



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-04-74-T  
Date: 9 April 2009  
Original: ENGLISH  
French

**IN TRIAL CHAMBER III**

**Before:** Judge Jean-Claude Antonetti, Presiding  
Judge Árpád Prandler  
Judge Stefan Trechsel  
Reserve Judge Antoine Kesia-Mbe Mindua

**Acting Registrar:** Mr John Hocking

**Decision of:** 9 April 2009

**THE PROSECUTOR**

v.

**Jadranko PRLIĆ  
Bruno STOJIĆ  
Slobodan PRALJAK  
Milivoj PETKOVIĆ  
Valentin ĆORIĆ  
Berislav PUŠIĆ**

***PUBLIC***

**DECISION ON THE ACCUSED PRLIĆ'S MOTION  
FOR PROVISIONAL RELEASE**

**The Office of the Prosecutor:**

Mr Kenneth Scott  
Mr Douglas Stringer

**Counsel for the Accused:**

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić  
Ms Senka Nožica and Mr Karim A. A. Khan for Bruno Stojić  
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak  
Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković  
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić  
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

## I. INTRODUCTION

1. Trial Chamber III (“Chamber”) 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 (“Tribunal”) was initially seized of a motion for the provisional release of the Accused Jadranko Prlić (“Accused Prlić”) filed confidentially by Counsel for the Accused Prlić (“Prlić Defence”) together with a confidential annex on 2 March 2009, and was then seized of a fresh motion for provisional release filed publicly together with three annexes on 17 March 2009 in place of the motion of 2 March 2009.

## II. PROCEDURAL BACKGROUND

2. On 2 March 2009, the Prlić Defence publicly filed “Jadranko Prlić’s Request for Extension of Word Limit for his Motion for Provisional Release & Jadranko Prlić’s Motion for Provisional Release” (“Request of 2 March 2009”) together with a confidential annex, requesting the Chamber to grant the Prlić Defence leave to submit a motion exceeding the authorised word count and seeking the Accused Prlić’s provisional release to the Republic of Croatia for an indeterminate period running until the conclusion of the trial.<sup>1</sup>

3. On 5 March 2009, the Ministry of Foreign Affairs of the Kingdom of the Netherlands sent a letter to the Tribunal stating that it did not object to the Accused Prlić’s provisional release.<sup>2</sup>

4. At the hearing on 9 March 2009, the Prosecution informed the Chamber that it did not intend to file a response to the Request of 2 March 2009.<sup>3</sup>

5. On 9 March 2009, the Chamber rendered an oral decision dismissing the Request of 2 March 2009 with respect to the Prlić Defence’s request to exceed the word limit, decided not to examine the central issue raised in the Request of 2 March

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<sup>1</sup> Request of 2 March 2009, pp. 1 and 21.

<sup>2</sup> Letter from the Kingdom of the Netherlands regarding the provisional release of Jadranko Prlić, 5 March 2009.

<sup>3</sup> Transcript in French (“T(F)”), 9 March 2009, p. 37888.

2009, i.e. the motion for the Accused Prlić's provisional release, and instructed the Prlić Defence to make a fresh filing complying with the authorised word limit.<sup>4</sup>

6. On 13 March 2009, the Prlić Defence filed "Jadranko Prlić's Expedited Request for Reconsideration of Leave to Exceed Word Limit for Jadranko Prlić's Motion for Provisional Release" ("Request for Reconsideration").

7. On 16 March 2009, the Prosecution informed the Chamber by email that it would not be responding to the Request for Reconsideration.

