that Mr Čermak's high profile, the public and media support which he enjoys in Croatia, and the likely impact of his release on the Croatian public as well as the victims and witnesses constitute relevant factors that must be considered when assessing whether he should be granted provisional release.³⁷ The Prosecution further responds that Mr Čermak's need to undergo a medical check up does not justify provisional release as he has access to the medical facility at the UNDU.³⁸

12. In its Response to the Reply, the Prosecution informs the Chamber that the Čermak Defence has provided it with the *ex parte* Annexes A and B to the Motion and that this part of the Response is therefore moot.³⁹

³¹ Response, para. 18.

³² Response, paras 16-17, 19.

³³ Reply, para. 3.

³⁴ Reply, paras 4, 8.

³⁵ Reply, paras 5-6.

³⁶ Reply, para. 10.

³⁷ Response to the Reply, para. 1.

³⁸ Response to the Reply, para. 2.

III. APPLICABLE LAW

13. Rule 65 of the Rules sets out the basis upon which a Trial Chamber may order the provisional release of an accused. Rule 65 applies during the pre-trial phase of the case, as well as during the course of trial.⁴⁰ Rule 65 reads, in relevant parts:

(A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

(C) The 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.

(D) Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal. Subject to paragraph (F) below, an appeal shall be filed within seven days of filing of the impugned decision. [...]

(E) The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.

(F) Where the Trial Chamber grants a stay of its decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision.

14. The conditions listed under Rule 65 (B) are the minimum requirements necessary for granting provisional release. The Chamber has the discretion not to grant the provisional release of an accused even if it is satisfied that these conditions have been met.⁴¹ In deciding whether the requirements of Rule 65 (B) are satisfied, the Chamber must consider all relevant factors. What these relevant factors are, as well as the weight to be given to them, depends upon the particular circumstances of each case.⁴²

³⁹ Response to the Reply, para. 6.

⁴⁰ *Prosecutor v. Milutinović et al.*, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, 14 December 2006, para. 10.

⁴¹ *Prosecutor v. Popović et al.*, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007 (“First *Popović et al.* Decision”), para. 5; *Prosecutor v. Stanišić and Simatović*, Decision on Prosecution Appeal on Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008, para. 3; *Prosecutor v. Popović et al.*, Decision on Vujadin Popovic's Interlocutory Appeal Against the Decision on Popovic's Motion for Provisional Release, 1 July 2008 (“Second *Popović et al.* Decision”), para. 5.

⁴² *Prosecutor v. Prilić et al.*, Decision on “Prosecution's Appeal from Décision relative à la demande de mise en liberté provisoire de l'accusé Petkovic dated 31 March 2008”, 21 April 2008 (“Petković Decision”), para. 10; Second *Popović et al.* Decision, para. 8.

15. According to the Appeals Chamber when considering a provisional release motion at the post-98 *bis* stage of the proceedings, even when satisfied that sufficient guarantees to offset the risk of flight, a Trial Chamber should not exercise its discretion in favour of a grant of provisional release unless compelling humanitarian grounds were present which cause to tip the balance in favour of allowing provisional release.⁴³

16. Where a motion requesting provisional release is filed following the denial of a previous application, it is incumbent upon the accused to satisfy the Chamber that there has been a change in circumstances that materially affects the approach taken in earlier provisional release decisions regarding the same accused.⁴⁴

IV. DISCUSSION

17. Mr Čermak voluntarily surrendered to the Tribunal in 2004. In its decision of 2 December 2004, the Appeals Chamber provisionally released Mr Čermak. He was on provisional release for more than three years and, with one exception noted by the Čermak Defence, the provisional release proceeded without violations of the conditions set. Mr Čermak has now been in detention for a period of more than 4 months since his provisional release was terminated effective 5 March 2008 prior to the start of trial on 11 March 2008.

