

ICTR-98-44-T  
(5045-5031)  
14/05/2002

5045



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

Original: English

**Before:** Judge Navanethem Pillay, President

**Registrar:** Adama Dieng

**Order of:** 13 May 2002

**THE PROSECUTOR**  
Versus  
**JOSEPH NZIRORERA**

*Case No. ICTR-98-44-T*

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JUDICIAL RECORDS SECTION

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**THE PRESIDENT'S DECISION ON REVIEW OF THE DECISION OF THE REGISTRAR WITHDRAWING MR. ANDREW McCARTAN AS LEAD COUNSEL OF THE ACCUSED JOSEPH NZIRORERA**

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I, Judge Navanethem Pillay, President of the International Criminal Tribunal for Rwanda (the "Tribunal");

**HAVING RECEIVED** an undated application from Mr. Andrew McCartan, received in my office on 1 March 2002, appealing the Registrar's decision of 5 February 2002, which discharged the said Mr. Andrew McCartan as Lead Counsel for the accused;

**HAVING CONSIDERED** the contents of the said Application, in particular the relief claimed: to recall and suspend ad interim the Decision of the Registrar as aforesaid in respect of the finding that Lead Counsel acted with financial dishonesty at paragraph 2 of that decision and in respect of the decision to discharge Lead Counsel and to remove him from the list of eligible counsel at the Tribunal; **and** to direct the Registrar to convene the Advisory Panel and hold a hearing before the Advisory Panel with respect to the allegations of financial dishonesty of Lead Counsel; **or** to direct the Trial Chamber to hear evidence on the said allegations and reach a judgement on the finding of financial dishonesty;

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**HAVING CONSIDERED** Articles 14 and 16 of the Statute of the International Tribunal, Rules 19, 33(A), 44, 45, 46 of the Rules of Procedure and Evidence, Articles 13,16, 17, 19, 24, 29, 30, of the Registrar's Directive on the Assignment of Counsel, Articles 1, 3, 4, 5, 8, 9, 11, 13, 17, 19, 20, 21, 22, of the Code of Professional Conduct for Defence Counsel;

**HAVING CONSIDERED** the submissions of Mr. Andrew McCartan and the Registrar as to the issue of jurisdiction;

**NOTES** the following, in respect of the issue of jurisdiction:

- (i) Article 16 of the Statute assigns to the Registry the responsibility for the administration and servicing of the Tribunal;
- (ii) Article 14 of the Statute empowers the Judges of the International Tribunal for Rwanda to adopt Rules of procedure and Evidence;
- (iii) Rule 19, detailing the functions of the President, states that:

*The President shall preside at all plenary meetings of the Tribunal, co-ordinate the work of the Chambers and **supervise the activities of the Registry** as well as exercise all the other functions conferred on him by the Statute and the Rules.*  
(Emphasis added);

- (iv) Rule 33(A), detailing the Functions of the Registrar, states that:

*(A) The Registrar shall assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication. (Emphasis added);*

- (v) The decision of the Registrar of 5 February 2002 to withdraw the assignment of Mr. Andrew McCartan was expressed to be made under Article 19 (A) of the Directive on Assignment of Defence Counsel (the Directive) which states:

*The Registrar may:*

...

- (iii) *In the case of a serious violation of the Code of Conduct, withdraw the assignment of Counsel or co-Counsel.*

- (vi) Article 19 (E) gives a right to have the Registrar's decision *denying a withdrawal* reviewed by the President. No express right is set out for a Counsel to have a decision withdrawing his assignment reviewed by the President;
- (vii) The Registrar's decision of 5 February 2002 was expressed to be based on a finding of a "serious violation of Articles 5 and 11 of the Code of Conduct

for Defence Counsel..." (Emphasis added). Rule 46 of the Rules of Procedure and Evidence deal with Misconduct of Counsel, and Rule 46(D) states in part that:

*If the Registrar has strong grounds for believing that Counsel has committed a serious violation of the Code of Professional Conduct so adopted, he may report the matter to the President or the Bureau for appropriate action under this rule.*