8. On 16 March 2009, the Chamber rendered an oral decision dismissing the Request for Reconsideration and again instructing the Prlić Defence to file a fresh motion for the Accused Jadranko Prlić's provisional release that did not exceed the 3,000-word authorised limit.<sup>5</sup>

9. On 17 March 2009, the Prlić Defence publicly filed "Jadranko Prlić's Motion for Provisional Release" ("Motion of 17 March 2009") together with three annexes, seeking the Accused Prlić's provisional release to the Republic of Croatia for the remainder of the trial, covering an indeterminate period of approximately twenty-one months, and more specifically until the delivery of the judgement.<sup>6</sup>

10. On 18 March 2009, following further consultation by the Prlić Defence after the Motion of 17 March 2009 had been filed, the Ministry of Foreign Affairs of the Kingdom of the Netherlands sent the Tribunal a further letter reiterating that it did not object to the Accused Prlić's provisional release.<sup>7</sup>

11. On 27 March 2009, the Office of the Prosecutor ("Prosecution") publicly filed its "Prosecution Response to Jadranko Prlić's Motion for Provisional Release" ("Response") in which it opposed the Accused Prlić's being provisionally released until the end of the trial.<sup>8</sup>

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<sup>4</sup> T(F), 9 March 2009, pp. 37802-37803.

<sup>5</sup> T(F), 16 March 2009, p. 37987.

<sup>6</sup> Motion of 17 March 2009, pp. 1 and 9.

<sup>7</sup> Letter from the Kingdom of the Netherlands regarding the provisional release of Jadranko Prlić, 18 March 2009.

<sup>8</sup> Prosecution Response, paras. 2 and 13.

12. On 30 March 2009, the Prlić Defence filed “Jadranko Prlić’s Expedited Request for Leave to Reply to the Prosecution Response to Jadranko Prlić’s Motion for Provisional Release” (“Request to Reply”).

13. On 2 April 2009, the Chamber rendered an oral decision dismissing the Prlić Defence’s Request to Reply.<sup>9</sup>

14. The Chamber notes that the other defence teams did not file any responses to the Motion of 17 March 2009.

### III. APPLICABLE LAW

15. Pursuant to Rule 65(A) of the Rules of Procedure and Evidence (“Rules”), once detained, an accused may not be released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Chamber may order release 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.

16. In line with the Tribunal’s established jurisprudence, the decision to grant or deny provisional release under Rule 65 of the Rules is at the discretion of the Chamber.<sup>10</sup> In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.<sup>11</sup> The Chamber must then provide a reasoned opinion indicating its view on

<sup>9</sup> T(F), 2 April 2009, pp. 38796-38797.

<sup>10</sup> *Prosecutor v. Jovica Stanisic and Franko Simatovic*, case no. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008 (“*Jovica Stanisic* Decision of 26 June 2008”), para. 3; *Prosecutor v. Milutinovic 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. 3; *Prosecutor v. Popovic et al.*, case no. IT-65-88-AR65.2, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovcanin Provisional Release, 30 June 2006, para. 5; *Prosecutor v. Prlic 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 (“*Petkovic* Decision of 21 April 2008”), para. 5; *Prosecutor v. Prlic et al.*, case no. IT-04-74-AR65.8, *Décision relative à l’appel interjeté par l’Accusation contre la décision relative à la demande de mise en liberté provisoire de l’Accusé Prlic* rendue le 7 avril 2008, 25 April 2008 (“*Prlic* Decision of 25 April 2008”), para. 7.

<sup>11</sup> *Prosecutor v. Mico Stanisic*, case no. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mico Stanisic’s Provisional Release, 17 October 2005 (“*Mico Stanisic* Decision of 17 October 2005”), para. 8; *Jovica Stanisic* Decision of 26 June 2008, para. 35; *Petkovic* Decision of 21 April 2008, para. 8; *Prlic* Decision of 25 April 2008, para. 10.

those relevant factors.<sup>12</sup> What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.<sup>13</sup> This is because decisions on motions for provisional release are fact-intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.<sup>14</sup> The Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the International Tribunal.<sup>15</sup>

17. According to the Appeals Chamber's recent jurisprudence, the close of the Prosecution case constitutes a significant change in circumstances necessitating a renewed and detailed consideration of the flight risk posed by an accused.<sup>16</sup> In such circumstances, and even where a Trial Chamber is satisfied that sufficient guarantees have been offered, it should use its discretion to grant provisional release only where sufficiently compelling humanitarian grounds tip the balance in favour of so doing.<sup>17</sup> Accordingly, provisional release may only be granted "at a late stage of the proceedings, and in particular after the close of the Prosecution case, when sufficiently compelling humanitarian reasons exist to justify the release and, even when provisional release is found to be justified in light of the nature of the circumstances, the length of the release should nonetheless be proportional to these circumstances."<sup>18</sup>