18. At the time of the decision on Provisional Release on 14 March 2008, Mr Čermak had just returned from provisional release and the trial had recently commenced with the hearing of one witness. The reason for this short break so early in the proceedings, during which Mr Čermak requested provisional release, was to address concerns expressed by the parties relating to scheduling issues.⁴⁵ The Chamber considers that the present procedural situation constitutes a change in circumstances that materially affects the approach taken in the previous decision.

19. On the basis of the letter from the Croatian Government the Chamber is satisfied that the Republic of Croatia would be able to secure the attendance of Mr Čermak before the Tribunal and the compliance with any conditions that may be imposed by the Chamber. In addition, the fact that Mr Čermak surrendered voluntarily to the Tribunal is an indication that

⁴³ Petković Decision, para. 15; *Prosecutor v. Prilić et al.*, Decision on “Prosecution’s Appeal from Décision relative à la demande de mise en liberté provisoire de l’accusé Stojić dated 8 April 2008”, 29 April 2008, paras 14-15; *Prosecutor v. Popović et al.*, Decision on Consolidated Appeal Against Decision on Borovčanin’s Motion for Custodial Visit and Decision on Gvero’s and Miletić’s Motions for Provisional Release During the Break in the Proceedings, 15 May 2008, para. 24.
⁴⁴ First *Popović et al.* Decision, para. 12.

he would not pose a flight risk.⁴⁶ The Chamber also considers that Mr Čermak's proper and cooperative behaviour in court is a relevant factor when considering the flight risk of Mr Čermak.

20. The assessment whether an accused, if released, would pose a danger to victims, witnesses or other persons cannot be made in abstract; rather a concrete danger needs to be identified.⁴⁷ As was the case for previous decisions on provisional release for Mr Čermak, the Chamber has received no indication that if released, Mr Čermak would pose a danger to witnesses, victims, or other persons.⁴⁸

21. In conclusion, the Chamber finds that the specific requirements set out in Rule 65 (B) for granting provisional release have been met. In addition, the Chamber has considered other relevant factors, including those discussed in the parties' submissions, for its determination whether provisional release is appropriate at this stage. As the proceedings in the present case are still at an early stage, the Čermak Defence does not have to demonstrate "compelling humanitarian grounds" to tip the balance in favour of granting provisional release.

22. Mr Čermak, who is 59 years old, has a wife and an eleven-year-old son to whom he is very close. If the interests of justice do not otherwise require, the Chamber has the discretion to consider as a relevant factor for provisional release the restoration, however temporary, of the relationship between a father and his young son. Mr Čermak intends to use the provisional release to get a full medical check-up at a local clinic. The Chamber is also mindful of the general benefits of provisional release and gives due weight to the fact that a period of release will tend to boost an accused person's morale and physical and mental health. As for the general situation for witnesses and any concerns for the integrity of the proceedings, the Chamber considers that this is, under the present circumstances, properly and adequately addressed by the conditions set out below. These conditions were proposed by the Prosecution and accepted by the Čermak Defence.

23. In light of the above, the Chamber is satisfied that a temporary provisional release for Mr Čermak, under the conditions set out below, is appropriate.

⁴⁵ See T. 340-343.

⁴⁶ Decision on Provisional Release, para. 8.

⁴⁷ *Prosecutor v. Hadžihasanović et al.*, Decision Granting Provisional Release to Enver Hadžihasanović, 19 December 2001, para. 11; *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 22; *Prosecutor v. Stanišić*, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para. 27.

⁴⁸ Decision on Interlocutory Appeal, para. 40; Decision on Provisional Release, para. 9.

24. The Prosecution has requested a stay of the Chamber's Decision in order to allow an appeal. The Chamber grants this stay.

