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27 February 2009

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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:

27 February 2009

Original:

English

IN TRIAL CHAMBER I

Before:

Judge Alphons Orie, Presiding
Judge Uldis Kinis
Judge Elisabeth Gwaunza

Acting Registrar:

Mr John Hocking

Decision of:

27 February 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON MOTION FOR PROVISIONAL RELEASE OF IVAN ČERMAK

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Counsel for Ante Gotovina

Mr Luka S. Mišetić
Mr Gregory Kehoe
Mr Payam Akhavan

Counsel for Ivan Čermak

Mr Steven Kay QC
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 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 On 2 December 2008, the Chamber again granted a motion by the Čermak Defence for provisional release, this time for the period of the winter recess, finding once again that the requirement of Rule 65 (B) of the Rules had been met.⁴

2. On 16 February 2009, the Čermak Defence filed a motion for provisional release.⁵ The Čermak Defence requests that Mr Čermak be provisionally released from the day after the last day of the Prosecution case until ten days after the date of release, this being the period between the end of the Prosecution case and the commencement of oral submissions under Rule 98 *bis* of the Rules.⁶ On 18 February 2009, The Netherlands filed a letter pursuant to Rule 65 (B) of the Rules stating that it has no objection to the Motion being granted.⁷ On 23 February 2009, the Čermak Defence filed a letter from the Government of the Republic of Croatia dated 16 February 2009, providing guarantees in respect of the requested provisional release.⁸ On 26 February 2009, the Prosecution filed its response, objecting to the Motion.⁹

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 Decision on Motion for Provisional Release of Ivan Čermak, 2 December 2008 ("December 2008 Decision"), para. 13.

⁵ Ivan Čermak's Motion for Provisional Release Pursuant to Rules 54 and 65, 16 February 2009 ("Motion").

⁶ *Ibid.*, paras 1, 9.

⁷ Letter by the Ministry of Foreign Affairs, The Netherlands, 18 February 2009.

⁸ Ivan Čermak's Submission of the Guarantees of the Republic of Croatia for Provisional Release, 23 February 2009, ("Croatian Guarantee").

⁹ Prosecution's Response to Ivan Čermak's 13 February 2009 Motion for Provisional Release, 26 February 2009 ("Response").

After the Chamber informally granted a request for this purpose the Čermak Defence filed a reply to the response of the Prosecution.¹⁰

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 as providing them with a substantial number of documents.¹¹ 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 cooperative.¹² 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.¹³ 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 December 2008 Decision.¹⁴ The Čermak Defence finally submits that Mr Čermak requests provisional release in order to spend time at home with his wife and eleven year-old son.¹⁵

4. In its Response, the Prosecution submits that there has been a material change of circumstance since Mr Čermak was previously granted provisional release, as Mr Čermak is seeking to be released during a brief period of non-sitting preparation time in his trial rather than during a regularly scheduled court recess.¹⁶ The Prosecution argues that this is a period in which the work of the trial is expected to continue, albeit outside of the courtroom, in preparation for the continuation of in-court proceedings.¹⁷ On this basis, the Prosecution requests that the Chamber deny the Motion.¹⁸

5. In its Reply, the Čermak Defence contests the Prosecution's position that there is a material difference between a regularly scheduled court recess and the up-coming break in proceedings.¹⁹ In the view of the Čermak Defence, all "non-sitting periods" are by definition a court recess and that during all such breaks in proceedings, whether they be the summer and

¹⁰ Ivan Čermak's Reply to Prosecution's Response to Ivan Čermak's 13th February Motion for Provisional Release, 27 February 2009 ("Reply").

¹¹ Motion, para. 3.

¹² Ibid.

¹³ Ibid., para. 6.

¹⁴ Ibid., para. 4.

¹⁵ Ibid., para. 5.

¹⁶ Response, para. 1.

¹⁷ Ibid., paras 3, 6.

¹⁸ Ibid., para. 8.

¹⁹ Reply, paras 3-4.

winter recesses or another type of “non-sitting period”, are times when work on the trial is expected to continue outside of the courtroom.²⁰

III. APPLICABLE LAW

6. Rule 65 (B) sets out that a Chamber may grant provisional release for an Accused if it is satisfied that that the Accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. Rule 65 applies during pre-trial, as well as during the trial.²¹ The mentioned conditions are the minimum requirements necessary for granting provisional release. A Chamber has the discretion not to grant the provisional release of an accused even if it is satisfied that these conditions have been met.²²

IV. DISCUSSION

7. 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.²³ The Chamber also considers that Mr Čermak’s proper and cooperative behaviour in court is a relevant factor when considering his flight risk.²⁴

8. 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.²⁵ Moreover, during his last two periods of provisional release nothing has arisen that suggests that Mr Čermak would not have abided by all conditions set by the Chamber, including not to have any contact with victims or potential witnesses and not to discuss or speak about the case with anyone, other than his counsel.²⁶

9. In conclusion, the Chamber finds that the specific requirements set out in Rule 65 (B) for granting provisional release have been met.

²⁰ Ibid.

²¹ *Prosecutor v. Milutinović et al.*, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, Appeals Chamber, 14 December 2006, para. 10.

²² *Prosecutor v. Popović et al.*, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovčanin Provisional Release, Appeals Chamber, 1 March 2007, para. 5; *Prosecutor v. Milutinović et al.*, Decision on Milutinović Motion for Provisional Release, Trial Chamber, 22 May 2007, para. 6.

²³ March 2008 Decision, para. 8; July 2008 Decision, para. 19; December 2008 Decision, para. 11.

²⁴ July 2008 Decision, para. 19; December 2008 Decision, para. 11.

²⁵ March 2008 Decision, para. 9; July 2008 Decision, para. 20; December 2008 Decision, para. 12.

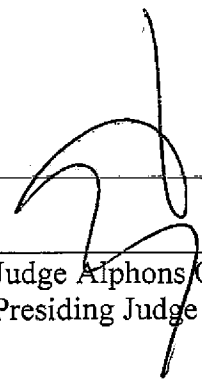
²⁶ July 2008 Decision, para. 25(d); December 2008 Decision, para. 16(d).

10. As mentioned, a Chamber nevertheless has the discretion to deny a request for provisional release in cases where it is satisfied that the two conditions of Rule 65 (B) have been met. The Čermak Defence has requested provisional release during a break in the proceedings between the end of the Prosecution case and Rule 98 *bis* submissions, rather than during one of the scheduled biannual court recesses. The period of time between the end of the Prosecution case and the commencement of oral submissions under Rule 98 *bis* of the Rules was established by the Chamber for the purposes of permitting the parties adequate time to prepare their submissions. The length of time of this preparatory stage of proceedings is relatively short compared to the usually scheduled court recesses. The short duration of the preparatory period constitutes both a relevant and material change in circumstance. Additionally, while the Chamber is mindful of the general benefits of provisional release and gives due weight to the fact that a period of provisional release will tend to boost an accused person's morale and physical and mental state, Mr Čermak was last on provisional release during the winter recess and returned to the United Nations Detention Unit relatively recently, on 8 January 2009. As the Čermak Defence has not submitted any humanitarian grounds of such an acute nature as to necessitate an immediate, if only temporary release, the Chamber, in the exercise of its discretionary powers, finds that provisional release would not be appropriate in this instance.

V. DISPOSITION

11. For the foregoing reasons, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-seventh day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]