18. This said, according to the Appeal Chamber's jurisprudence, the Chamber is best positioned to assess whether circumstances at trial, such as the closure of the

<sup>12</sup> *Jovica Stanisic* Decision of 26 June 2008, para. 35; *Petkovic* Decision of 21 April 2008, para. 8; *Prlic* Decision of 25 April 2008, para. 10; *Mico Stanisic* Decision of 17 October 2005, para. 8.

<sup>13</sup> *Jovica Stanisic* Decision of 26 June 2008, para. 35; *Petkovic* Decision of 21 April 2008, para. 8; *Prlic* Decision of 25 April 2008, para. 10.

<sup>14</sup> *Prosecutor v. Boškoski and Tarkulovski*, case no. IT-04-82-AR65.1, Decision on Johan Tarkulovski's Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7; *Jovica Stanisic* Decision of 26 June 2008, para. 35; *Petkovic* Decision of 21 April 2008, para. 8; *Prlic* Decision of 25 April 2008, para. 10; *Mico Stanisic* Decision of 17 October 2005, para. 8.

<sup>15</sup> *Jovica Stanisic* Decision of 26 June 2008, para. 35; *Petkovic* Decision of 21 April 2008, para. 8; *Prlic* Decision of 25 April 2008, para. 10; *Mico Stanisic* Decision of 17 October 2005, para. 8.

<sup>16</sup> *Prosecutor v. Prlic et al.*, case no. IT-04-74-AR65.5, *Décision relative à l'appel unique interjeté par l'Accusation contre les décisions ordonnant la mise en liberté provisoire des Accusés Prlic, Stojic, Praljak, Petkovic et Coric*, 11 March 2008 ("*Prlic* Decision of 11 March 2008"), para. 20.

<sup>17</sup> *Décision faisant suite à l'appel interjeté par Slobodan Praljak contre la décision rendue le 2 décembre 2008 par la Chambre de première instance concernant la mise en liberté provisoire* ("*Prlic* Decision of 16 December 2008"); *Prlic* Decision of 11 March 2008, para. 21; *Prlic* Decision of 25 April 2008, para. 16; *Petkovic* Decision of 21 April 2008, para. 17.

<sup>18</sup> *Petkovic* Decision of 21 April 2008, para. 17; *Prlic* Decision of 25 April 2008, para. 16.

Prosecution case, have increased the flight risk of an accused during provisional release.<sup>19</sup>

#### IV. SUBMISSIONS OF THE PARTIES

19. In support of the Motion of 17 March 2009, the Prlić Defence contends that concern for the respect of the Accused Prlić's fundamental rights argues in favour of the Accused's provisional release.<sup>20</sup> More specifically, the Prlić Defence alleges that holding the Accused Prlić in detention, where factors exist in favour of the Accused's provisional release, violates the Accused Prlić's right to be presumed innocent and receive a fair trial.<sup>21</sup> In addition, the Prlić Defence argues that holding the Accused Prlić in detention for a lengthy period also violates the Accused's fundamental rights and runs counter to international human rights standards.<sup>22</sup>

20. Furthermore, the Prlić Defence argues that Rule 65 of the Rules places no temporal limitations on motions for provisional release and that, as a consequence, the provisional release of an accused is conceivable during trial proceedings, as well as during judicial recess periods.<sup>23</sup> The Prlić Defence relies upon a 1999 report by the Expert Group to Conduct a Review of the Effective Operation and Functioning of the Tribunal, which recommends that accused persons be granted provisional release during trial, and upon the Tribunal's jurisprudence which has *inter alia* granted some accused persons periods of provisional release during the pre-trial phase.<sup>24</sup> The Prlić Defence goes on to add that were the Chamber to grant the Motion of 17 March 2009 the Accused's provisional release would not disrupt the trial proceedings and, in this regard, also underscores that the Accused Prlić has expressly and in writing waived his right to be present at trial.<sup>25</sup> Relying mainly upon the Statute of the Special Tribunal for the Lebanon, the Prlić Defence further argues that a trial *in absentia* may be held where an accused has expressly agreed that the trial may be held in his

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<sup>19</sup> *Milutinović* Decision of 17 October 2005, para. 15.

