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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 the Former Yugoslavia
since 1991

Case No.

IT-06-90-T

Date:

2 December 2008

Original:

English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Kinis
Judge Elizabeth Gwaunza

Registrar: Mr Hans Holthuis

Decision of: 2 December 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

CONFIDENTIAL

DECISION ON IVAN ČERMAK'S MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Counsel for Ante Gotovina

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Counsel for Ivan Čermak

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Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

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 On 18 July 2008 the Chamber granted a further motion by the Čermak Defence for provisional release during the summer recess. In its decision, the Chamber held that the specific requirements set out in Rule 65 (B) for granting provisional release had been met, and that the procedural situation at the time constituted a change in circumstances that materially affected the approach taken in the March 2008 decision.³

2. On 31 October 2008, the Čermak Defence filed a confidential motion, requesting that the Chamber grant Mr Čermak provisional release during the winter recess for the period immediately after 19 December 2008 until 9 January 2009.⁴ On 4 November 2008, the Čermak Defence filed a letter by the Government of the Republic of Croatia dated 29 October 2008, providing guarantees in respect of the requested provisional release.⁵ On 7 November 2008, The Netherlands, in its capacity as host nation, filed a letter stating its position on the matter.⁶ On 13 November 2008, the Prosecution filed its response to the Motion.⁷

II. SUBMISSIONS

3. The Čermak Defence submits that Mr Čermak voluntarily surrendered to the Tribunal and has cooperated with the Tribunal by consenting to interviews with the Prosecution as well

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 (“March 2008 Decision”), paras 10-11.

³ Decision on Ivan Čermak’s Motion for Provisional Release, 18 July 2008 (“July 2008 Decision”), paras 17-21.

⁴ Ivan Čermak’s Motion for Provisional Release Pursuant to Rules 54 and 65, 31 October 2008 (“Motion”), paras 1, 19.

⁵ Ivan Čermak’s Submission of the Guarantees of the Republic of Croatia for Provisional Release, 4 November 2008, (“Croatian Guarantee”).

⁶ Correspondence from Host Country Regarding Request for Provisional Release, 7 November 2008.

⁷ Prosecution’s Response to Ivan Čermak’s Motion for Provisional Release, 13 November 2008 (“Response”).

as providing them with a substantial number of documents.⁸ The Čermak Defence also draws the Chamber's attention to the fact that during trial, Mr Čermak's behaviour has been described as proper and co-operative.⁹ It further argues that with one exception, Mr Čermak has complied strictly with the Chamber's orders during prior periods of provisional release.¹⁰ The Čermak Defence also points out that despite the Prosecution having repeatedly raised concerns regarding the possible impact a return to Croatia by Mr Čermak could have, for example on Prosecution witnesses, such concerns have been shown to have been unjustified.¹¹ Moreover, the Čermak Defence submits that Mr Čermak has never posed a danger to victims, witnesses or other persons in the case and assures the Chamber that this position will remain the same.¹² In addition, the Čermak Defence agrees to Mr Čermak being subjected to the same conditions of provisional release as those ordered by the Chamber in its July 2008 Decision.¹³ The Čermak Defence finally submits that it has been nearly four months since Mr Čermak has seen his eleven-year-old son in "relatively normal circumstances", and that provisional release for the requested period would allow him to maintain a relationship with his son.¹⁴

4. In a letter addressed to the Čermak Defence, the Government of the Republic of Croatia expresses 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.¹⁵ Moreover, the Government of the Republic of Croatia confirms that it will take all necessary steps to ensure that Mr Čermak will appear before the Chamber and that during his provisional release he will not in any way interfere with or pose a threat to witnesses, victims, or other persons.¹⁶ Finally, it gives assurances that the Government of the Republic of Croatia, in accordance with its laws, would extend additional assistance or additional guarantees in support of the Čermak Defence's request for provisional release of Mr Čermak.¹⁷

5. On 7 November 2008, The Netherlands, limiting itself to the practical consequences of a possible provisional release, filed a letter pursuant to Rule 65 (B) stating that it has no

⁸ Motion, para. 7.

⁹ Ibid., para. 7.

¹⁰ Ibid., para. 8.

¹¹ Ibid., paras 11-15.

¹² Ibid., para. 16.

¹³ Ibid., para. 17.

¹⁴ Ibid., paras 9-10.

¹⁵ Croatian Guarantee.

