



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: 25 August 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

**Registrar:** Mr John Hocking

**Order of:** 25 August 2009

**THE PROSECUTOR**

v.

Jadranko PRLIĆ  
Bruno STOJIC  
Slobodan PRALJAK  
Milivoj PETKOVIĆ  
Valentin ĆORIĆ  
Berislav PUŠIĆ

***PUBLIC***

**SECOND ORDER APPOINTING AN *AMICUS CURIAE***

**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

**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”),

***PROPRIO MOTU,***

**NOTING** the “Order Appointing an *Amicus Curiae*”, issued confidentially by the Chamber on 3 July 2009 (“Order of 3 July 2009”),

**NOTING** the “Order Amending the Appointment of an *Amicus Curiae*”, issued by the Chamber on 15 July 2009 (“Order of 15 July 2009”),

**NOTING** the “Advisory Opinion of the *Amicus Curiae* Disciplinary Council of the Association of Defence Counsel of the ICTY”, filed on 13 August 2009 (“Opinion”) by the Disciplinary Council of the Association of Defence Counsel (“ADC”; together “Disciplinary Council of the ADC”),

**CONSIDERING** that in the Order of 3 July 2009, the Chamber seized the “*Amicus Committee*” of the ADC and requested that it respond to the following questions:

- To what extent may a violation, misconduct or contempt, within the meaning of the Code of Conduct for attorneys practicing before the International Tribunal and/or the Rules, be constituted by the fact that a Defence Counsel repeatedly refuses to disclose to the Chamber and the parties the sources of documents requested for admission by way of written motion, on the ground that the safety of the sources would, in general, be jeopardized by such disclosure?
- To what extent may a violation, misconduct or contempt, within the meaning of the Code of Conduct and/or the Rules, be constituted by the fact that this Counsel ultimately discloses the identity of some of these sources, after several reminders from the Chamber, without giving any satisfactory explanation justifying this late disclosure, and without seeking any request for protective measures for these sources?
- To what extent may a violation, misconduct or contempt on the part of the Defence Counsel, within the meaning of the Code of Conduct and/or the Rules, be

constituted by the fact that some of these sources ultimately turn out to be witnesses for the Prlić Defence who testified in open session in the absence of any protective measures, several months before the request, by way of written motion, for the admission of the documents at issue?<sup>1</sup>

**CONSIDERING** that in the Order of 15 July 2009, the Chamber authorised the transfer of the Chamber's request for an opinion contained in the Order of 3 July 2009 to the Disciplinary Council of the ADC, to the extent that the latter has the jurisdiction to address the questions asked by the Chamber from the various angles specified by the Chamber,<sup>2</sup>

**CONSIDERING** that in its Opinion, the Disciplinary Council of the ADC first recalls the range of applicable provisions governing its jurisdiction<sup>3</sup> and concludes, on the basis of these provisions, that it has the jurisdiction to give its opinion on certain aspects of the questions asked by the Chamber, but not on others,<sup>4</sup>

**CONSIDERING**, therefore, that the Disciplinary Council of the ADC indicates that it does not have the jurisdiction to provide an opinion on whether or not certain conduct may or may not constitute contempt of the Tribunal if such an opinion may usurp the fact-finding function of the other organs of the Tribunal as described in Rule 77 (C) of the Rules,<sup>5</sup>

**CONSIDERING** subsequently, that the Disciplinary Council of the ADC sets out that unless it is seized of a complaint in accordance with Article 18 of the Constitution of the ADC<sup>6</sup> or comes into possession of information relevant to Article 17 of the Constitution of the ADC, it is not incumbent upon to make factual determinations on the misconduct of a defence counsel, responsibility for which falls within the jurisdiction of other organs of this Tribunal,<sup>7</sup>

**CONSIDERING** that with regard to the questions asked by the Chamber in the Order of 15 July 2009, the Disciplinary Council made general observations on professional

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<sup>1</sup> Order of 3 July 2009, pp. 5 and 6.

<sup>2</sup> Order of 15 July 2009, p. 4.

<sup>3</sup> Opinion, paras 8 to 40.

<sup>4</sup> Opinion, para. 7.

<sup>5</sup> Opinion, paras 21 to 24.