- (viii) While the Rules made under the authority of the Statute should be considered as having priority over Directives made under the Rules, Rule 46(D) is not expressed in mandatory terms, but is permissive. The Registrar *may* report the matter but is not obliged to do so. Thus both Rule 46(D) of the Rules and Article 19(A) (iii) give the Registrar a discretion as to how to proceed in the event of a finding of serious breach of the Code of Professional Conduct.
- (ix) If the Registrar chooses to proceed under Article 19 of the Directive, his decision may be subject to review by the President by virtue of the provisions of Rules 19 and 33(A) of the rules of Procedure and evidence set out above. By virtue of these Rules, the President exercises authority and supervision over the Registrar.
- (x) The circumstances when the President may exercise that authority and supervision are not expressly set out in the Rules. Decisions of the International Criminal Tribunal for Yugoslavia have, however, made explicit the power to review the Registrar's decisions vested in the President.<sup>1</sup>
- (xi) Additionally, all modern systems of administrative law have review procedures built in to them to ensure fairness when individual rights or protected interests are in issue, or to preserve the interests of justice. In the context of this Tribunal, Rules 19 and 33(A) ensure that such review is available in appropriate cases. While the Registrar has the responsibility of ensuring that *all* decisions are procedurally and substantively fair, not every decision made by the Registrar can be made subject of review by the President. The Registrar must be free to conduct the business of the Registry without undue interference by Presidential review. In all systems of administrative law, there is a threshold condition that must be met before an administrative decision may be impugned by supervisory review. The reasons for this are based on sound reasons of public policy. It would be impossible to conduct day to day administration if every decision of an administrator were subject to review. The threshold condition is variously formulated in national jurisdictions, but a common theme is that the decision

<sup>1</sup> See, for example, Prosecutor v Hadzihasanovic et al, IT-01-47-PT, 26 March 2002, Decision on the Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, esp paras. 12, 13; Prosecutor v. Delalic et al., Decision of the President on the Prosecutor's motion for the production of Notes Exchanged between Zejnil Delalic and Zdravko Mucic, IT-96-21-PT, 11 November 1996, President Cassese.

sought to be challenged must involve a substantive right that should be protected as a matter of human rights jurisprudence or public policy. I find that an application for the review by the President of a decision of the Registrar on the basis that it is unfair procedurally or substantively is receivable under Rules 19 and 33(A) if the applicant has a protectable right or interest or if it is otherwise in the interests of justice.

- (xii) In respect of the Decision of the Registrar of February 5 2002 that is the subject of challenge, the question arises as to whether there is any individual right or protected interest at stake for the applicant. Mr. McCartan challenges the decision on the basis of the finding that he was found to have acted “with financial dishonesty” and he challenges the two consequential orders made by the Registrar that he should be discharged as lead Counsel and that he should be removed from the list of eligible counsel.
- (xiii) These two separate consequential orders in the Registrar’s Decision were based on the finding that Mr. McCartan acted in breach of Articles 5 and 11 of the Code of Conduct and, further, that these acts amounted to financial dishonesty. The finding that Mr. McCartan was financially dishonest was a grave one, especially for a member of the profession of law. In numerous national jurisdictions, it has been held that an individual has a protectable interest in his reputation. A fortiori, a professional lawyer has a protectable interest in his professional reputation. I find that Mr. McCartan has an interest in his reputation that requires procedural and substantive fairness for its protection. That fairness requires that any decision affecting that interest must be subject to review by the President. Accordingly, on this basis, jurisdiction to review the Decision is accepted.

**HAVING CONSIDERED**, in respect of the substantive Application, that:

- (i) The Applicant states that the Registrar is obliged to act according to the Principles of Natural Justice. In particular, the Applicant complains that the Registrar “failed to observe the audi alterem partem rule and denied Counsel his basic rights.” It is unclear from the formulation whether the last six words of that complaint are merely an exemplification of the alleged failure of the Registrar to observe the duty to hear the Applicant or are an expansion of the complaint to include other unspecified rights. In view of the specific complaints made in different parts of the Application, the words will be treated as merely an exemplification of the alleged failure to accord the applicant a right to be heard.
- (ii) Mr. McCartan, in the course of his application, makes a number of specific and inter-related complaints as follows:
- (a) No specific allegations were made to him at any time;
  - (b) In particular, no specific allegations were made to him “relating to inflating any bill”;