<sup>20</sup> Motion of 17 March 2009, para. 1.

<sup>21</sup> Motion of 17 March 2009, paras. 1 and 2.

<sup>22</sup> Motion of 17 March 2009, paras. 3-5.

<sup>23</sup> Motion of 17 March 2009, paras. 6-7.

<sup>24</sup> Motion of 17 March 2009, paras. 7 and 9.

<sup>25</sup> Motion of 17 March 2009, paras. 8 and 12.

absence and where the accused has been given prior notice of the proceedings against him by the Tribunal.<sup>26</sup>

21. The Prlić Defence also submits that provisionally releasing the Accused Prlić would optimise his involvement in the preparation of his case by, amongst other things, enabling him to both follow the trial and conduct research for his defence team on the Internet.<sup>27</sup> The Prlić Defence thus asserts that provisionally releasing the Accused Prlić would increase the Accused's engagement and involvement in the preparation of his case whilst affording the United Nations the opportunity to reduce the costs incurred in trying him and, in particular, in keeping accused in detention during trial.<sup>28</sup>

22. In closing, the Prlić Defence challenges the legal foundation of the "sufficiently compelling humanitarian reasons" requirement – as a precondition for granting an accused provisional release – set by the Appeals Chamber in its decision of 21 April 2008, and also argues that there is no legal basis for the requirement in customary international law.<sup>29</sup> The Prlić Defence likewise alleges that Rule 65(B) of the Rules does not require parties to demonstrate that there are sufficiently compelling humanitarian reasons to justify the provisional release of an accused.<sup>30</sup>

23. In its Response, the Prosecution opposes the Accused Prlić's provisional release on the ground, firstly, that the Prlić Defence has not shown that the Accused Prlić does not present a flight risk and, secondly, that the Prlić Defence has not identified any sufficiently compelling humanitarian reasons to justify the Accused's provisional release for the remainder of the trial.<sup>31</sup>

24. The Prosecution claims that the Prlić Defence has not shown that the Accused Prlić does not present any flight risk.<sup>32</sup> More specifically, the Prosecution asserts that the Prlić Defence's does not allude to the advanced stage of the proceedings and the Accused Prlić's conduct during prior periods of provisional release, especially when the Accused breached some of the conditions attached to the provisional release

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<sup>26</sup> Motion of 17 March 2009, paras. 10-12.

<sup>27</sup> Motion of 17 March 2009, para. 13.

<sup>28</sup> Motion of 17 March 2009, para. 13.

<sup>29</sup> Motion of 17 March 2009, paras. 14-21.

<sup>30</sup> Motion of 17 March 2009, paras. 16-18.

<sup>31</sup> Response, paras. 1-2.

<sup>32</sup> Response, paras. 2, 6 and 13.

orders, contribute to increasing the flight risk of the Accused.<sup>33</sup> The Prosecution further argues that the Accused Prlić's decision not to attend the trial and the very issue raised in the Motion of 17 March 2009 are suggestive of detachment on the part of the Accused from his own trial and are indicative of an increased flight risk of the Accused.<sup>34</sup>

25. Furthermore, the Prosecution contends that the Prlić Defence has failed to show that there are any sufficiently compelling humanitarian reasons to justify the Accused Prlić's provisional release, as required by the Tribunal's jurisprudence.<sup>35</sup> The Prosecution points out *inter alia* that the Prlić Defence has challenged the legal foundation of this standard.<sup>36</sup> The Prosecution states that the Appeals Chamber's jurisprudence stipulates that parties are required to show sufficiently compelling humanitarian reasons justifying provisional release in an accused's motion for provisional release.<sup>37</sup>

