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

Date: 22 March 2007

Original: English

IN THE DISCIPLINARY BOARD
Established Pursuant to Article 48(C) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal (IT/125/Rev.2)

Before: **Judge Iain Bonomy, Chairperson**
Judge Christine Van Den Wyngaert
Judge Bakone Justice Moloto
Mr John Ackerman, ADC-ICTY
Ms Mira Tapušković, ADC-ICTY

Registrar: **Mr. Hans Holthuis**

Order of: **22 March 2007**

IN THE MATTER OF MR DEYAN RANKO BRASHICH,
ATTORNEY AT LAW FROM THE UNITED STATES

DECISION IN THE APPEAL BY THE REGISTRAR TO THE DISCIPLINARY BOARD

Appellant: Hans Holthuis, Registrar

Respondent: Deyan Ranko Brashich, Attorney at Law from the United States

1. This is an appeal at the instance of the Registrar[1] ("Appellant") against the Disciplinary Panel's Decision of 6 December 2006[2] dismissing the complaint by the Registrar that Deyan Ranko Brashich ("Respondent") had breached Articles 35(v) and 35(i) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal ("Code"). Before turning to the merits, we address a number of preliminary issues.

Jurisdiction of the Disciplinary Board

2. When the Respondent first heard of the appeal, he submitted a communication in which he mentioned a number of preliminary issues, including whether the Board was validly constituted and thus had jurisdiction to deal with the appeal.[3] In its Order Determining Procedure and Setting Time Schedule, dated 25 January 2007, the Board required the Respondent to include in his response to the appeal "all matters he wishes to raise, including challenge to the competence of jurisdiction of this Board, the timing of the appeal, and any defence on the merits of the appeal". The Respondent did not mention in his response the issue of "competence of jurisdiction" of the Board.[4] Nevertheless the Board considers that it is *pars iudicis* to address the issue of competence of jurisdiction whenever there is any hint of controversy about it. The Board has accordingly considered the question whether it was validly constituted and thus has jurisdiction to determine the appeal.

3. The appeal is presented under Article 48 of the Code which, in relevant part, is in these terms:

> "(B) In cases where the Disciplinary Panel has decided that a charge has not been proved, the Registrar may file an appeal with the Disciplinary Board within fourteen days of notification of the decision to the respondent.
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> (C) the Disciplinary Board shall consist of:

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[1] The Registrar initially filed a notice of its intent to appeal by filing a memorandum with the Office of the President in which the Registrar requested that the Disciplinary Board be convened. That memorandum is dated 28 December 2006 (hereinafter referred to as "Registrar's Memorandum"). In the memorandum, the Registrar requested an extension to file an appeal. Before action was taken to grant or deny the appeal, the Registrar filed an appeal, titled "Registrar's Appeal Against Disciplinary Panel's Decision DP-2-5 of 6 December 2006 (hereinafter referred to as the "Registrar's Appeal") which is dated 16 January 2007.

[2] *The Registrar of the Tribunal v. Mr. Deyan Ranko Brashich, Attorney at Law, United States*, D-P-2-5, Decision of the Disciplinary Panel (Confidential), 6 Dec 2006.

[3] This document was initially filed as Prosecutor v. Momcilo Krajisnik *(sic)*, *Ex Parte and Confidential*, Case No. IT-00-39 A, 12 January 2007, and was titled, "Acknowledgment of Receipt of Order, Reservation of Rights and Demand for Documents". Pursuant to the Disciplinary Board's "Order Determining Procedure and Setting Time Schedule for the Disciplinary Board" (Confidential), dated 25 January 2007, (hereinafter, "Order Determining Procedure") this submission was withdrawn from the Registry and filed instead with the Disciplinary Board's records.

[4] In the Matter of Mr. Deyan Ranko Brashich, Attorney from the United States, Response to the Registrar's Filing Dated January 16, 2007 (Confidential), 7 Feb 2007, and In the Matter of Mr. Deyan Ranko Brashich, Attorney from the United States, Further Response to the Registrar's Filing Dated 16 January 2007 (Confidential), 16 Feb 2007.

(i) three Judges to be appointed by the President of the Tribunal;

(ii) two members of the Association of Counsel to be appointed for a two year period, and in accordance with the Association's statute."