- (c) In particular, no specific allegations were put to him “regarding fees for October”;
  - (d) “At no time did the Registry allege any wrongdoing”;
  - (e) During three conversations with a representative of the Office of Internal oversight concerning “fee-splitting”, it was never suggested that Mr. McCartan was being investigated for alleged dishonesty;
  - (f) Counsel had been denied a hearing;
  - (g) Allegations had not been “formally put to Counsel”;
  - (h) The Registrar’s decision is punitive in effect;
  - (i) The Registrar should have acted in accordance with the terms of the Statute and the rights enumerated in Article 20.4.
- (iii) The Registrar, in the course of his Response, observes:
- (a) That the exchange of written submissions constituted an appropriate method of disposing of the matter;
  - (b) That Mr. McCartan was adequately informed of the allegations against him and that the Registry “expressly and in an unequivocal manner brought the alleged facts and accusations to the attention of Mr. McCartan...”;
  - (c) That allegations “relating to his financial dishonesty and fee-splitting arrangement were made by his client and had been widely debated before Trial Chamber II ...”;
  - (d) That Trial Chamber II had requested the Registry to investigate “the question of financial dishonesty and fee splitting ...”;
  - (e) That a letter from the Registry dated 23 October 2001 “requesting Mr. McCartan to provide the Registry with sufficient information with regard to the queries put to him by the Registry is a clear indication that a formal investigation into the matter was initiated by the Registry...”;
  - (f) That Mr. McCartan’s written responses make it clear that he was aware that he was being investigated in respect of allegations of wrongdoing;
  - (g) That Mr. McCartan knew that his client and Legal Assistant had accused him of “financial dishonesty in the way he billed the Registry for the work allegedly done on behalf of his client” and the Registry had provided him with the correspondence of the Legal Assistant in which the allegations were made and Office of Internal Oversight had provided him with a copy of a letter dated 16 January 2002 from the same source with allegations that he had asked her to “create work he did not do”;

**AND HAVING CONSIDERED** the allegations forming the basis of the Deputy-Registrar’s Decision as follows:

(A)

- (i) The first of the two reasons given in the Decision of the Registrar for making of the orders was that Counsel had inflated his bills for October and November 2000. The evidence put forward concerning this allegation is three-fold: first that Counsel asked his Legal Assistant to maximize his fees for November 2000 in a letter to her dated 17 December 2000<sup>2</sup>. In the letter, Mr. McCartan stated that he enclosed a draft of his fees for that month and he asked the Legal Assistant to make alterations to the draft as she considered necessary to maximize payment.
- (ii) The second evidential basis for the finding of fee-inflation is the assertions of the Legal Assistant, Aurea Mukangabo, about what Mr. McCartan asked her to do in relation to the fees for October and November 2000.
- (iii) The third evidential basis for this finding is an analysis of the relevant Time-sheets and Fee Statements submitted by Mr. McCartan to the Registry and those submitted by the Legal Assistant.

**(i) The letter of 17 December 2000.**

- (a) The Registry asserts on the basis of its investigation that by the letter of 17 December 2000, and by his subsequent instructions to the Legal Assistant, Counsel was asking her to increase his fees to a higher level within the overall limits allowed to counsel by making false claims;
- (b) Mr. McCartan states that, on the contrary, the Legal Assistant was asked to alter his drafts of fee claims for his eventual submission: she was to do this by examining his drafts and preparing claims in a proper form so as to maximize claims. He states that he never instructed her to make false claims.
- (c) The Registry brought the allegations to Mr. McCartan's attention on or about the 30 May 2001<sup>3</sup>. The allegations appear first to have been made in correspondence to the Tribunal by the accused, Nzirorera, and the Counsel's Legal Assistant on 17, 18 and 20 May 2001.<sup>4</sup>
- (d) The Registry forwarded a copy of the 17 December 2000 letter to Mr. McCartan who stated on 31 May 2001<sup>5</sup> that he had his own copy. Mr. McCartan made comments on it and stated that "Once again I re-iterate that I have acted ethically and properly both towards the Tribunal and your Staff ...".
- (e) Mr. McCartan again responded on 5 June 2001<sup>6</sup> to a faxed copy of a request for information (which has not been produced to me) with an

<sup>2</sup> Registry Response, page 4962

<sup>3</sup> Registry Response, page 4952, internal reference in letter from McCartan to Caldarone 31 May 2001.

<sup>4</sup> Registry Response, page 4964.

<sup>5</sup> Registry Response, page 4952.

<sup>6</sup> Mr. McCartan's Application, exhibit M18

explanation stating that the terms of the letter of 17 December 2000 were "entirely capable of any construction other than a perfectly proper one".