26. In closing, the Prosecution alleges that neither the length of the trial nor the Accused Prlić's desire to be tried *in absentia* are sufficiently compelling humanitarian reasons to justify the provisional release of the Accused for a period of approximately twenty-one months, which moreover it views as excessive.<sup>38</sup> Further, the Prosecution underscores that provisionally releasing the Accused Prlić for such a lengthy period would likely undermine the international community's and the victims' perception of the Tribunal's proceedings and judgements.<sup>39</sup>

## V. DISCUSSION

27. As a preliminary matter, the Chamber deems it necessary to make observations on the form of the Motion of 17 March 2009. The Chamber therefore notes that Annex 1 of this Motion repeats paragraphs 6 to 16 of the Request of 2

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<sup>33</sup> Response, para. 6; Decision on Motion for Provisional Release of the Accused Prlić, confidential with confidential annex, 10 December 2008 ("*Prlić* Decision of 10 December 2008"), para. 33; *Prlić* Decision of 10; Reasons for Decision on Prosecution's Appeal of the Trial Chamber's 10 December 2008 Decision on Prlić Provisional Release During Winter Recess and Corrigendum, public, 20 January 2009 ("*Prlić* Decision of 20 January 2009"), para. 10.

<sup>34</sup> Response, para. 7.

<sup>35</sup> Response, paras. 2, 9 and 13.

<sup>36</sup> Response, para. 9.

<sup>37</sup> Response, paras. 10 and 11.

<sup>38</sup> Response, paras. 3 and 12.

<sup>39</sup> Response, para. 12.

March 2009.<sup>40</sup> The Chamber also notes that the Prlić Defence added three supplementary paragraphs to Annex 1 of the Motion of 17 March 2009. An analysis of the content of this Annex reveals that in it the Prlić Defence expands on arguments relating to the facts, and notably to the factual context of the Accused Prlić's motion for provisional release.<sup>41</sup>

28. Furthermore, the Chamber notes that Annex 2 of the Motion of 17 March 2009 repeats paragraphs 1 to 5 of the Request of 2 March 2009.<sup>42</sup> In this regard, the Chamber notes that Annex 2 of the Motion of 17 March 2009, which concerns in particular the criteria for provisional release pursuant to Rule 65 of the Rules, contains legal arguments.<sup>43</sup>

29. The Chamber recalls that point 6 of the Tribunal's Practice Direction on the Length of the Briefs and Motions dated 16 September 2005<sup>44</sup> ("Directive of 16 September 2005") expressly states that "[a]n appendix or book of authorities will not contain legal or factual arguments, but rather references, source materials, items from the record, exhibits, and other relevant, non-argumentative material".<sup>45</sup> Furthermore, the Chamber recalls, firstly, its oral Decision of 9 March 2009, denying the Motion of 2 March 2009 as it relates to the request to exceed the word limit, and instructed the Prlić Defence to file a fresh motion respecting the authorised word limit,<sup>46</sup> and secondly, its oral decision of 16 March 2009, in which it denied the Prlić Defence Request for Reconsideration and again instructed the Prlić Defence to file a fresh motion for the Accused Jadranko Prlić's provisional release that did not exceed the 3,000-word authorised limit.<sup>47</sup>

30. The Chamber holds that Annexes 1 and 2 of the Motion of 17 March 2009 infringe point 6 of the Directive of 16 September 2005, and finds that by including these two annexes in this Motion, the Prlić Defence breached the Chamber's Decisions of 9 and 16 March 2009. The Chamber deplores the step taken by the Prlić Defence and deems it therefore unnecessary to examine the content of Annexes 1 and

<sup>40</sup> Request of 2 March 2009, paras. 6-16; Motion of 17 March 2009, Annex 1.

<sup>41</sup> Motion of 17 March 2009, Annex 1.

<sup>42</sup> Request of 2 March 2009, paras. 1-5; Motion of 17 March 2009, Annex 2.