4. The use of the definite article in the designation of "the" Disciplinary Board and the reference to the appointment of two members of the Association of Defence Counsel for a period of two years indicate that the Disciplinary Board is a standing body rather than a body constituted *ad hoc* for each appeal. On the other hand, the absence of any reference to the term of office of judges appointed to the Board appears to allow for the possibility that they might be appointed either for a period or ad hoc. The impression that either is possible is enhanced by the terms of paragraph (D) of Article 48, as follows:

"(D) No Judge who sat as a member of the Chamber before which the respondent appeared shall be eligible to sit as a member of the Disciplinary Board on the hearing or determination of any charge against the respondent for professional misconduct".[5]

5. In any event, on 6 December 2006, when the Disciplinary Panel handed down and notified the parties of its Decision, no membership of the Disciplinary Board had been appointed. On 28 December 2006 the Registrar sent a memo to the President indicating his intention to appeal to the Disciplinary Board and asking that it be convened.[6] On 5 January 2007 the President appointed three judges.[7] On 10 January the Association of Defence Counsel appointed two of their members.[8] The Disciplinary Board was thus constituted in terms of Article 48(C). Thereafter, on 16 January, the President issued an Order convening the Disciplinary Board comprising the five members appointed.[9]

6. It is commonplace for members to be appointed to boards, panels, tribunals etc., for specific terms of office and entirely understandable that that should be the position in relation to counsel.[10]

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[5] *Ibid.*

[6] Registrar's Memorandum.

[7] Memorandum, President Fausto Pocar, "Appeal of Decision of the Disciplinary Panel in the matter of the Registrar of the Tribunal v. Mr. Deyan Ranko Brashich", 5 January 2007.

[8] Memorandum, Mr Michael G. Karnavas, President, Association of Defence Counsel, "Disciplinary Board – ADC Members Appointed," 10 January 2007.

[9] This order was initially styled "*Prosecutor v. Momčilo Krajišnik, Order Convening a Disciplinary Board, IT-00-39-A (Ex Parte and Confidential), 12 January 2007*". Pursuant to the 25 January 2007 "Order Determining Procedure", the President's Order Convening the Board was withdrawn from the Registry and filed with the Disciplinary Board.

[10] For example, there are such appointments to the Disciplinary Panel under Article 40 of the Code, and appointments to the Disciplinary Council of the Association of Defence Counsel, in accordance with Article 14 of the Constitution of the Association of Defence Counsel Practising 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.

It is equally understandable that a different arrangement should apply to the appointment of judges. They have a fixed term of office at the Tribunal. It is sensible that any situation giving rise to even a suspicion of partiality should be avoided. Hence the specific provision in Article 48(D). Whenever the Disciplinary Board sits, specific attention must be given to the question whether any of the judges presided over proceedings referred to in that Article. In the event that any did, the President would be required to appoint a substitute. In the absence of such an issue, the judges appointed by the President and still in office would sit on the Board whenever convened. None of the judges appointed by the President sat as a member of the Trial Chamber before which the Respondent appeared. The Board has thus been constituted in accordance with the provisions of Article 48(C) and is convened to hear this Appeal in accordance with Article 48. For these reasons, we have concluded that the Board has jurisdiction to hear this Appeal.

Timeliness Of The Appeal

7. Since the Disciplinary Panel's Decision was intimated to the parties on 8 December 2006[11] and the Appellant first gave indication of an intention to appeal on 28 December,[12] on any view of the matter the appeal is late. In terms of Rule 126 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), where the time prescribed for the doing of any act is to run as from the occurrence of an event, that time shall begin to run as from the date of the event. As noted above, the Appellant was bound to "file an appeal" within fourteen days of notification of the Decision. We consider that, in order to satisfy that requirement, the Appeal Brief itself must be filed. In this case the Appeal Brief was not filed until 16 January,[13] coincidentally the date on which the President convened the Board.

8. The Appellant invites the Board to hear the matter, though late, on the ground that Article 41(3) of the Code allows complaints to the Disciplinary Panel, brought out of time, to be pursued if they are "of general importance to the Tribunal".[14] The Appellant explains his failure to file the appeal within the prescribed time by reference to his "extraordinary workload,"[15] but does not suggest that that alone would justify considering the appeal out of time. We entirely agree with the Appellant's assessment that the fairly vague reference to his workload as justification for late filing of the appeal would not, of itself, be a sustainable basis for considering the appeal out of time.

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[11] *The Registrar of the Tribunal v. Mr. Deyan Ranko Brashich, Attorney at Law, United States*, D-P-2-5, Decision of the Disciplinary Panel (Confidential), 6 December 2006.

[12] Registrar's Memorandum.

[13] Registrar's Appeal.

[14] Registrar's Appeal.

[15] Registrar's Appeal, 16 January 2007, p. 8, para. 24 – 26.

9. On the other hand, the Disciplinary Board is persuaded, on exactly the same basis as the Panel, that the matter before it is one of general importance to the Tribunal as it concerns "the integrity of Defence Counsel and the proper expenditure of Tribunal funds".[16] The questions for the Board are whether it has power to extend the time-limit of fourteen days and, if so, whether it is appropriate in all the circumstances of this case to do so.