¹⁶ Ibid.

¹⁷ Ibid.

objection to the Motion being granted.¹⁸ The Netherlands understands from the Motion that upon provisional release Mr Čermak would leave Dutch territory.¹⁹

6. In its Response, the Prosecution submits that it has previously asserted its position that Mr Čermak should not be released during a period of court recess.²⁰ The Prosecution further submits however that it recognizes that there has been no material change of circumstances since Mr Čermak was last granted provisional release and that Mr Čermak has agreed to the same conditions as those imposed during his last provisional release.²¹ Under these circumstances, the Prosecution does not oppose the Motion.²²

III. APPLICABLE LAW

7. 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.²³ 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.

8. 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.²⁴

¹⁸ Correspondence from Host Country Regarding Request for Provisional Release, 7 November 2008.

¹⁹ *Ibid.*

²⁰ Response, para. 1.

²¹ *Ibid.*

²² *Ibid.*

²³ *Prosecutor v. Milutinović et al.*, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, 14 December 2006, para. 10.

²⁴ *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, para. 5.

9. According to the Appeals Chamber, when considering a provisional release motion at the post-Rule 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.²⁵

10. 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.²⁶

IV. DISCUSSION

11. On the basis of the Croatian Guarantee, the Chamber is satisfied that the Government of 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 he would not pose a flight risk.²⁷ The Chamber also considers that Mr Čermak's proper and cooperative behaviour in court is a relevant factor when considering his flight risk.²⁸

12. 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.²⁹ 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.³⁰ Moreover, during his last period of provisional release, Mr Čermak abided by the conditions set out in its 18 July 2008 Decision, including not to

²⁵ *Prosecutor v. Prlić 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, para. 15; *Prosecutor v. Prlić 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.

²⁶ First *Popović et al.* Decision, para. 12.

²⁷ March 2008 Decision, para. 8; July 2008 Decision, para. 19.

²⁸ July 2008 Decision, para. 19.

²⁹ *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; July 2008 Decision, para. 20.

³⁰ Decision on Interlocutory Appeal, para. 40; March Decision 2008, para. 9; July 2008 Decision, para. 20.

have any contact with victims or potential witnesses and not to discuss or speak about the case with anyone, other than his counsel.³¹

13. 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 Motion, for its determination whether provisional release is appropriate at this stage. As the proceedings in the present case are still at the pre-Rule 98 *bis* stage, the Čermak Defence does not have to demonstrate “compelling humanitarian grounds” to tip the balance in favour of granting provisional release.

14. Mr Čermak, who is 58 years old, has a wife and an eleven-year-old son to whom he is very close. As in its July 2008 Decision, the Chamber considers that, if the interests of justice do not otherwise require, a relevant factor for provisional release is the restoration, however temporary, of the relationship between a father and his young son.³² The Chamber also reiterates 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.³³ 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.

15. 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.

V. DISPOSITION

16. 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 after 19 December 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 the Republic of Croatia to be designated prior to his release in accordance with subparagraph (e)(4), below, who shall accompany Mr Čermak for the remainder of his travel to and from the address detailed in Annex A of the Motion;

³¹ July 2008 Decision, para. 25(d).

³² *Ibid.*, para. 22.

- (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 UNDU 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, at the address listed in Annex A 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 the Republic 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 8 January 2009, or at such time and date as the Chamber may order;

³³ Ibid., para. 22.

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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 the Republic of Croatia, to assume responsibility for:

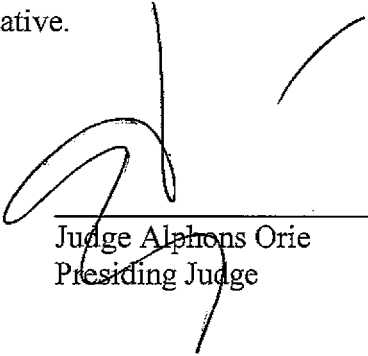
- 1) the personal security and safety of Mr Čermak while on provisional release;
- 2) ensuring compliance with the conditions imposed on Mr Čermak under the present decision;
- 3) all expenses concerning the transport of Mr Čermak from the airport in The Netherlands to his place of residence in Croatia, 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 the Republic 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 address detailed in Annex A 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 UNDU 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 UNDU in The Hague, should he attempt to escape.

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



Judge Alphonse Orié
Presiding Judge

Dated this 2nd day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]