<sup>43</sup> Motion of 17 March 2009, Annex 2.

<sup>44</sup> Direction of 16 September 2005, point 6.

<sup>45</sup> Practice Direction on the Length of Briefs and Motions, 16 September 2005.

<sup>46</sup> T(F), 9 March 2009, pp. 37802-37803.

<sup>47</sup> T(F), 16 March 2009, p. 37987.

2 of the Motion of 17 March 2009. The Chamber wishes furthermore to underscore the need for the parties to scrupulously respect the formal obligations of the Tribunal's Rules and directives.

31. Having regard to the subject of the Motion of 17 March 2009, the Chamber notes firstly that, pursuant to Rule 65 (B) of the Rules, the Government of the Kingdom of the Netherlands, the host country, informed the Chamber in a letter dated 18 March 2009 that it did not object to the procedure related to the possible provisional release of the Accused Prlić.<sup>48</sup>

32. In a letter dated 16 February 2009, the Government of the Republic of Croatia provided guarantees that if a motion for provisional release were granted by the Chamber, the Accused Prlić would not influence or pose a threat to victims, witnesses or any other person during his provisional release and that he would return to The Hague on the date ordered by the Chamber.<sup>49</sup>

33. The Chamber recalls that in order to assess whether the conditions set out in Rule 65 (B) of the Rules have been met, it must take into consideration all the relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision.<sup>50</sup> In this case, the Chamber must also take into consideration the fact that the Accused Prlić voluntarily surrendered to the Tribunal.

34. Furthermore, even if the close of the Prosecution case constitutes, according to the Appeals Chamber, a significant change in circumstances necessitating a renewed and detailed consideration of the flight risk posed by an accused,<sup>51</sup> the Chamber notes that, despite the importance of the recent close of the presentation of the Accused Prlić's case on 15 January 2009, there were no notable developments in the trial since the 98 *bis* decision that would suggest an increased flight risk on the part of the Accused Prlić.

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<sup>48</sup> Letter from the Ministry of Foreign Affairs of the Netherlands regarding the provisional release of Jadranko Prlić dated 18 March 2009.

<sup>49</sup> Letter from the Ministry of Justice of the Republic of Croatia dated 16 February 2009, appended as Annex 3 to the Motion of 17 March 2009.

<sup>50</sup> *Mičo Stanisić* Decision, para. 8; *Jovica Stanisić* Decision, para. 35; *Petković* Decision, para. 8; *Prlić* Decision of 25 April 2008, para. 10.

<sup>51</sup> *Prlić* Decision of 11 March 2008, para. 20.

35. The Chamber recalls, however, that it is bound by the *Prlić* Decision of 20 January 2009 in which the Appeals Chamber found that the recurrent breach by the Accused Prlić of one of the conditions attached to the provisional release orders, namely the condition prohibiting an Accused to have contact with potential witnesses during the provisional release period, puts into doubt the reliability of the Accused Prlić to abide by the conditions attached to the provisional release orders and is not without effect on the flight risk of the Accused and the influence that he might exert on potential witnesses.<sup>52</sup> In light of the *Prlić* Decision of 20 January 2009, the Chamber can only dismiss the argument put forth by the Prlić Defence on the non-existence of a flight risk for the Accused Prlić.<sup>53</sup>

36. Furthermore, according to the Appeals Chamber, with regard to the stage reached in the case and the close of the Prosecution case, it is the duty of the Chamber to determine whether the humanitarian reasons put forth by the Prlić Defence are sufficiently compelling to justify the provisional release of the Accused Prlić.<sup>54</sup>

37. In this regard, the Chamber finds that the Prlić Defence did not provide sufficiently compelling humanitarian reasons to support its Motion of 17 March 2009.<sup>55</sup> The Chamber notes moreover that in the Motion of 17 March 2009, the Prlić Defence challenges the legal basis of the criteria for sufficiently compelling humanitarian reasons set out by the Appeals Chamber in its Decision of 21 April 2008.<sup>56</sup>

38. The Chamber finds furthermore that the Prlić Defence did not challenge the legal basis of the criteria for sufficiently compelling humanitarian reasons in its Motion for provisional release of the Accused Prlić during the 2008-2009 court winter recess, filed confidentially on 23 October 2008.<sup>57</sup>

39. In its response, the Prosecution noted that the Prlić Defence did not raise sufficiently compelling humanitarian reasons in support of its Motion of 17 March

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<sup>52</sup> *Prlić* Decision of 20 January 2009, paras. 10 and 11.