10. The Respondent submits that, not only is there no provision entitling the Board to entertain a late appeal, there is specific provision prohibiting it.[17] He refers to Article 50 of the Code which is in these terms:

"Non Bis in Idem"

> "Once a proceeding or complaint has been finally adjudicated by the Disciplinary Board (*sic*) and an appeal has not been filed to the Disciplinary Board within fourteen days of notification, or by the Disciplinary Panel (*sic*), no further action shall be taken by the Disciplinary Panel or Disciplinary Board against the respondent with respect to the subject matter of the proceeding or complaint."

11. As it stands, that provision is incomprehensible. However, having regard to the terms of Article 49(A) and (B), which deal with the closely related matter of costs on completion of proceedings, the Board considers that the true terms of Article 50 are not faithfully reproduced in "The Code" and contain two misprints. Article 49(A) and (B) are in these terms:

> "(A) If a respondent is sentenced by the Disciplinary Panel, and an appeal is not filed, or by the Disciplinary Board, the respondent shall bear the costs of the procedure. ...
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> (B) If a proceeding or complaint is dismissed by the Disciplinary Panel, and an appeal is not filed, or by the Disciplinary Board, the Tribunal bears the costs of the proceedings, unless the Panel or Board decides, on the basis of reasonable cause, that the Respondent should bear up to fifty percent of the costs."

12. If, following the format of Article 49, the first reference to "Disciplinary Board" in Article 50 is replaced by a reference to the "Disciplinary Panel" and the later reference to the "Disciplinary Panel" is replaced by reference to the "Disciplinary Board", the provision makes sense and is consistent with the terms of Article 49. We proceed on the basis that the words "Panel" and "Board" were inadvertently transposed in the typing or printing of Article 50.

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[16] *The Registrar of the Tribunal v. Mr. Deyan Ranko Brashich, Attorney at Law, United States*, D-P-2-5, Decision of the Disciplinary Panel (Confidential), 6 December 2006, p. 8, para. 27.

13. The Respondent submits that the terms of Article 50 provide for finality in the event that the fourteen days for appeal are allowed to lapse without any further steps being taken. However, the heading of Article 50 is "*Non Bis In Idem*". The Article is designed to rule out the submission of any new complaint based on the subject-matter of an earlier one once the proceedings before the Disciplinary Panel and the Disciplinary Board are complete. In any event, in the opinion of the Board, such a provision has no application to the question whether there is authority to entertain a late appeal. In its present form, Article 50 cannot reliably serve as any authoritative guidance, given the appearance that there must be two misprints in the Article.

14. The Respondent rightly points out that, in contrast to the situation before the Panel, where Article 41(3) of the Code provides specifically for the pursuit of a complaint after the expiry of the time-limit for making it if the matter is of general importance as described above, there is no specific provision authorising the Board, in that Article or elsewhere in the Code, to consider matters presented out of time.[18] The Appellant submits that Article 41(3) should be applied *mutatis mutandis* to the work of the Board.[19] On that basis the Appellant moves the Board to hear the matter out of time.

15. The Code, under which this appeal is taken, is made under the provisions of the Rules, in particular Rule 46(C). Rule 45(A) further provides for a Directive on the Assignment of Defence Counsel[20] ("Directive") to provide services under the Tribunal's legal aid scheme. The Code and Directive are accordingly documents drawn up in terms of the Rules. Rule 127 of the Rules is a general provision allowing recognition as validly done, in appropriate circumstances, of any act done after the expiration of a time-limit even where the limit has already expired. The Rule is in these terms:

Variation of Time-limits

(A) Save as provided by paragraph (C), a Trial Chamber or Pre-Trial Judge may, on good cause being shown by motion,

(i) enlarge or reduce any time prescribed by or under these Rules;

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[17] *In the Matter of Mr. Deyan Ranko Brashich, Attorney from the United States*, Response to the Registrar's Filing Dated January 16, 2007 (Confidential), 7 February 2007, para. 10 – 11.

[18] *Ibid.* at para. 12 – 17.

[19] Registrar's Appeal at para. 25 and "Registrar's Reply to Mr Deyan Ranko Brashich's Response to the Registrar's Appeal Against Disciplinary Panel's Decision DP-2-5 of 6 December 2006" (Confidential), filed 22 February 2007 (hereinafter "Registrar's Reply"), at para. 15.

[20] This reference is to the "Directive on Assignment of Defence Counsel", Directive No. 1/94. The Board has relied upon those versions of the Directive which were applicable on the relevant dates of events reported in the proceeding, recognizing that there have been amendments to the Directive on 12 July 2002, 28 July 2004, and 29 June 2006.

(ii) recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired.

(B) In relation to any step failing to be taken in connection with an appeal, the Appeals Chamber or Pre-Appeal Judge may exercise the like power as is conferred by paragraph (A) and in like manner and subject to the same conditions as are therein set out.

(C) This Rule shall not apply to the times prescribed in Rules 40*bis* and 90*bis*.

