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14 January 2010

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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 January 2010
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Order of: 14 January 2010

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

ORDER ISSUING A PUBLIC REDACTED VERSION OF THE
CONFIDENTIAL "DECISION ON MOTION FOR PROVISIONAL
RELEASE OF IVAN ČERMAK" OF 14 DECEMBER 2009

Office of the Prosecutor

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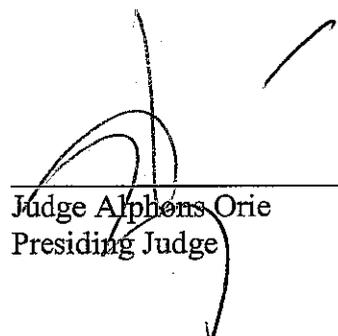
TRIAL CHAMBER I of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991;

NOTING the Decision on Motion for Provisional Release of Ivan Čermak (“Decision”), issued confidentially on 14 December 2009;

CONSIDERING that some of the information contained in the Decision is to remain confidential;

HEREBY ISSUES a public redacted version of the Decision.

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



Judge Alphons Orie
Presiding Judge

Dated this 14th day of January 2010
At The Hague
The Netherlands

[Seal of the Tribunal]



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DECISION ON MOTION FOR PROVISIONAL RELEASE OF IVAN ČERMAK

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I. PROCEDURAL BACKGROUND

1. Mr Čermak was first 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 requirements of 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 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.³ In its decision, the Chamber held that the specific requirements set out in Rule 65 (B) of the Rules 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.⁴ 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.⁵ On 27 February 2009, the Chamber denied a motion by the Čermak Defence for provisional release, finding that although the requirements of Rule 65 (B) of the Rules had been met, the short duration of the requested provisional release constituted a relevant and material change in circumstances, which justified the Chamber’s exercise of its discretion to deny the request.⁶ On 3 April 2009, the Chamber issued its decision pursuant to Rule 98 *bis* of the Rules, holding that all three accused had a case to answer on the counts of the indictment.⁷ On 14 July 2009, the Chamber denied a motion by the Čermak Defence for provisional release, holding that although the requirements of Rule 65 (B) of the Rules for granting provisional release had been met, compelling humanitarian grounds which must be shown in the post-Rule 98 *bis* stage of the proceedings to tip the balance in favour of provisional release, had not been demonstrated.⁸ The Čermak Defence appealed the July 2009 Decision, with the Appeals Chamber holding that the Trial Chamber had committed a discernable error in

¹ Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, 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”), para. 25.

⁴ July 2008 Decision, paras 17-21.

⁵ Decision on Motion for Provisional Release of Ivan Čermak, 2 December 2008 (“December 2008 Decision”), para. 13.

⁶ Decision on Motion for Provisional Release of Ivan Čermak, 27 February 2009 (“February 2009 Decision”), paras 7-11.

⁷ T. 17595-17623 (“Rule 98 *bis* Decision”).

⁸ Decision on Motion for Provisional Release of Ivan Čermak’s, 14 July 2009 (“July 2009 Decision”), para. 11.

finding that [REDACTED].⁹ The appeal was granted in part and the Trial Chamber's decision was reversed.¹⁰

2. On 12 November 2009, the Čermak Defence filed a motion for provisional release.¹¹ The Čermak Defence requested that the Accused be provisionally released on a day after 18 December 2009, for a period that the Chamber deems appropriate and proportionate.¹² On 18 November 2009, the Tribunal's host state filed a letter pursuant to Rule 65 (B) of the Rules stating that it had no objection to the Motion being granted.¹³ On 4 December 2009, the Čermak Defence filed a letter from the Government of the Republic of Croatia ("Croatia") dated 17 November 2009, providing guarantees in respect of the requested provisional release.¹⁴ On 26 November 2009, the Prosecution filed its response, noting that while it previously asserted that circumstances argued by the Čermak Defence would not amount to sufficiently compelling humanitarian grounds, the Appeals Chamber had ruled otherwise in favour of provisional release.¹⁵

II. SUBMISSIONS

3. The provisional release is requested to take place during a scheduled court recess, and is requested for a period which the Chamber deems appropriate and proportionate in the circumstances.¹⁶ The Čermak Defence notes that Mr Čermak surrendered to the Tribunal voluntarily, co-operated with the Prosecution prior to trial, and that his conduct during trial has been proper and co-operative.¹⁷ In addition, Mr Čermak agrees to be bound by the same conditions as those ordered by the Appeals Chamber in the Appeals Decision, as well as any other measures the Chamber deems appropriate.¹⁸ It is submitted by the Čermak Defence that a relevant factor in determining whether provisional release would be appropriate is [REDACTED].¹⁹ The Čermak Defence further submits that the [REDACTED] presents a sufficiently compelling humanitarian ground, as determined by the Appeals Chamber in

⁹ Decision on Ivan Čermak's Appeal Against Decision on his Motion for Provisional Release, 3 August 2009 ("Appeals Decision"), para. 18.

