

IT-06-90-T
D 7555 - D 7552
16 March 2008

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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: 14 March 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Ķiniš
Judge Elisabeth Gwaunza

Registrar: Mr Hans Holthuis

Decision of: 14 March 2008

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
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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

1. On 7 March 2008, the Čermak Defence filed a motion for provisional release.¹ The Defence requests that Mr Čermak be provisionally released from the day following the last day of trial in March 2008 until 5 April 2008.² The Čermak Defence attached to its Motion a letter by the Government of the Republic of Croatia, dated 28 February 2008, providing guarantees in respect of the requested provisional release.³ It also attached to its Motion a letter by Mr Čermak, stating that he would comply with any order of the Chamber.⁴

2. On 10 March 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) of the Tribunal's Rules of Procedure and Evidence ("Rules") stating that it has no objection to the Motion being granted.⁵ The Netherlands understood from the Motion that upon provisional release Mr Čermak would leave Dutch territory.⁶

3. On 13 March 2008, the Prosecution filed its response, requesting that the Trial Chamber deny the Motion.⁷ The Prosecution further requested that should the Motion be granted, the Chamber grant a stay of the decision to release Mr Čermak.⁸

4. Rule 65 sets out the basis upon which a Chamber may order the provisional release of an accused. Rule 65 applies during pre-trial, as well as during the trial.⁹ 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.

¹ Motion for Provisional Release from 15 March 2008 until 5 April 2008, 7 March 2008 ("Motion").

² Ibid., para. 3.

³ Ibid., Confidential Annex 1.

⁴ Ibid., Confidential Annex 2.

⁵ Letter by the Ministry of Foreign Affairs, the Netherlands, 10 March 2008.

⁶ Ibid.

⁷ Prosecution's Response to Čermak's Motion for Provisional Release from 15 March 2008 until 5 April 2008, 13 March 2008 ("Response").

⁸ Ibid., para. 29.

⁹ *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.

5. The conditions listed under Rule 65 (B) 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.¹⁰

6. The Čermak Defence submits that all requirements of Rule 65 (B) have been met.¹¹ It points out that Mr Čermak surrendered voluntarily to the Tribunal.¹² In addition, the Čermak Defence notes that with one exception, Mr Čermak complied with all conditions imposed by the Chamber on his pre-trial provisional release.¹³ In respect to the aforementioned exception, the Čermak Defence points out that the Chamber held that the breach “was not of a kind to jeopardise the core elements found in Rule 65”.¹⁴

7. The Prosecution does not contest the Defence’s submission that the requirements of Rule 65 (B) have been met.¹⁵ The Prosecution points out that Čermak has recently returned from a provisional release for the start of trial. It argues that a provisional release at this time would undermine the public confidence in the administration of justice by the Tribunal and contribute to the existing atmosphere of hostility towards Prosecution witnesses in Croatia.¹⁶

8. According to Rule 65 (B), a Chamber cannot grant provisional release unless it is satisfied that an accused, if released, would return for trial. 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. Moreover, the fact that an accused surrendered voluntarily to the Tribunal is an indication that he would not pose a flight risk. Mr Čermak voluntarily surrendered to the Tribunal in 2004. In its decision of 2 December 2004, the Appeals Chamber provisionally released Mr Čermak. Mr Čermak was on provisional release for more than three years and, with one exception noted by the Čermak Defence, his provisional release proceeded without violations of the conditions set.

9. Additionally, provisional release cannot be granted unless the Chamber is satisfied that an accused, if released, would not pose a danger to victims, witnesses or other persons.

¹⁰ *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.

¹¹ Motion, paras 7-10.

¹² *Ibid.*, para. 9.

¹³ *Ibid.*, para. 10.

¹⁴ *Ibid.*, para. 10.

¹⁵ Response, para. 3.

¹⁶ *Ibid.*, paras 2, 11-25.

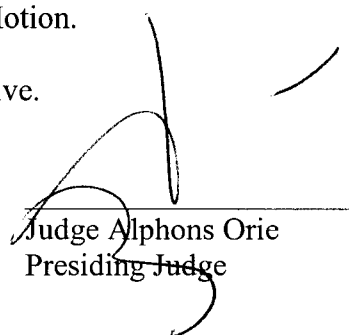
This assessment cannot be made in abstract; rather a concrete danger needs to be identified.¹⁷ The Chamber has received no indication that Mr Čermak, if released, would pose a danger to witnesses, victims, or other person.

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

11. 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 trial commenced on 11 March 2008. This constitutes both a relevant and material change in circumstances. The Čermak Defence has requested provisional release for a short period of time, during a break in the proceedings. It has not submitted any humanitarian grounds of such an acute nature that would call for an immediate, if only temporary, release. In this respect, it is also important to consider that Mr Čermak has been on provisional release for most of the pre-trial phase and that he returned to the United Nations Detention Unit recently, on 5 March 2008. The Čermak Defence argues that the provisional release would be for the purpose of facilitating the communication between Mr Čermak and his defence team which, at the time of the requested release, will be in Croatia to prepare for the trial. Although the Chamber is mindful of the importance of access to one's client, the mere fact that communication between Counsel and the Accused would be facilitated if they both were in Croatia at the same time, is not a sufficient reason for provisional release. The Chamber, in the exercise of its discretionary powers, finds that provisional release would not be appropriate in this instance.

12. 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 14th day of March 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

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