16. The Board considers that the power to alter time-limits is designed to apply wherever such an issue arises under the Rules.[21] The Board is thus empowered to entertain the appeal on good cause being shown by Motion. The Appellant has moved the Board to consider the appeal, albeit late, and founds the motion upon the general importance of the matter to the Tribunal.

17. In exercising its discretion to vary the time requirement, the Board agrees with the Panel that the general importance of the matter in issue to the Tribunal merits allowing the appeal to be considered. There is nothing before us to indicate that the delay involved has caused, or could cause, any prejudice to the Respondent. The Board accordingly considers it appropriate to exercise its discretion in favour of considering the Appeal.

Standard of Proof

18. Although the Appellant has submitted no ground of appeal challenging the standard of proof applied by the Panel, he has submitted that the appropriate standard to which the essential facts must be established is "a preponderance of the evidence". He makes that submission by reference[22] to the Decision of the Disciplinary Panel in the *Registrar of the International Tribunal for the former Yugoslavia v. Slaviša Prodanović, Attorney at Law from Foča, Bosnia and Herzegovina.*[23] That case does indeed suggest that "as a body conducting a procedure which is administrative in nature, the requisite burden of proof to be applied is not as strict as in criminal cases. The Respondent must prove all of the essential facts by a preponderance of the evidence".[24]

19. The Board rejects the reasoning in that opinion. Article 47(C) of the Code provides specifically as follows:

[21] The Board notes that the Respondent filed two requests for Enlargement of Time under Rule 127 in this proceeding, each of those requests having been granted by the Board. See "Rule 127(A) Motion for Enlargement of Time Within Which to File Attachment I to Respondent's Response Dated February 7, 2007" (Confidential) and "Rule 127(A) Motion for Enlargement of Time Within Which to Respond to a Cited Disciplinary Panel Precedent" (Confidential), filed 8 February 2007.

[22] Registrar's Appeal, para. 22.

> "A Respondent against whom a charge of professional misconduct has been found proved beyond a reasonable doubt may be sentenced by the Disciplinary Panel to be, either alternatively or cumulatively: ..."

The various possible sanctions are then listed. In his original complaint the Appellant invited the Disciplinary Panel to apply appropriate sanctions from those listed in Article 47(C) and, in addition, to consider utilising the remedy of *restitutio in integrum* to recover legal aid funds paid to the Respondent.[25] The complaint is plainly one to which Article 47(C) applies. The standard of proof is accordingly proof beyond a reasonable doubt, the standard applied by the Panel in this case.

The Merits

20. The Appellant's complaint relates to (i) the alleged failure of the Respondent to disclose between 22 September 2002 and 10 April 2003 that he had been disciplined for misconduct in the State of New York, in breach of his obligation under Article 35(v) of the Code,[26] and (ii) his alleged failure to protect his client's interests in violation of Articles 11 and 35(i) of the Code.[27] The Appellant's first two grounds of appeal relate to the first complaint.[28] The Board addresses them together. The Respondent relies on his submissions to the Panel, which were no more than a plea in mitigation.[29]

(i) Failure to Disclose

21. On 25 January 2002, the New York Supreme Court Appellate Division found that the Respondent had violated Articles DR 1-102(A)(7)(excessive fees) and DR 2-106(A)(conduct adversely reflecting on fitness to practice) of the New York Lawyer's Code in Relation to the

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[23] DP-2-3, 5 April 2004.
[24] *Ibid. at para 25.*
[25] Registrar's Appeal, para. 57 (4).
[26] "In the matter of a disciplinary complaint against Mr Deyan Ranko Brashich", 23 December 2004 (Confidential), para 19 – 28.
[27] *Ibid.* at para 29 – 43.
[28] Registrar's Appeal, para. 27 – 47.
[29] Response, para. 30.

Proceedings in the *Matter of the Estate of Thomas S. Callahan* ("Callahan proceedings").[30] The Respondent sought and received from Mrs. Lubjica Callahan, as Administratrix of Thomas S. Callahan, fees and disbursements for the representation of Mrs. Callahan in various challenges to Mr. Callahan's Will. The Respondent's fees and expenses were found to be excessive in relation to both the reasonable value of the services rendered and the size and complexity of the estate.