- (f) Soon after that exchange of correspondence, the issue of the conduct of counsel for the accused Nzirorera came before me in an application for review of an earlier Decision by the Registrar not to withdraw Mr. McCartan as counsel. In my Decision of 13 June 2001<sup>7</sup>, I stated that a factual determination on allegations made by the Accused which, in part, related to Counsel's integrity, should be left to the Trial Chamber who would be in a better position to determine these allegations.
- (g) At the hearing of the Motion of the Accused for the removal of his Lead Counsel before Trial chamber II on 21 September 2001, in which Mr. McCartan participated, the closed session hearing was dominated by the issue of an alleged fee-splitting agreement. (This allegation of a fee-splitting agreement between Mr. McCartan and his client does not form any part of the Deputy-Registrar's Decision which is the subject of this review.) At one point, however, the Trial Chamber did hear from Mr. McCartan on the subject of the 17 December 2000 letter: he stated that the interpretation the Accused placed on the letter was incorrect but that this letter was a request to his Legal Assistant to make sure that every item of work done by him was claimed for in the fee submission. Counsel stated that the word "maximise" did not suggest anything that could be considered as "wrong-doing".
- (h) The Decision of the Trial Chamber on 3 October 2001<sup>8</sup>, was principally directed at allegations of unprofessional conduct by Counsel and fee-splitting. Such parts of the Decision of the majority as deal with allegations of dishonesty, while mentioning that the allegations were a later addition, did not express a view but considered it a matter for the Registry.<sup>9</sup> In its final Direction, the Trial Chamber directed the Registry to examine fee-splitting matters "including allegations in this case". It made no separate Direction in respect of the allegations concerning the 17 December letter other than those comments already referred to.
- (i) After the Decision of the Trial Chamber, on 23 October 2001<sup>10</sup>, the Registry asked specific questions about the 17 December letter. Mr.

<sup>7</sup> The President's Decision on Review, in accordance with Article 19(E) of the Directive on Assignment of Defence Counsel, 13 June 2001, ICTR-98-44-I

<sup>8</sup> Decision on Nzirorera's Motion for Withdrawal of Counsel, 3 October 2001, ICTR-98-44-T

<sup>9</sup> The last allegation by the accused before the Chamber, as stated by the Chamber in its Decision, was that "3.5. Lead Counsel has acted dishonestly to the detriment of the interests of his client and of the Tribunal, by asking the legal assistant *inter alia* to alter his fee claims in order to maximise his payments." The Chamber stated, in respect of the allegation of financial dishonesty before it: "The Chamber considers that the allegation of financial dishonesty by Counsel is an administrative matter that falls under the power of the Registry, not a Trial Chamber. The Chamber also notes that the initial request of the Accused before the Registrar did not include any allegations of financial dishonesty. The Chamber acknowledges that that this is a serious allegation which needs to be investigated by the proper authority."

<sup>10</sup> Registry Response, page 4944.

McCartan replied on 29 October 2001<sup>11</sup>, dealing with his interpretation of the letter. Although Mr. McCartan did not explain what he had meant by maximising payments in this letter, he did state "Please acknowledge receipt and confirm that you are satisfied that any allegations of wrongdoing on my part are utterly false."

- (j) Subsequently, the interpretation to be placed on the word "maximise" was discussed by an Office of Internal Oversight Services ("OIOS") representative and Mr. McCartan during a telephone conference as part of an OIOS investigation, and Mr. McCartan composed and sent a Memorandum<sup>12</sup> that was subsequently received by the Registry. In the Memorandum, Mr McCartan stated that the Legal Assistant had stated on an earlier occasion that his Fee Statements had not been prepared correctly and had offered to prepare them for him. In relation to the word "maximise", Mr. McCartan had stated: "Mr.Postica asked me what I meant by the use of the word "maximiser". I stated that I had not used French for 3 weeks, that my drafting of the French text was poor, that it did not express my meaning properly. I explained the context of the letter reveals the meaning. To me maximise means (in English and in context) to charge the maximum allowable or permissible for all work actually done (my emphasis). He accepted that."

**(ii) The assertions of the Legal Assistant, Aurea Mukangabo**

- (a) The Legal Assistant had originally sent the 17 December 2000 letter to the Registry to support her suggestion that Mr. McCartan had wanted to remove her for failing to do what he wanted. She later submitted a letter to the OIOS dated 16 January 2002<sup>13</sup> stating that what Mr. McCartan had demanded by the use of the word "maximize" in the earlier letter was that his fees should be inflated to the maximum fees allowed for lawyers working for the Tribunal. She detailed the discussions between her and Mr. McCartan in which she attempted to increase his fees in accordance with his wishes<sup>14</sup>.
- (b) The Registry states that both letters with enclosures were sent to Mr.McCartan.<sup>15</sup> However, it is not clear from the internal evidence that

<sup>11</sup> Registry Response, page 4929.

<sup>12</sup> Registry Response, page 4914 et seq.

<sup>13</sup> Registry Response, page 4901 et seq.