¹⁰ Appeals Decision, para. 20.

¹¹ Ivan Čermak's Motion for Provisional Release Pursuant to Rules 54 and 65, 12 November 2009 ("Motion").

¹² Motion, para. 20(i).

¹³ Letter by the Ministry of Foreign Affairs, The Netherlands, 18 November 2009.

¹⁴ Ivan Čermak's Submission of the Guarantees of the Republic of Croatia for Provisional Release, 4 December 2009 ("Croatian Guarantees").

¹⁵ Prosecution's Response to Čermak's Request for Provisional Release During the Winter Recess, 26 November 2009 ("Response").

¹⁶ Motion, para. 2.

¹⁷ Motion, para. 6.

¹⁸ Motion, para. 7.

August 2009, to tip the balance in favour of release.²⁰ In this regard, the Čermak Defence suggests that [REDACTED].²¹ The Čermak Defence finally submits that Mr Čermak has never posed a danger to victims, witnesses or other persons, and notes that because the trial is now in the defence phase, any remote risk to prosecution witnesses has ceased to exist.²² The Čermak Defence and Mr Čermak also offer to take all reasonable steps to eliminate media coverage of Mr Čermak's departure from and return to the UNDU.²³

4. In its Response, the Prosecution noted its continuing position that circumstances similar to those that Mr Čermak currently argues do not amount to sufficiently compelling humanitarian grounds warranting his release during a period of court recess at the post-Rule 98 *bis* stage of the proceedings.²⁴ However, the Prosecution notes that the Appeals Chamber ruled in connection with the previous request that the circumstances described did amount to sufficiently compelling humanitarian grounds warranting provisional release during a period of court recess.²⁵

III. APPLICABLE LAW

5. Rule 65 (B) of the Rules sets out that a Chamber may grant provisional release for an Accused 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. Rule 65 of the Rules applies during pre-trial, as well as during the trial.²⁶ 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.²⁷

6. 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 exist to offset the risk of flight, a Chamber should not exercise its discretion in favour of a grant of provisional release unless compelling humanitarian grounds are present which tip the

¹⁹ Motion, paras 8-9.

²⁰ Motion, paras 10-11.

²¹ Motion, paras 12-15.

²² Motion, para. 17.

²³ Motion, para. 18.

²⁴ Response, para. 1.

²⁵ *Ibid.*

²⁶ *Prosecutor v. Milutinović et al.*, Case no. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para. 10.

²⁷ *Prosecutor v. Popović et al.*, Case no. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, para. 5; *Prosecutor v. Milutinović et al.*, Case no. IT-05-87-T, Decision on Milutinović Motion for Provisional Release, 22 May 2007, para. 6.

balance in favour of allowing provisional release.²⁸ The existence of compelling humanitarian reasons will only become relevant if the accused has met the aforementioned prerequisite requirements of Rule 65 (B) of the Rules, which must be satisfied for the Chamber to have the discretion to consider granting provisional release.²⁹ Further, the duration of post-Rule 98 *bis* provisional release must be proportionate to the circumstances of the request for provisional release.³⁰

IV. DISCUSSION

7. In its July 2009 Decision, the Chamber found that Mr Čermak did not pose a risk of flight if provisionally released, and since that point there have been no developments which would impact negatively on this assessment.³¹ On the basis of the renewed Croatian Guarantees, the Chamber is satisfied that Croatia would be willing and able to secure Mr Čermak's attendance before the Tribunal and the compliance with any conditions that may be imposed by the Chamber.³² In addition, the fact that Mr Čermak surrendered voluntarily to the Tribunal indicates that he would not pose a flight risk.³³ Mr Čermak's proper and co-operative behaviour in court further indicates that he would not pose a flight risk.³⁴ For these reasons, having considered that the proceedings are in the post-Rule 98 *bis* stage, the Chamber remains satisfied that Mr Čermak would return for trial, if provisionally released.