22. On 1 April 2003, after considering the recommendation of a court-appointed referee, the New York Supreme Court, Appellate Division, suspended the Respondent from the practice of law in the State of New York for a period of one year from 1 May 2003.[31]

23. On 10 April 2003 the Respondent informed the Appellant, by letter, of the finding of misconduct in the State of New York in the Callahan proceedings and the sentence of suspension from the practice of law.[32]

24. The documentation, which he forwarded to the Appellant, also contained information about a decision by the New York Supreme Court regarding the Respondent's professional misconduct in the *Matter of Lucille M. Stern* ("Stern proceedings").[33] In those proceedings the New York Supreme Court found that the Respondent had violated Articles DR 1-102(A)(4), (5), (8) and DR 5-101(A) of the New York Lawyer's Code of Professional Responsibility. On 5 November 1998 the New York Supreme Court publicly censured the Respondent for his conduct. The decision to suspend the Respondent for conduct in the Callahan matter was, in part, based upon his prior disciplinary history in his State Bar, which, in addition to the Callahan and Stern matters, included seven other admonitions for misconduct.[34]

25. Following the finding of misconduct, but before the sanction was imposed, amendments to the Code came into force on 11 September 2002 and the amendments to the Directive came into force on 26 August 2002.

Following the amendments, Article 35(v) of the Code provided:

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[30] "In the matter of a disciplinary complaint against Mr Deyan Ranko Brashich", 23 December 2004 (Confidential), at Annex III, the proceeding styled: *In the Matter of Deyan R. Brashich (admitted as Deyan Ranko Brashich), an attorney and counsellor-at-law: Departmental Disciplinary Committee for the First Judicial Department, Petitioner, Deyan R. Brashich, Esq., Respondent, M-5042,* Appellate Division of the Supreme Court of the State of New York, First Judicial Department, Notice of Entry, an unpublished order, January 25, 2002.

[31] "In the matter of a disciplinary complaint against Mr Deyan Ranko Brashich," Annex III, the proceeding styled: "*In the Matter of Deyan R. Brashich (admitted as Deyan Ranko Brashich), an attorney and counselor-at-law: Departmental Disciplinary Committee for the First Judicial Department, Petitioner, Deyan R. Brashich, Esq., Respondent"* M-5850, M-6380, April 1, 2003.

[32] "In the matter of a disciplinary complaint against Mr Deyan Ranko Brashich," Annex III, filed by the Registrar of the Tribunal on 23 December 2004.

[33] *Ibid.* at Annex I.

[34] *Ibid.* at Annex III, p. 5.

"It shall be professional misconduct for counsel, *inter alia*, to:

(v) provide inaccurate information or fail to disclose information regarding counsel's qualifications to practice before the Tribunal as set out in the Rules and, where counsel has been assigned to a client, the Directive".

Following the amendments, Article 14A(ii) of the Directive provided:

"Any person may be assigned as counsel if the Registrar is satisfied that he is admitted to the list of counsel envisaged in Rule 45(B) of the Rules. A person is eligible for admission to the list if:

i. he is admitted to the practice of law in a State, or is a university professor of law;

ii. he has not been found guilty in relevant disciplinary proceedings against him where he is admitted to the practice of law or a university professor, and has not been found guilty in relevant criminal proceedings against him;

iii. he speaks one of the two working languages of the Tribunal, except if the interests of justice do not require this;

iv. he possesses reasonable experience in criminal and/or international law;

v. he agrees to be assigned as counsel by the Tribunal to represent any indigent suspect or accused;

vi. he is or is about to become a member of an association of counsel practising at the Tribunal."

27. The Practice Directive, at paragraph 19(C)(ii) as amended on 12 July 2002, also required that the Registrar withdraw the assignment of counsel who no longer satisfied the requirements of Article 14A. That provision stated:

"The Registrar shall withdraw the assignment of counsel:

i. upon the decision by a Chamber to refuse audience to assigned counsel for misconduct under Rule 46(A);

ii. where counsel no-longer satisfies the requirements of Article 14(A); or

iii. where counsel has been found to be in contempt pursuant to Rule 77 of the Rules."

28. In arriving at its determination that the Respondent did not breach Article 35 of the Code the Panel made two crucial determinations which the Appellant challenges as errors in law. In the first place, the Panel held that, by taking no action to disclose the findings of misconduct prior to 10 April 2003, the Respondent had simply "delayed" disclosure, and had not failed to disclose the

25 January 2002 finding of misconduct, and was thus not guilty of violating Article 35(v).[35] In the second place, the Panel decided that the obligation to disclose arose only in relation to findings of misconduct made after the amended terms of Article 35(v) came into force, and thus determined that the earlier finding in the Stern proceedings did not require disclosure.[36]

29. In reaching the first of these crucial determinations, the Panel noted that the Respondent should have disclosed the finding in the Callahan proceedings to the Appellant as from 11 September 2002, but that the subsequent delay did not amount to a "failure to disclose".[37] The Panel appears to have been influenced by the fact that no sanction had been imposed and that the Respondent had reason to believe that he would not be suspended from practice.[38] In the view of the Board these factors are irrelevant to the question whether there was an obligation to disclose the finding of professional misconduct in the Callahan proceedings when the revised Code came into force. The amended terms of Article 35(v) apply to findings of misconduct and not to the imposition of sanctions. In the opinion of the Board any material delay thereafter in disclosing the fact of the finding amounts to a failure to disclose it for the period during which it remains undisclosed. The Board is accordingly of the view that the Panel erred in law in so construing the expression "failure to disclose".