<sup>14</sup> She asserted that Mr. McCartan had asked her to arrive at a figure of at least 170 hours a month. She had increased her original calculation of 122 hours and 15 minutes for November 2000 to 145 hours and 45 minutes. She had also been asked to find billable work for Counsel in October 2000 in spite of having no documentation from Counsel detailing such work. She created a bill for 70 hours of work for October 2000.

<sup>15</sup> Registrar's Response, page 5013, paragraph 57 (presumably "17 December 2000" refers to the enclosed letter from Mr. McCartan, the actual letter from the Legal Assistant being dated 17 May 2001) and paragraph 59.



the second detailed letter dated 16 January 2002 was sent to Counsel for comment.<sup>16</sup> The Registry Response<sup>17</sup>, however, states that all correspondence was shown to Counsel and this is not contradicted by any counter-response from Mr. McCartan. Certainly, Mr. McCartan never did comment on that letter from the Legal Assistant.

- (c) Was counsel sufficiently apprised of the allegations being made by the Legal Assistant to allow him to meet them? It is clear from the correspondence that Mr. McCartan was aware that the Legal Assistant was alleging that he had asked her to inflate his fees. On 23 October 2001<sup>18</sup>, he was asked to submit his detailed record of work done in October, November and December 2000. It is clear that that request was part of an investigation into the contents of the 17 December 2000 letter. In subsequent correspondence, on 29 October 2001<sup>19</sup>, Mr. McCartan gave his detailed comments as to how the fee statements for October, November and December 2000 were compiled. He concluded with a request for confirmation that "any allegations of wrongdoing" on his part were false.<sup>20</sup> He discussed the matter further with the OIOS and it is clear from Counsel's own Memorandum of the discussions that he was aware that the Legal Assistant was alleging that he had asked her to inflate his fees. There was, during that OIOS interview, a discussion of discrepancies within 5 pages of Time Sheets that were faxed by the OIOS to Mr. McCartan on 8 January 2002. From the internal evidence it appears that these Time Sheets were identical to the ones supplied by the Legal Assistant subsequently on 16 January 2002. How this came about is unexplained by the submissions of the Parties. However, it is clear that Counsel was invited to examine copies of his own Time Sheets sent to the Registry and the copies supplied by the Legal Assistant. Counsel maintained that there were no discrepancies between the two sets of Time Sheets. Counsel stated that the Legal Assistant had "an axe to grind" because of her dismissal by Counsel for breach of the UNDF Regulations and because he was taking court action to recover money he had lent to her. As stated above, while there is no internal evidence to show that the Legal Assistant's letter of 16 January 2002 to the OIOS was shown to Mr. McCartan, the Registry Response states that all

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<sup>16</sup> The second letter was faxed to the OIOS with a cover sheet dated 16 January 2002. The Memorandum and Addendum to the Memorandum of Mr. McCartan recording the conversations with OIOS were apparently sent on 15 and 16 January 2002. The Addendum of 16 January 2002 sent to OIOS by Mr. McCartan contained no reference to the Legal Assistant's letter of the same date. The only reference in that Addendum was to the Time Sheets sent by OIOS to Mr McCartan on 8 January 2002.

<sup>17</sup> Registry Response, page 5018.

<sup>18</sup> Registry Response, page 4944.

<sup>19</sup> Registry Response, page 4929.

<sup>20</sup> Mr. McCartan stated that he had personally supervised the preparation of the fee Statements by the Legal Assistant at the Tribunal on 21 or 22 March 2001. Subsequently, Mr. McCartan was interviewed about the issue by OIOS and gave a slightly different account to the effect that he had taken the November Time Sheets away from the Legal Assistant in Arusha and had prepared his Fee Statement using a local typist.

correspondence was shown to Counsel and this is accepted in the absence of any response from Mr. McCartan.