8. As was the case in previous decisions on provisional release for Mr Čermak, the Chamber has received no indication that if released, Mr Čermak would pose a danger to

²⁸ *Prosecutor v. Prlić et al.*, Case no. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008 ("Prlić 11 March 2008 Decision"), para. 21; *Prosecutor v. Prlić et al.*, Case no. IT-04-74-AR65.7, 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 ("Prlić 21 April 2008 Decision"), paras 15, 17; *Prosecutor v. Prlić et al.*, Case no. IT-04-74-AR65.8, Decision on "Prosecution's Appeal from Décision relative à la demande de mise en liberté provisoire de l'accusé Prlić dated 7 April 2008", 25 April 2008 ("Prlić 25 April 2008 Decision"), para. 14; *Prosecutor v. Prlić et al.*, Case no. IT-04-74-AR65.9, 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 ("Prlić 29 April 2008 Decision"), paras 13-15; *Prosecutor v. Popović et al.*, Case nos IT-05-88-AR65.4, IT-05-88-AR65.5, IT-05-88-AR65.6, 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 ("Popović 15 May 2008 Decision"), paras 23-24.

²⁹ *Prlić 21 April 2008 Decision*, para. 17.

³⁰ *Ibid.*; *Prlić 25 April 2008 Decision*, para. 18; *Prlić 29 April 2008 Decision*, para. 20; *Popović 15 May 2008 Decision*, para. 32.

³¹ July 2009 Decision, para. 9.

³² Croatian Guarantees.

³³ See March 2008 Decision, para. 8; July 2008 Decision, para. 19; December 2008 Decision, para. 11; February 2009 Decision, para. 7; July 2009 Decision, para. 9.

³⁴ See July 2008 Decision, para. 19; December 2008 Decision, para. 11; February 2009 Decision, para. 7; July 2009 Decision, para. 9.

witnesses, victims, or other persons.³⁵ Moreover, nothing arose during his four prior periods of provisional release that suggests that Mr Čermak did not abide by all conditions set by the Chamber.³⁶ In conclusion, the Chamber finds that the requirements set out in Rule 65 (B) of the Rules for granting provisional release have been met.

9. In previous decisions, the Chamber has considered [REDACTED] a relevant factor in favour of provisional release.³⁷ However, as the proceedings are now in the post-Rule 98 *bis* stage, the Čermak Defence must demonstrate compelling humanitarian grounds which tip the balance in favour of provisional release.³⁸ The Čermak Defence [REDACTED].³⁹ The requested provisional release would [REDACTED], and would thus be limited to a short period of time.

10. [REDACTED].⁴⁰ Moreover, [REDACTED]. [REDACTED]. For these reasons, the Chamber is satisfied that [REDACTED] presents a sufficiently compelling humanitarian ground to tip the balance in favour of provisional release.

V. DISPOSITION

11. 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 **18 December 2009**, 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 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 B of the Motion;
- (c) On his return, Mr Čermak shall be accompanied by the same designated official of Croatia, who shall deliver him into the custody of the Dutch authorities at the

³⁵ See March 2008 Decision, para. 9; July 2008 Decision, para. 20; December 2008 Decision, para. 12; February 2009 Decision, para. 8; July 2009 Decision, para. 10.

³⁶ See February 2009 Decision, para. 8; July 2009 Decision, para. 10.

³⁷ July 2008 Decision, para. 22; December 2008 Decision, para. 14.

³⁸ *Prlić* 11 March 2008 Decision, para. 21; *Prlić* 21 April 2008 Decision, paras 15, 17; *Prlić* 25 April 2008 Decision, para. 14; *Prlić* 29 April 2008 Decision, paras 13-15; *Popović* 15 May 2008 Decision, paras 23-24.

³⁹ Motion, Confidential and Ex-Parte Annex A.

⁴⁰ Motion, Confidential and Ex-Parte Annex A, Report of 28 October 2009.

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 Croatia;
- 2) remain within the confines of his private residence in Croatia, at the address listed in Annex B 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 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 **7 January 2010**, 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 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 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 subparagraphs (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 B of the Motion, and maintaining a log of such reports;
- 7) submitting a written report every week to the 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.

12. The Chamber further **INSTRUCTS** the Registrar of the Tribunal to consult with the Ministry of Justice of 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 has been notified of the name of the designated official of Croatia into whose custody Mr Čermak is to be provisionally released.

13. Finally, the Chamber **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 Alphons Orié
Presiding Judge

Dated this 14th day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]