30. In reaching the second crucial determination the Panel found, without further elaboration, that the obligation under Article 35(v) was not retroactive in nature and that it did not apply to the Stern proceedings in 1998.[39] That decision depends upon distinguishing the application of the Article to the Callahan proceedings. The distinction made by the Panel was that the Callahan proceedings were "ongoing", in the sense that, although a finding of misconduct had been made, no sanction had been imposed.

31. The Board can see no basis in the terms of the Article for such a distinction. If the Article applies to recent misconduct findings, predating the introduction of the disclosure obligation, then, it must also apply to older ones. The crucial question in relation to both the Callahan and Stern proceedings is, therefore, whether the obligation to disclose related to findings made prior to the obligation coming into force. It is plain from the language of the Directive that counsel who has been found guilty in relevant disciplinary proceedings in the jurisdiction where admitted to the practice of law is not qualified for assignment. The Board accordingly concludes that the

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[35] *The Registrar of the Tribunal v. Mr. Deyan Ranko Brashich, Attorney at Law, United States*, D-P-2-5, Decision of the Disciplinary Panel (Confidential), 6 December 2006 at para 55 – 59.

[36] *Ibid.* at para. 58.

[37] *Ibid.* at para. 56.

[38] *Ibid.* at para. 55.

[39] *Ibid.* at para. 58.

obligation to disclose also applies in principle to any relevant findings of misconduct made prior to 11 September 2002.

32. Of course, if Article 14A(ii) of the Directive were to apply without qualification to all past findings of misconduct, that could lead to injustice. However, the findings that matter are those made "in relevant disciplinary proceedings".[40] The antiquity of a finding of misconduct is at least one factor to be weighed in the balance in determining whether it was made in "relevant" proceedings. Where the findings made relate to conduct adversely reflecting on fitness to practice or excessive fees, they are clearly relevant in the context of Article 14A(ii).

33. The failure to disclose the finding in the Callahan proceedings was deliberate, as is clearly shown by the Respondent's submissions. In these circumstances it cannot be said, as the Panel found, that there was "no intention on the part of the Respondent to deceive the Tribunal".[41] The Respondent is responsible for the natural consequences of his deliberate conduct and is thus beyond a reasonable doubt guilty of violating Article 35(v) in respect of the Callahan proceedings.

34. The finding in the Stern proceedings also related, *inter alia*, to excessive fees. The finding in these proceedings was taken into account by the New York Supreme Court Appellate Division in determining their sanction in the Callahan proceedings. Although the finding in the Stern proceedings was made in 1998, it remains relevant in terms of Article 14A(ii) in light of the whole circumstances of the Respondent's misconduct record. The Board is satisfied, again beyond a reasonable doubt, that the Respondent is also guilty of violating Article 35(v) in respect of the Stern proceedings.

(ii) Failure to Protect Client's Interests

35. The third ground of appeal is restricted to a very specific finding by the Panel which is challenged as an error in interpretation of Article 11 of the Code.[42]

36. The second complaint made by the Appellant to the Panel was broadly to the effect that, when the finding of misconduct was disclosed and the papers in the case in which the Respondent was acting had to be passed to new counsel, the state of affairs established that the Respondent had violated his duty under Article 11 of the Code to "represent (his) client diligently and promptly in order to protect the client's best interests" and his obligation under Article 9(D) of the Code upon

[40] Article 14(A)(ii) of The Directive as amended on 12 July 2002, and effective on 26 August 2002.

[41] *The Registrar of the Tribunal v. Mr. Deyan Ranko Brashich, Attorney at Law, United States*, D-P-2-5, Decision of the Disciplinary Panel (Confidential), 6 December 2006 at para 57.

[42] Registrar's Appeal, para. 48 – 56.

termination or withdrawal of representation to "take steps to the extent reasonably practicable to protect the client's interests, such as giving sufficient notice to the client, or surrendering papers and property to which the client or the Tribunal is entitled".[43] The Appellant's complaint was that the failure to act diligently was obvious from the available paperwork. The Appellant alleged that the Respondent had also been "obstructive or otherwise negligent"[44] in handing over the papers to new counsel in the period following his withdrawal. In responding to this ground, the Respondent again relied upon his submissions to the Panel in which he denies the complaint. In the Panel submission, the Respondent denied this complaint. The Appellant alleged before the Panel that this conduct on the part of the Respondent was a breach of Article 35(i) of the Code which provides:

> "It shall be professional misconduct for counsel, *inter alia*, to:
>
> (i) Violate or attempt to violate the Statute, the Rules, this Code or any other applicable law ...".