<sup>53</sup> Motion of 17 March 2009, para. 12.

<sup>54</sup> *Petković* Decision, para. 17; *Prlić* Decision of 25 April 2008, para. 16.

<sup>55</sup> Motion of 17 March 2009, paras. 14-21.

<sup>56</sup> Motion of 17 March 2009, paras. 14-21.

<sup>57</sup> Jadranko Prlić's Motion for Provisional Release, confidential with confidential annexes, 23 October 2008, para. 24.

2009<sup>58</sup> and that the Prosecution in particular cited the *Prlić* Decision of 16 December 2008 and the *Prlić* Decision of 20 January 2009, in which the Appeals Chamber establishes the criteria for sufficiently compelling humanitarian reasons and stipulates that the parties must establish sufficiently compelling humanitarian reasons to justify the provisional release of an Accused.<sup>59</sup>

40. The Chamber finds that the *Prlić* Defence did not provide sufficiently compelling humanitarian reasons in support of its Motion of 17 March 2009, as required by Tribunal jurisprudence, and deems therefore that there is no need to decide on the issue of proportionality of the length of the provisional release requested by the *Prlić* Accused in this Motion.

41. Having regard further to the argument put forth by the *Prlić* Defence in the Motion of 17 March 2009 suggesting that provisionally releasing the Accused *Prlić* would increase this Accused's involvement in the preparation of his trial,<sup>60</sup> the Chamber holds, *a contrario*, that only the presence of the Accused *Prlić* in court guarantees his active participation in the trial, notably by direct interaction with his defence counsel.

42. Furthermore, the Chamber notes the arguments put forth by the *Prlić* Defence relating to the right of the Accused *Prlić* to be presumed innocent and to the respect of his fundamental rights and the guarantees contained in international human rights instruments.<sup>61</sup> The Chamber acknowledges that a review of a motion for provisional release of an accused during his trial could be based on substantially different legal considerations if it were to be reviewed in light of the jurisprudence of the European Court of Human Rights. As an example, the Chamber underscores that pursuant to Article 5(3) of the European Convention on Human Rights ("ECHR"), detention of an accused during his trial constitutes an exception and not the rule.<sup>62</sup> The Chamber notes, however, that in this instance, the European Court of Human Rights proceeds, in its evaluation of alleged violations of Article 5(3) of the ECHR, with an *in concreto* analysis of the decisions of national jurisdiction relating to the motions for provisional

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<sup>58</sup> Response, para. 2.

<sup>59</sup> Response, paras. 8-11; *Prlić* Decision of 16 December 2009, para. 15; *Prlić* Decision of 20 January 2009, para. 10.

<sup>60</sup> Motion of 17 March 2009, para. 13.

<sup>61</sup> Motion of 17 March 2009, paras. 1-5.

release and to an *in concreto* review of the grounds invoked by the applicants in support of their motion before the European Court of Human Rights.<sup>63</sup> Therefore, this *in concreto* analysis allowed the European Court of Human Rights (and previously the European Commission for Human Rights) to determine, for each case submitted to them, the violations or non-violations of Article 5 (3) arising from the duration of the provisional detention.<sup>64</sup> In this instance, the Chamber notes, however, that it is bound in its review by the Tribunal's legal framework, namely the Statute of the Tribunal and the Rules as interpreted by the Appeals Chamber, which considers *inter alia* the gravity of the crimes with which the Accused are charged. Therefore, the Chamber recalls that in view of the legal framework specific to the Tribunal, particularly the Decision of the Appeals Chamber of 28 July 2008, an Accused who files a motion for provisional release is required to provide sufficiently compelling humanitarian reasons to justify his provisional release.

