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27 August 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 August 2009  
Original: English

IN TRIAL CHAMBER I

**Before:** Judge Alphons Orie, Presiding  
Judge Uldis Ķiniš  
Judge Elisabeth Gwaunza  
**Registrar:** Mr John Hocking  
**Order of:** 27 August 2009

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  
JULY 2009

Office of the Prosecutor

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Mr Payam Akhavan

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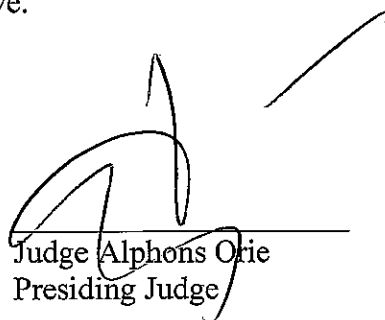
**TRIAL CHAMBER I** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991;

**NOTING** the Decision on Motion for Provisional Release of Ivan Čermak ("Decision"), issued confidentially on 14 July 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 Twenty-seventh day of August 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**



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PROSECUTOR

v.

ANTE GOTOVINA  
IVAN ČERMAK  
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*PUBLIC REDACTED VERSION*

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.<sup>1</sup> 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.<sup>2</sup> On 18 July 2008, the Chamber granted a further motion by the Čermak Defence for provisional release during the summer recess.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

2. On 8 June 2009, the Čermak Defence filed a motion for provisional release.<sup>8</sup> The Čermak Defence requested that Mr Čermak be provisionally released from 25 July 2009, for a period that the Chamber deemed appropriate and proportionate.<sup>9</sup> On 10 June 2009, the Netherlands filed a letter pursuant to Rule 65 (B) of the Rules stating that it had no objection to the Motion being granted.<sup>10</sup> On 23 June 2009, the Čermak Defence filed a letter from the Government of the Republic of Croatia dated 10 June 2009, providing guarantees in respect of the requested provisional

<sup>1</sup> 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.

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

<sup>3</sup> Decision on Ivan Čermak’s Motion for Provisional Release, 18 July 2008 (“July 2008 Decision”), para. 25.

<sup>4</sup> July 2008 Decision, paras 17-21.

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

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

<sup>7</sup> T. 17595-17623 (“Rule 98 *bis* Decision”).

<sup>8</sup> Ivan Čermak’s Motion for Provisional Release Pursuant to Rules 54 and 65, 8 June 2009 (“Motion”).

<sup>9</sup> Motion, paras 2, 23-24.

<sup>10</sup> Letter by the Ministry of Foreign Affairs, The Netherlands, 10 June 2009.

release.<sup>11</sup> On 23 June 2009, the Prosecution filed its response, objecting to the Motion.<sup>12</sup> On 29 June 2009, after the Chamber informally granted a request for leave to reply, the Čermak Defence filed a reply to the Prosecution's response.<sup>13</sup>

## II. SUBMISSIONS

3. The Čermak Defence submits that there have been relevant and material changes of circumstance since the February 2009 Decision.<sup>14</sup> In contrast to the previous circumstances, the presently requested provisional release is during a scheduled court recess, and is of a longer duration than was previously requested.<sup>15</sup> Additionally, the Čermak Defence submits that both the Chamber's Rule 98 *bis* Decision and [REDACTED] amount to a relevant and material change in circumstance.<sup>16</sup> The Čermak Defence further notes that Mr Čermak surrendered to the Tribunal voluntarily, he co-operated with the Prosecution prior to trial, and his conduct during trial has been proper and co-operative.<sup>17</sup> In addition, Mr Čermak agrees to be bound by the same conditions as those ordered by the Chamber in its December 2008 Decision, as well as any other measures the Chamber deems appropriate.<sup>18</sup> The Čermak Defence further submits that the Rule 98 *bis* Decision has neither increased nor decreased the risk of flight of Mr Čermak.<sup>19</sup> Moreover, even if the Chamber were to find an increased risk of flight, the Čermak Defence submits that [REDACTED] presents a sufficiently compelling humanitarian ground to tip the balance in favour of release.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

4. In its Response, the Prosecution agrees that the Chamber's Rule 98 *bis* Decision presents a material change of circumstance since the February 2009 Decision.<sup>23</sup> The Prosecution submits that

<sup>11</sup> Ivan Čermak's Submission of the Guarantees of the Republic of Croatia for Provisional Release, 23 June 2009 ("Croatian Guarantee").