37. In arriving at its determination that the Respondent was not guilty of professional misconduct by breaching Article 35(i), the Panel made the specific finding that acting diligently under Article 11 of the Code "did not require the Respondent to maintain a record of the work performed which would have facilitated the transfer of the case to replacement counsel".[45] The Appellant's third ground of appeal is restricted to a specific challenge to that determination as an erroneous interpretation of Article 11.[46]

38. It is plain that a certain amount of paperwork was handed over. On the other hand, the Respondent submitted that, since he expected to continue to represent his client, much of the product of his preparation was "in his head" and had not been committed to paper in a form that could be handed over. He invited the Panel to carry out a detailed investigation of the work product actually handed over.[47] The Panel did not undertake that task. It made the finding, which the Appellant challenges, to the effect that acting "diligently" under Article 11 of the Code did not require the Respondent to maintain a complete case file. The specific finding challenged is that the Code did not require him "to keep a written record of the work performed".[48] The Appellant challenges that finding as an error in law in light of an acknowledgement by the Disciplinary Panel

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[43] "In the matter of a disciplinary complaint against Mr Deyan Ranko Brashich", para. 29 – 43.

[44] *Ibid.* at para 35.

[45] *The Registrar of the Tribunal v. Mr Deyan Ranko Brashich, Attorney at Law, United States*, D-P-2-5, Decision of the Disciplinary Panel (Confidential), 6 December 2006 at para 60.

[46] Registrar's Appeal at para. 51.

[47] Response to Complaint Filed by the Registrar on December 23, 2004, filed before the Disciplinary Panel on April 11, 2005, at p. 9, Part III.

[48] Registrar's Appeal at para 51.

that "... it would have been prudent for the Respondent to have maintained his case file in a state that would have facilitated the transfer of the file more readily to replacement counsel".[49]

39. It does not appear to the Board that that last statement was any more than cautionary advice. It was not made in the context of finding unacceptable inadequacies in the state of his work product. It is perfectly conceivable that counsel who commits a significant amount of the information in a case to memory could transfer that to paper in the course of handing over the case to new counsel. It follows that it is not a requirement of Article 11 that the Respondent should have kept a written record of all work performed. That is a much too narrow statement of his obligation. It follows that violation of Article 35(i) could not be established by the failure to keep a written record of the work performed *per se*. Since the Appellant's third ground of appeal was confined to that particular point, the Board cannot sustain the appeal on that ground.

(iii) Sanction

40. Article 47(C) of the Code provides for the imposition of sanctions in these terms:

> "(C) A respondent against whom a charge of professional misconduct has been found proved beyond a reasonable doubt may be sentenced by the Disciplinary Panel to be, either alternatively or cumulatively: admonished by the Disciplinary Panel;
>
> (i) given advice by the Disciplinary Panel as to his future conduct;
>
> (ii) publicly reprimanded by the Disciplinary Panel;
>
> (iii) ordered to pay a fine of up to 50,000 € to the Tribunal;
>
> (iv) suspended from practising before the Tribunal for an appropriate fixed period of time not exceeding two years;
>
> (v) banned from practising before the Tribunal."

41. The Board considers it appropriate to ensure that counsel and potential counsel before the Tribunal have a clear understanding of their obligations to disclose prior findings of professional misconduct. The Board is therefore of the clear view that its determination and the ensuing sanction should be made public.

[49] *The Registrar of the Tribunal v. Mr Deyan Ranko Brashich, Attorney at Law, United States*, D-P-2-5, Decision of the Disciplinary Panel (Confidential), 6 December 2006 at para 60.

42. While it is not easy to identify the precise cost to the Tribunal's legal aid fund of the Respondent's misconduct, it is clear that it had a significant impact, because the Respondent disclosed the findings of misconduct only ten days before the commencement of the trial of the client he was then representing.

43. The Appellant invites the Board to order *restitutio in integrum* in favour of the Tribunal's legal aid fund by ordering the Respondent to repay the fees paid to him and his team during the period of unlawful representation amounting to at least 333,028 US dollars. The Board notes that the amount paid to the Respondent personally amounted to approximately 115,660 US dollars and that, if there were any authority to order repayment, the latter would be a far more appropriate figure than the former one which includes payments to personnel against whom there is no complaint.

44. The Board can find no basis in the legislative framework of the Tribunal for ordering *restitutio in integrum*. The Appellant has advanced no argument and presented no authority in support of the proposition that the Board has power to make such an order.

45. Having said that, however, it is a matter of concern to the Disciplinary Board that the remedy sought by the Appellant in this matter is not available under the current rules. It is, we think, important for an institution such as this Tribunal to adopt and to enforce the principle of *"restitutio in integrum"*, which finds support in some domestic jurisdictions which participate in this and other international bodies, particularly where the funds at issue are public funds.[50] The Tribunal has a significant interest in ensuring that the public can have confidence that their funds shall not be used in an irresponsible way, and that there are sufficient mechanisms in place with regard to regulating the conduct of counsel appearing in the Tribunal to ensure that, where misconduct has resulted in the loss or misuse of such public funds, or where additional public funds must be expended as a result of the misconduct of such counsel, that such funds can be recovered.