<sup>6</sup> "Constitution of the Association of Defence Counsel Practicing before 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", amended on 23 October 2004 ("Constitution of the ADC").

conduct that should be adopted by counsel in situations described in the said questions,<sup>8</sup>

**CONSIDERING**, however, that the Disciplinary Council of the ADC submits that the question of whether the counsel in question knowingly or continuously refused to comply with a Chamber's decision or to abide by the Rules and the question of whether the conduct of this counsel in the three situations described in the Order of 15 July 2009 constitutes professional misconduct according to Article 35 of the Code of Conduct, are questions that depend on the circumstances of the case at hand<sup>9</sup> and it is not incumbent upon the Disciplinary Council to resolve them in its Advisory Opinion,<sup>10</sup>

**CONSIDERING** that the Disciplinary Council of the ADC concludes that in light of the circumstances any informed opinion on the questions asked by the Chamber in the Order of 15 July 2009 can only be given after counsel has been given the opportunity to be heard,<sup>11</sup>

**CONSIDERING** that the Chamber notes the considerations submitted by the Disciplinary Council of the ADC in its Advisory Opinion in response to the questions asked in the Order of 15 July 2009,

**CONSIDERING** that the Chamber also notes the limitations facing the Disciplinary Council of the ADC in the exercise of its mandate, namely the fact that it does not have the jurisdiction for a fact-check into alleged misconduct that falls outside Articles 17 and 18 of the Constitution of the ADC, or to give its opinion on the question whether alleged misconduct may or may not constitute contempt of the Tribunal,

**CONSIDERING** that while the Disciplinary Council of the ADC does not exclude the possibility that conduct of the counsel in question conforms to the applicable rules of conduct, it also does not exclude the possibility that it does not conform,

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<sup>7</sup> Opinion, para. 26.

<sup>8</sup> Opinion, paras. 41 to 71.

<sup>9</sup> Opinion, paras 45, 52, 60, 68, 70 and 71.

<sup>10</sup> Opinion, paras 52, 60, 63 and 68.

<sup>11</sup> Opinion, para. 72.

**CONSIDERING** that if the Disciplinary Council of the ADC does not have the jurisdiction to address the three questions asked by the Chamber from the various angles specified by the Chamber in the Order of 15 July 2009, the Chamber deems it necessary in the interest of justice to invite another *amicus curiae* to respond to the questions asked by the Chamber in the Orders of 3 and 15 July 2009 and to investigate the facts described in the Order of 3 July 2009,

**CONSIDERING** that the Chamber deems it advisable that the *amicus curiae* who is to be appointed becomes acquainted with the considerations put forward by the Disciplinary Council of the ADC in its Opinion,

**CONSIDERING** that the investigation by the *amicus curiae* will be conducted confidentially and that the *amicus curiae* report at the end of the investigation will be issued confidentially,

**CONSIDERING** that, in any event, the Chamber will not be able to adjudicate on the possibility of initiating proceedings against the counsel in question or of closing this file until the end of the investigation by the *amicus curiae*,

**FOR THE FOREGOING REASONS,**

**PURSUANT TO** Rule 74 of the Rules,

**REQUESTS** that the Registry to appoint an *amicus curiae* capable of investigating the facts described in the Order of 3 July 2009,

**REQUESTS** that the *amicus curiae* who is to be appointed respond to the questions asked by the Chamber in its Orders of 3 and 15 July 2009, namely:

- To what extent may a violation, misconduct or contempt, within the meaning of the Code of Conduct and/or the Rules, be constituted by the fact that a Defence Counsel repeatedly refuses to disclose to the Chamber and the parties the sources of documents requested for admission by way of written motion, on the ground that the safety of the sources would, in general, be jeopardized by such disclosure?
- To what extent may a violation, misconduct or contempt, within the meaning of the Code of Conduct and/or the Rules, be constituted by the fact that this

Counsel ultimately discloses the identity of some of these sources, after several reminders from the Chamber, without giving any satisfactory explanation justifying this late disclosure, and without seeking any request for protective measures for these sources?

- To what extent may a violation, misconduct or contempt on the part of the Defence Counsel, within the meaning of the Code of Conduct and/or the Rules, be constituted by the fact that some of these sources ultimately turn out to be witnesses for the Prlić Defence who testified in open session in the absence of any protective measures, several months before the request, by way of written motion, for the admission of the documents at issue?

**AUTHORISES** the *amicus curiae* to have access to all the documents and decisions cited in the Order of 3 July 2009, be they confidential or public,

**REQUESTS** that the *amicus curiae* submit a report to the Chamber within one month of the date of publication of the present decision.

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

*/signed/*

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Judge Jean-Claude Antonetti  
Presiding Judge

Done this twenty-fifth day of August 2009  
At The Hague  
The Netherlands

[Seal of the Tribunal]