43. Consequently, in view of the strict criteria imposed by the Appeals Chamber in this case and the conclusions of the Chamber on the absence of sufficiently compelling humanitarian reasons in the Motion of 17 March 2009, the Chamber finds that it is unable to disregard the criteria of the Appeals Chamber and to review the merits of a motion for provisional release that is principally based on the guarantees envisaged by various international instruments for the protection of human rights, as suggested by the Prlić Defence in the Motion of 17 March 2009.

44. Moreover, the Chamber finds that the provisional release of the Accused Prlić for the remainder of the trial would not be without negative effect on the proper conduct of the trial. The provisional release of an accused for an indeterminate period of time during his trial gives rise, particularly where there are multiple accused, in an inherent risk of unfairness to the treatment of the accused. The Chamber points out

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<sup>62</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 ("ECHR"), 4 November 1950, Article 5(3).

<sup>63</sup> European Court of Human Rights, *Case of Gabriel Woukam Moudefo v. France*, Commission Report of 8 July 1987 (Application no. 10868/84), paras. 70 and 71; *Case of Letellier v. France*, 26 June 1991 (Application no. 12369/86), paras. 33-53; *Case of Quinn v. France*, 22 March 1995 (Application no. 18580/91), paras. 50-56; *Case of McKay v. the United Kingdom*, 3 October 2006 (Application no. 543/03), paras. 42-43; *Case of Bykov v. Russia*, 10 March 2009 (Application no. 4378/02), paras. 62-63.

<sup>64</sup> European Court of Human Rights, *Case of Letellier v. France*, 26 June 1991 (Application no. 12369/86), paras. 52-53; *Case of Quinn v. France*, 22 March 1995 (Application no. 18580/91), paras. 50-56; *Case of McKay v. the United Kingdom*, 3 October 2006 (Application no. 543/03), paras. 48-51; *Case of Bykov v. Russia*, 10 March 2009 (Application no. 4378/02), paras. 58-68.

that this unfairness would be reflected, *inter alia*, in the inevitably longer detention of accused whose cases were presented towards the end of the defence case. Consequently, these accused would not have the possibility of filing motions for provisional release for the remainder of the trial or for similar periods, which would result in flagrant unfairness in the treatment of the accused. Furthermore, the provisional release of an accused for an indeterminate period of time during his trial may not only seriously disrupt the proceedings but also affect the very legitimacy of the proceedings and of international justice, especially in the eyes of the victims of the alleged crimes.

45. Consequently, after a detailed review of the arguments put forth by the Prlić Defence in support of its Motion of 17 March 2009, the Chamber finds, firstly, that the reasons given by the Prlić Defence do not constitute sufficiently compelling humanitarian reasons, in terms of the Tribunal's jurisprudence, and that, secondly, these reasons do not conform to the Tribunal's legal framework, as defined by the Statute of the Tribunal and the Rules as interpreted by the Appeals Chamber, to justify the provisional release of the Accused Prlić for the remainder of the trial, namely an indeterminate period of approximately twenty-one months.

## VI. CONCLUSION

46. For these reasons, the Chamber finds that the Accused Prlić has not shown sufficiently compelling humanitarian reasons to support his Motion of 17 March 2009. Accordingly, exercising its discretion, the Chamber decides to deny the motion for the provisional release of the Accused Prlić for the remainder of the trial.

## VII. DISPOSITION

47. **FOR THE FOREGOING REASONS**, the Chamber,

**PURSUANT TO** Rules 46(A), 54, 65(B) and 65(E) of the Rules,

**DECIDES** not to examine Annexes 1 and 2 of the Motion of 17 March 2009,

**CALLS TO ORDER** the Prlić Defence and instructs it to comply scrupulously with the Chamber's oral and written decisions,

**AND**

**DENIES** the Prlić Defence Motion of 17 March 2009.

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

*/signed/*

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Jean-Claude Antonetti  
Presiding Judge

Done this ninth day of April 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**