[50] We have reviewed provisions in the United Kingdom, the United States, Sweden, Germany, South Africa, Belgium and France. There is no authority specifically to order *"restitutio in integrum"* in Sweden, Germany, South Africa, Belgium or France. However, there are varying provisions in each jurisdiction which would allow financial penalties as follows: United States: payment of monetary restitution; United Kingdom: a barrister may be required to forego fees: a solicitor was found guilty of professional misconduct in *Allan Macpherson v The Law Society* [2005- EWHC 2837 (Admin)] and was ordered to pay costs; Germany: a fine of up to 25,000€ may be ordered; Sweden: a fine may be ordered; France: no mention of a financial penalty; Belgium: the disciplinary panel may award costs against the lawyer for the cost of bringing the disciplinary charges, and "Le Batonnier", or "President" of the Bar may order an advocate to repay client fees; South Africa: may order a fine of up to R10000 or an order for costs incurred by the provincial law society council. According to the Cape Bar Council, the repayment of client fees is brought in a separate civil action.

46. We think it important as well to note that in the relevant domestic jurisdiction of the Respondent, that is New York in the United States, the Appellant would be able to recover the funds it seeks. Specifically, Article 4, paragraph 90(2), section 6(a) of the New York Consolidated Laws states:

> "Where the appellate division of supreme court orders the censure, suspension from practice or removal from office of an attorney or counsellor-at-law following disciplinary proceedings at which it found, based upon a preponderance of the legally admissible evidence, that such attorney or counsellor-at-law wilfully misappropriated or misapplied money or property in the practice of law, its order may require him or her to make monetary restitution in accordance with this subdivision. Its order also may require that he or she reimburse the lawyers' fund for client protection of the state of New York for awards made to the person whose money or property was wilfully misappropriated or misapplied".[51]

47. We, therefore, urge amendment of the Code of Conduct to incorporate the award of "*restitutio in integrum*" in appropriate cases, with a provision which authorizes payment for services rendered under the theory of "*quantum meruit.*"[52] The jurisdiction in which the Respondent was licensed to practise law, New York, has held in several cases that an attorney's misconduct does not result in the loss of counsel's right to compensation for those services actually performed.[53]

48. The nature of the Tribunal, however, is such that the international community should expect that the conduct of counsel receiving financial compensation from funds provided by the supporting States will be carefully and thoughtfully regulated in regards to the expenditure of legal aid funds, and that there will be a remedy to restore those funds where the Counsel's conduct falls short of the standards set out in the Code of Conduct.

49. We further urge that the language of Article 50, *Non Bis in Idem* be modified to clarify the ambiguity which arises from the apparent typographical errors contained in that Article as it appears in the current Code of Conduct.

50. Finally, we urge that the review of the Code which we have urged above include the consideration of providing specific authority to address the issue of appeals filed out of time.

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[51] New York Consolidated Laws, Judiciary, Chapter 30, Article 4, Paragraph 90(2), 6-a.

[52] The Latin phrase for "as much as he deserved". *Quantum meruit* determines the amount to be paid for services when no contract exists or when there is doubt as to the amount due for the work performed but done under circumstances when payment could be expected. This may include a physician's emergency aid, legal work when there was no contract, or evaluating the amount due when outside forces cause a job to be terminated unexpectedly. If a person sues for payment for services in such circumstances the judge or jury will calculate the amount due based on time and usual rate of pay or the customary charge, based on *quantum meruit* by implying a contract existed. *Law.com Dictionary.*

[53] See, for example, *Hernandez v Nierenberg, et al.*, 15 Misc. 2d 818, 179, N.Y.S. 2d 322 (1958), *Brown v Moffitt*, 173 N.Y.S.2d 716 (1958).

51. Having regard to the fact that the Respondent was suspended from practice by the New York Supreme Court, this Board considers that his violation of Article 35(v) of the Code will be adequately penalised by the imposition of a fine of 10,000 US dollars to be paid within thirty days of the intimation of this Decision to him and by the issuing of a public reprimand to the Respondent.

DISPOSITION

52. The Appeal is upheld in part. The Respondent is found to be in breach of Article 35 (v) of the Code.

53. The Appeal is dismissed in all other respects.

54. The Respondent is ordered to pay a fine of 10,000 U.S. dollars to the Tribunal, to be effected within 30 days of the intimation of this order to him and

55. The Respondent is hereby reprimanded.

This decision is to be made public.

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

Judge Iain Bonomy
Chairperson

Dated this 22nd day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]