**(iii) The internal analysis of the relevant Time-sheets and Fee Statements**

- (a) The Registry conducted an internal analysis of the relevant Time Sheets, working documents and fee Statements supplied by Mr. McCartan<sup>21</sup> and his Legal Assistant<sup>22</sup>. The Registry noted disparities between the original November 2000 Time Sheets and the subsequent Fee Statement for that month. However, the Registry have produced no evidence to show that they submitted this analysis and their conclusion to Mr. McCartan for his comments or rebuttal. The only reference to a discussion of Time Sheets with Mr. McCartan comes in Mr. McCartan's own Memorandum<sup>23</sup> of his telephone discussions with OIOS and his Addendum thereto<sup>24</sup>. In the Memorandum it is stated in relation to unspecified parts of unspecified documents that:
- "Mr. Postica stated that there appeared discrepancies. (sic) I disagreed. I denied the only Time Sheets were those he faxed to me. There was not discrepancy between the two in my opinion. I further explained that Mrs. Mukangabo had an axe to grind. ..."*
- (b) The second part of the internal analysis conducted by the Registry involved an alteration of a Time Sheet for November 2000 – the Registry had one copy from Mr. McCartan and another copy passed on by the OIOS after it had been submitted to the OIOS by Mr. McCartan.<sup>25</sup> The alteration purported to show that work on one day in November had been continued on other days. The original Time Sheet submitted to the Registry did not show the work actually conducted on 17, 18 and 19 November 2000. The copy of the same November Time Sheet later sent by Mr. McCartan to the OIOS was altered by filling in the blank spaces to show that the work of the 11 November continued on subsequent days. The Registry conclude from this that Mr. McCartan's honesty was in doubt.<sup>26</sup>
- (c) Additionally, the Registry compared the Fee Statements of Mr. McCartan with the actual records of work done and the Accused's account of the

<sup>21</sup> Registry Response, page 4890, 4889.

<sup>22</sup> Registry Response, page 4884, 4883

<sup>23</sup> Registry Response, page 4913, 4914

<sup>24</sup> Registry Response, page 4904

<sup>25</sup> Registry Response, pages 4890 and 4887.

<sup>26</sup> Registry Response page 4974.

work done and discovered that work claimed for in early part of November had not, in fact, been performed.

- (d) The third part of the analysis conducted by the Registry was on a series of discrepancies between the Time Sheets and the Fee Statements. A Schedule of the discrepancies<sup>27</sup> was prepared showing a number of differences. It appears from the submitted documentation that the Registry did not submit their analysis and conclusions to Mr. McCartan for his comments or rebuttal.<sup>28</sup>
- (e) The Decision of the Deputy-Registrar also found that Counsel had inflated his bills for October 2000. This finding appears to be entirely based on the observation by the Legal Assistant in her letter of 16 January 2002<sup>29</sup> that Mr. McCartan had asked her to find some activities for him for the month of October 2000 and for which there were no Time Sheets and for which "almost nothing" was recorded in the file. She further states that Mr. McCartan was satisfied with 70 hours for October.

**(B)**

- (i) The second of the two reasons given in the decision of the Registrar for the making of the orders was that Counsel "...did provide his Legal Assistant with pre-signed blank forms for submission and reimbursement of expenses."
- (a) The Registry asserts that by the same letter dated 17 December 2000, Mr. McCartan recorded his sending to the Legal Assistant of "some signed blank sheets of paper to facilitate approval of your fees and reimbursements."<sup>30</sup>
- (b) Mr. McCartan's explanation in his letter to the Registry of 31 May 2001<sup>31</sup> was that he sent the blank forms to the Legal Assistant for her to complete the forms and fax them back to him for checking before submission to the

<sup>27</sup> Registry Response, page 4875 et seq.

<sup>28</sup> The Registry was examining original November Time Sheets marked as numbers 2 and 3. No question is raised in the documentation submitted as to whether there was a Time Sheet number 1 and what it might show. According to the letter Mr. McCartan sent dated 11 December 2001, he sent two Time Sheets for November.

<sup>29</sup> Registry Response, page 4901, 4900.

<sup>30</sup> « Je joins aussi, quelques feuilles de papier signées en blanc pour faciliter les approbations de tes honoraires et remboursements. »

<sup>31</sup> Registry Response, page 4952

Tribunal.<sup>32</sup> Mr. McCartan did not on this or any other occasion explain why the forms had been pre-signed. On 23 October 2001<sup>33</sup>, the Registry asked Counsel about the use to which the two blank forms had been put.<sup>34</sup> Mr. McCartan replied on 29 October 2001 and, without stating expressly that the blank forms were Work Programmes, asserted that the Legal Assistant "...did not submit any Programme de Travail herself at any time after 17.12.00 using the two blanks. All of her Programme de Travails were submitted by me either on her behalf or via my office, authorized personally by me."<sup>35</sup> After further correspondence on other allegations, the Registry acknowledged receipt of that letter and appears to have assumed, perhaps based on a literal interpretation of the 17 December 2000 letter, that the blank documents were other than work schedules. The Registry wrote to Mr. McCartan on 8 November 2001 to the effect that Counsel had not addressed the issue of blank documents and it assumed from Counsel's letter there were two sets of blank documents involved.<sup>36</sup> On 9 November 2001, Mr. McCartan explained in a letter that he had only sent blank work schedules and that no other blank documents were sent. He further states that the blanks were never used.<sup>37</sup>