<sup>12</sup> Prosecution Response to Ivan Čermak's Sixth Motion for Provisional Release, 23 June 2009 ("Response").

<sup>13</sup> Defence for Ivan Čermak's Reply to Prosecution's Response to Ivan Čermak's Motion for Provisional Release Pursuant to Rules 54 and 65, 29 June 2009 ("Reply").

<sup>14</sup> Motion, para. 8.

<sup>15</sup> Motion, paras 9-10.

<sup>16</sup> Motion, paras 11-12.

<sup>17</sup> Motion, para. 13.

<sup>18</sup> Motion, para. 14.

<sup>19</sup> Motion, paras 15-16.

<sup>20</sup> Motion, paras 16-19.

<sup>21</sup> Motion, para. 20.

<sup>22</sup> Motion, para. 21.

<sup>23</sup> Response, para. 1.



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.<sup>33</sup> Further, the duration of post-Rule 98 *bis* provisional release must be proportionate to the circumstances of the request for provisional release.<sup>34</sup>

8. 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.<sup>35</sup>

#### IV. DISCUSSION

9. The Chamber considers that its Rule 98 *bis* Decision constitutes a change in circumstances that materially affects the approach taken in its February 2009 Decision, and warrants a renewed consideration of the risk of flight.<sup>36</sup> On the basis of the Croatian Guarantee, the Chamber is satisfied that the Government of the Republic of 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. In addition, the fact that Mr Čermak surrendered voluntarily to the Tribunal indicates that he would not pose a flight risk.<sup>37</sup> Mr Čermak's proper and co-operative behaviour in court further indicates that he would not pose a flight risk.<sup>38</sup> For these reasons, having considered that the proceedings are in the post-Rule 98 *bis* stage, the Chamber is satisfied that Mr Čermak would return for trial, if provisionally released.

10. 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 witnesses, victims, or other persons.<sup>39</sup> Moreover, nothing arose during his two prior periods of provisional release that suggests that Mr Čermak did not abide by all conditions set by the Chamber.<sup>40</sup> In conclusion, the

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l'accusé Stojić dated 8 April 2008", 29 April 2008 ("Prlić 29 April 2008 Decision"), paras 13-15; *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 ("Popović 15 May 2008 Decision"), paras 23-24.

<sup>33</sup> Prlić 21 April 2008 Decision, para. 17.

<sup>34</sup> Ibid.; Prlić 25 April 2008 Decision, para. 18; Prlić 29 April 2008 Decision, para. 20; Popović 15 May 2008 Decision, para. 32.

<sup>35</sup> Popović 1 March 2007 Decision, para. 12.

<sup>36</sup> See Prlić 11 March 2008 Decision, para. 20; Prlić 25 April 2008 Decision, para. 14; Prlić 29 April 2008 Decision, paras 13-15; Popović 15 May 2008 Decision, para. 30.

<sup>37</sup> See March 2008 Decision, para. 8; July 2008 Decision, para. 19; December 2008 Decision, para. 11; February 2009 Decision, para. 7.

<sup>38</sup> See July 2008 Decision, para. 19; December 2008 Decision, para. 11; February 2009 Decision, para. 7.

<sup>39</sup> See March 2008 Decision, para. 9; July 2008 Decision, para. 20; December 2008 Decision, para. 12; February 2009 Decision, para. 8.

<sup>40</sup> See February 2009 Decision, para. 8.

Chamber finds that the requirements set out in Rule 65 (B) of the Rules for granting provisional release have been met.

11. In previous decisions, the Chamber has considered [REDACTED] a relevant factor in favour of provisional release.<sup>41</sup> 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 release. The Čermak Defence has submitted [REDACTED]. The requested provisional release would aim to [REDACTED]. For these reasons, the Chamber is not satisfied that [REDACTED] presents a sufficiently compelling humanitarian ground to tip the balance in favour of provisional release.

## V. DISPOSITION

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

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

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

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Judge Alphons Orie  
Presiding Judge

[Seal of the Tribunal]

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<sup>41</sup> July 2008 Decision, para. 22; December 2008 Decision, para. 14.  
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