



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: 3 November 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: 3 November 2009

THE PROSECUTOR

v.

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

PUBLIC

DECISION SUBSEQUENT TO THE *AMICUS CURIAE* REPORT

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”),

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

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

NOTING the “Advisory Opinion of *Amicus Curiae* Disciplinary Council of the Association of Defence Counsel of the ICTY” filed publicly by the Disciplinary Council of the Association of Defence Counsel on 13 August 2009,

NOTING the “Second Order Appointing an *Amicus Curiae*” rendered publicly by the Chamber on 25 August 2009 (“Order of 25 August 2009”),

NOTING the appointment by the Registry of the Tribunal of Mr Giuseppe Battista as *amicus curiae* on 28 August 2009,

NOTING the “Order on *Amicus Curiae* Request to Extend Deadline” rendered publicly by the Chamber on 23 September 2009,

NOTING the “Legal Opinion - *Amicus Curiae* Response to the Chamber’s Questions Following the Order Appointing an *Amicus Curiae* of 25 August 2009” filed publicly by Mr Battista on 6 October 2009 (“Report”),

CONSIDERING that, in the Order of 25 August 2009, the Chamber requested that the Registry appoint an *amicus curiae* capable of investigating the facts described in the Order of 3 July 2009 and asked the *amicus curiae* who was to be appointed to respond to the questions asked by the Chamber in its Orders of 3 and 15 July 2009,¹ namely:

- To what extent may a violation, misconduct or contempt, within the meaning of the Code of Conduct for attorneys practicing before the International Tribunal

(“Code of Conduct”) and/or the Rules of Procedure and Evidence (“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?

CONSIDERING that in his Report, the *amicus curiae* examined the documents and facts submitted for his investigation that were associated with the questions raised by the Chamber and concluded that the facts did not establish that Mr Karnavas acted out of *mala fides* or wished to impede or prejudice the Chamber’s work as described in its three questions,²

CONSIDERING that the *amicus curiae* consequently concludes that there was no indication of misconduct, a violation or contempt with regard to the facts relating to the initiatives of Mr Karnavas,³

CONSIDERING that the Chamber takes note of the Report and its conclusions,

CONSIDERING that the Chamber notes, in particular, the *amicus curiae*’s opinion according to which, by seeking to keep their sources anonymous despite the fact that

¹ Order of 25 August 2009, pp. 5 and 6.

² Report, paras 90, 97, 103 and 104.

³ Report, para. 104.

the Rules and provisions set down in the Chamber's guidelines make no provision for this procedure, the Prlić Defence did not cause prejudice to the Office of the Prosecutor, or to the other parties at the trial at the stage of the motion for admission of documentary evidence,⁴

CONSIDERING that the Chamber also notes that the *amicus curiae*, in reaching his conclusions, took into account the fact that the Prlić Defence submitted that the Chamber has the discretionary power to decide whether or not to admit evidence that, *prima facie*, does not present sufficient indicia of reliability due to the anonymity of its sources, and that the Prlić Defence knew that by using pseudonyms instead of the names of the sources, their motion to admit documents might be denied,⁵

CONSIDERING that the Chamber however questions other parts of the Report and notably the link between the *amicus curiae*'s observations with regard to Rule 70 (B) of the Rules, as set forth in paragraph 82 of his Report, and this particular case submitted to be investigated by the *amicus curiae*,

CONSIDERING that, indeed, Rule 70 (B) of the Rules allows for the disclosure of the identity of a piece of information provided on a confidential basis or a source on condition that not only the source consents to this, but also such information and sources may only be used as evidence after prior disclosure to the accused, while in this particular case the Motion was aimed at requesting the admission of confidential information without revealing and disclosing its source to the other parties and the Chamber,

CONSIDERING that, consequently, the reference to Rule 70 (B) of the Rules in the context of the question asked by the Chamber is not justified,

CONSIDERING furthermore that it surprises the Chamber that, in response to the third question asked by the Chamber in its Orders of 3 and 15 July 2009, the *amicus curiae*, in reference to Mr Karnavas's intention, presents it from the point of view of two alternative options, namely, "Was his aim to mislead the Chamber into committing an error or to respect an agreement that he had with a witness or a source

⁴ Report, para. 86 (underlined in the text).

⁵ Report, paras 88 and 89.

of information?”⁶ whereas theoretically a person can simultaneously intend to protect its sources and, with this aim in mind, mislead a Trial Chamber,

CONSIDERING that the intention to protect the sources cannot, in any case, legitimise actions that would mislead a Chamber,

CONSIDERING, however, that the Chamber’s concerns on the above-mentioned two points do not undermine the presumption that Mr Karnavas acted in good faith,

CONSIDERING that consequently, the Chamber decides to close the case file opened against Mr Karnavas,

CONSIDERING that the Chamber takes this opportunity to recall the obligation that is incumbent upon each counsel to perform his or her duties in accordance with the relevant provisions of the Statute of the Tribunal, the Rules and the Code of Conduct,

CONSIDERING that, in the context of the supervision required to properly facilitate the work of the Chamber, the Chamber will continue to ensure that these provisions are correctly implemented,

FOR THE FOREGOING REASONS,

PURSUANT TO Rule 74 of the Rules,

TAKES NOTE of the Report,

DECIDES to close the case file against Mr Karnavas.

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

⁶ Report, para. 101.

/signed/

Jean-Claude Antonetti

Presiding Judge

Done this third day of November 2009

At The Hague

The Netherlands