V. DISPOSITION

25. For the foregoing reasons and pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 65 of the Rules, the Chamber hereby **GRANTS** the Motion, and **ORDERS** as follows:

- (a) On the first practicable date on or after 25 July 2008, Mr Čermak shall be transported to the appropriate airport in The Netherlands by the appropriate Dutch authorities;
- (b) At the appropriate airport, Mr Čermak shall be provisionally released by the Dutch authorities into the custody of an official of the Government of Croatia to be designated prior to his release in accordance with subparagraph 4(e), below, who shall accompany Mr Čermak for the remainder of his travel to and from the addresses detailed in annex B and C of the Motion;
- (c) On his return, Mr Čermak shall be accompanied by the designated official of Croatia, who shall deliver him to the custody of the Dutch authorities at the appropriate airport, and the Dutch authorities shall then transport him back to the United Nations Detention Unit in The Hague.
- (d) During the provisional release, Mr Čermak shall:
 - 1) surrender his passport and any other valid travel documents to the Ministry of Interior of the Republic of Croatia;
 - 2) remain within the confines of his private residence in Croatia, with the exception of the visit to the address detailed in annex C of the Motion;
 - 3) report once a week to the local police station;
 - 4) consent to having his presence checked, including checking by occasional, unannounced visits by the Ministry of Interior, officials of the Government of Croatia, the local police, or by a person designated by the Registrar of the International Tribunal;

- 5) not have any contact or in any way interfere with victims or potential witnesses or otherwise interfere with the proceedings or the administration of justice;
- 6) not seek direct access to documents or archives nor destroy evidence;
- 7) not discuss or speak about the case with anyone, including the media, other than his counsel;
- 8) not engage in any activity that is not in accordance with the private nature of the provisional release, including any contact with public officials or public figures not relating to the administration of the provisional release;
- 9) comply strictly with any requirements of the Croatian authorities necessary to enable such authorities to comply with their obligations pursuant to the present decision;
- 10) return to the custody of the Tribunal by 21 August 2008, or at such time and date as the Chamber may order;
- 11) comply strictly with any order issued by the Chamber varying the terms of, or terminating, the provisional release;

(e) The Chamber requires the Government of Croatia, to assume responsibility for:

- 1) the personal security and safety of Mr Čermak while on provisional release;
- 2) ensuring compliance with the conditions imposed on Mr Čermak under the present decision;
- 3) all expenses concerning the transport of Mr Čermak from the airport in The Netherlands to his place of residence in Croatia, and back to The Netherlands;
- 4) ensuring that upon release of Mr Čermak at the airport in The Netherlands, designated officials of the Government of Croatia (whose names shall be provided in advance to the Chamber and the Registry) take custody of Mr Čermak from the Dutch authorities and accompany him as detailed in subparagraph (b) and (c), above;

- 5) not issuing any new passports or other documents which would enable Mr Čermak to travel;
- 6) monitoring on a regular basis the presence of Mr Čermak at the addresses detailed in annexes B and C of the Motion, and maintaining a log of such reports;
- 7) submitting a written report every week to the Trial Chamber and the Registry as to the presence of Mr Čermak and his compliance with the terms of the present Decision;
- 8) reporting immediately to the Registrar of the Tribunal the substance of any threats to the security of Mr Čermak, including full reports of investigations related to such threats;
- 9) immediately detaining Mr Čermak should he breach any of the terms and conditions of his provisional release and reporting immediately any such breach to the Registry and the Chamber;


INSTRUCTS the Registrar of the Tribunal to consult with the Ministry of Justice in The Netherlands as to the practical arrangements for the provisional release of Mr Čermak, and to continue to detain Mr Čermak at the United Nations Detention Unit in The Hague until such time as the Chamber and the Registrar have been notified of the name of the designated official of the Government of the Republic of Croatia into whose custody Mr Čermak is to be provisionally released.

REQUESTS the authorities of all states through which Mr Čermak will travel:

- (a) to hold him in custody for any time that he will spend in transit at an airport in their territories; and
- (b) to arrest and detain him pending his return to the United Nations Detention Unit in The Hague, should he attempt to escape.

GRANTS the Prosecution's request for stay of the decision.

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



Judge Alphons Orie
Presiding Judge

Dated this 18th day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]