- (c) Although the submission of blank forms was given as a reason for the Decision of the Deputy Registrar, the Response of the Registry does not deal directly with the issue. Paragraph 7<sup>38</sup> of the Response recites the relevant contents of the 17 December 2000 letter as providing to the Legal Assistant of "...pre-signed blank forms for payment and instructing her to alter his November 2000 draft statements of fees as she considers

<sup>32</sup> "I should like to explain certain points in that letter. ... I sent two blank forms for submission and reimbursement of expenses to Madam Mukangabo signed. These were sent to her "pro forma", by that I mean she was to complete the forms, fax them back to me signed so that I could re-check them and then fax them on to you. There is no reason why such an action should be criticized as, I insisted upon final approval of any claim submitted by her."

<sup>33</sup> Registry Response, page 4944

<sup>34</sup> idem: "In your letter 17 December 2001(sic, read 2000) to Mrs. Mukangabo you mentioned 3=2 blank papers signed by you. We would like to know the use it has been done." (sic)

<sup>35</sup> Registry Response, page 4929.

<sup>36</sup> Registry Response, page 4935: "3. You did not address the issue of blank documents sent with your signature to your assistant for the submission of her claims as mentioned in your letter of 17 December 2000. We will appreciate to receive your comments as you were supposed to certify all her statements of fees prior to their submission. 4. Furthermore, we noted from your letter of October 29, 2001 that you also signed blank documents for your assistant's work schedules. Could you specify how many blank documents you signed, how many were used and if your assistant is still in position (sic) of such blank documents?"

<sup>37</sup> "I made it plain in my letter to you of 29<sup>th</sup> October that the only blank documents that were sent were for work schedules. Two were sent. I refer to my reply of 29<sup>th</sup> October at point 2 (c) no other blank documents were sent. My records show that the work schedules submitted for the Assistant on 20<sup>th</sup> December were sent by me from my office and signed by me. The subsequent Programme de Travail for January, February and March were sent by me from my office. The two blanks were never used. As I stated in my reply of 29<sup>th</sup> October I did not send any blank documents for submission of Fee Payments. In salary only two blank Programme de travail were sent. Neither was used. As it turned out, the better solution was for me to prepare and submit her work schedule and mine together from this office and accordingly the blanks were superfluous. I trust this is now clear."

<sup>38</sup> Registry Response, page 5020

*necessary in order to maximize the payment. This information of dishonesty was forwarded to Mr McCartan for his comments.*" In its account of what happened, the Registry submission refers to the letter from the Registry dated 23 October 2001, asking Mr. McCartan to answer certain questions relating to the 17 December 2000 letter. The Registry submission then states that: *"On 25 October 2001, Mr. McCartan replied to the Registry's letter in which he avoided answering all the questions put to him on 23 October 2000, with an exception to question number 4 relating to certain payments to the legal assistant. The Registry's conclusion was that Mr. McCartan was being evasive."*

- (d) However, reference to the letter of 25 October 2001<sup>39</sup> from Mr. McCartan shows that it is not a reply to the letter from the Registry but a reply to a fax of a different date. Reference to the letter of 29 October 2001<sup>40</sup> from Mr. McCartan shows that this letter was the reply to the Registry enquiry of 23 October 2001.
- (e) The Registry's interpretation of the exchange of correspondence on the subject of the nature of the blank forms is that Mr. McCartan gave two contradictory explanations of what the forms were. In the 17 December 2000 letter and a letter on 31 May 2001, Counsel appeared to be referring to documents that could be used for submission of requests for payments for the Legal Assistant. In other letters, he described them as Work Schedules. The Registry's Response appears to interpret the blank forms as blanks for the submission of Mr. McCartan's fee and expense claims.<sup>41</sup> However, the original letter that started the speculation, the letter of 17 December 2000, stated: "Je joins aussi, quelquel feuilles de papier signee en blanc pour faciliter les approuvals de tes honoraires et remboursements." ("I enclose also some signed blank sheets of paper to assist in the approval of your fees and expenses." Emphasis is added in French and English.)
- (f) From Counsel's correspondence, correspondence from the Legal Assistant, and from internal evidence the Registry was entitled to conclude that in addition to the blank forms referred to in the letter of 17 December 2000, Mr. McCartan had sent initialed time sheets that were in part blank. However, the Registry should have put its analysis of the contradictions in correspondence and its conclusions to Mr. McCartan for comment and rebuttal. There is no documentary evidence that the Registry did this. However, for the purposes of the Review, the Registrar's full submissions were forwarded by my office to Mr. McCartan for his response but no response was made.
- (g) The passing of 'signed' blank forms, of whatever nature, to a team member is said by the Registry to be a breach of Articles 5 and/or 11 of the Code of Professional Conduct for Defence Counsel. The Articles state:

<sup>39</sup> Registry Response, page 4942.

<sup>40</sup> Registry Response, page 4929.

<sup>41</sup> Registry's Response, pages 4978, 4977.

**Article 5****Competence and Independence**

*In providing representation to a client, Counsel must:*

- (a) *Act with competence, dignity, skill, care, honesty and loyalty;*
- (b) *Exercise independent professional judgement and render open and honest advice;*
- (c) *Never be influenced by improper or patently dishonest behaviour on the part of a client;*
- (d) *Preserve their own integrity and that of the legal profession as a whole;*
- (e) *Never permit their independence, integrity and standards to be compromised by external pressures.*

**Article 11****Accounting for time**

*Counsel should account in good faith for the time spent working on a case and maintain and preserve detailed records of time spent. Counsel is under a duty to set his bills and fees with moderation.*

- (h) The Registry does not clarify which part of these Articles the passing of pre-signed blank forms (of either type) to the Legal Assistant would be breached. I am left to speculate that the passing of such forms might breach the Article 5 duty of care. It might also breach the good faith accounting requirement of Article 11 if the forms provided were to be submitted to the Registry without checking by Counsel. But, if the forms were for the Legal Assistant's Work Programmes, Mr. McCartan stated that the forms were to be sent back to him and checked before submission. The Registry came to the conclusion on the basis of the evidence that Counsel, in submitting pre-signed forms to the Legal Assistant, had arranged to mislead the Registry in that a signature on a document represents to the Registry that the contents have been checked and that the signatory has satisfied himself that the work described therein was performed. Additionally, Mr. McCartan had the recourse of reply to the Registry analysis in this Review process which he did not take up.

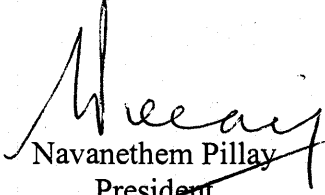
**FINDS**, in accordance with the above reasoning, in relation to Mr. McCartan's complaints:

- (i) that while specific allegations were not made by the Registry to Mr. McCartan that he had instructed his Legal Assistant to inflate his fees, he was made aware and was indeed aware that this was the allegation against him and that it was being investigated.
- (ii) that the substance of the Legal Assistant's allegation was given to him and he was able to comment on it.
- (iii) that Counsel was not given sufficient opportunity to comment on the Registry's analysis and conclusions of the discrepancies in the Time Sheets, Fee Statements and other related documentation.
- (iv) that no specific allegations were put to Counsel for inflating the bill of October 2000.

- (v) that, while the Registry did not specifically allege particular wrongdoing, their communications made it clear - and Counsel by his responses made it clear that he understood - that he was being investigated for "wrongdoing".
- (vi) that the allegation of the Legal Assistant was put to him by the OIOS.
- (vii) that Counsel did not need to be given an oral hearing in respect of administrative decisions that related to the breaches of the Code of Conduct alleged in the Decision. I find that Counsel was given a "hearing" in respect of the matters referred to above in the sense that he was allowed to make comments on the factual issues being considered by the Registry, except in respect of the analysis of the documentation referred to above. In an effort to address the failings observed in paragraphs (iii) and (iv), Mr. McCartan was afforded an opportunity to respond during the Review process but he did not do so. Furthermore, all of the documents that formed the subject matter of the analysis were known to or were submitted by Mr. McCartan. The analysis cannot be faulted.
- (viii) that there was no formal putting to Counsel of the allegations against him. I find that generally, in respect of administrative decisions, there is no such requirement. I find that what is required is the giving to Counsel of a sufficient opportunity to meet the allegations against him which must include a detailing of those allegations. In some instances such as those detailed above, the specific allegations were not put to Counsel but were apparent to him from the enquiry as a whole.
- (ix) that the part of the Deputy Registrar's decision that found financial dishonesty is punitive in effect. I find, further, that this finding required a high standard of compliance with the requirements of natural justice, and that in the context of this enquiry, that standard was met.
- (x) that while the Registry was bound to make its Decisions in accordance with natural justice, there is no observable or credible basis for Mr. McCartan's complaint that the Registry had to accord him the rights enumerated in Article 20(4) of the Statute.

**ACCORDINGLY, I CONFIRM** the Decision of the Deputy Registrar.

Arusha, 13 May 2002

  
Navanethem Pillay  
President

(Seal of the Tribunal)

