

UNITED
NATIONS



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: 16 December
2011

Original: English

IN THE DISCIPLINARY BOARD

**Established Pursuant to Article 48(D) of the Code of Professional Conduct for Counsel
Appearing Before the International Tribunal (IT/125 REV. 3)**

Before: Judge Fausto Pocar, Chairperson
Judge Bakone Justice Moloto
Judge Guy Delvoie
Ms. Colleen Rohan, ADC-ICTY
Mr. Karim A. A. Khan QC, ADC-ICTY
Registrar: Mr. John Hocking
Decision: 16 December 2011

**In the matter of
Mr Boris Aleksić (Case No. DP-2-11)**

CONFIDENTIAL AND EX PARTE

**DECISION ON THE APPEAL BY THE REGISTRAR
TO THE DISCIPLINARY BOARD**

Appellant: John Hocking, Registrar

Respondent: Boris Aleksić, Legal Associate to Vojislav Šešelj

1. The Disciplinary Board is seized of the Registrar's ("Appellant") 10 June 2011 Appeal ("Appeal") of the 9 May 2011 Disciplinary Panel ("Panel") Decision ("Decision") which dismissed the Appellant's disciplinary complaint of 31 December 2010 ("Complaint") that Mr. Boris Aleksić ("Respondent"), legal associate to Mr. Vojislav Šešelj, infringed Articles 35(iii)-(iv) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal ("Code") and/or Rule 44(A)(vi) of the Rules of Procedure and Evidence ("Rules").

I. PROCEDURAL HISTORY

2. In the Complaint the Appellant submitted that the Respondent (i) had made false statements about the medical treatment Mr. Vojislav Šešelj had been receiving in the UNDU by claiming that the UNDU does not adhere to "basic medical principles"; and (ii) "appear[ed] to endorse the view that the UNDU's Medical Officer "played a role in the murder of Slobodan Milošević" and that "the UNDU allegedly tampered with a blood analysis of Milošević"¹. The Appellant submitted that the Respondent's comments were dishonest and "likely to diminish public confidence in the Tribunal"², contrary to Article 35(iii)-(iv) of the Code and/or Rule 44(A)(vi) of the Rules.³

3. The Appellant submitted that despite the fact that the Respondent is not Counsel assigned or appointed to Mr. Šešelj as defined by the Rules, Rule 44(A)(vi) of the Rules and Article 35(iii)-(iv) of the Code apply to the Respondent because he signed an undertaking to be bound by the provisions of the Code and to respect the Rules and the Statute of the Tribunal.⁴

4. On 14 January 2011, the Panel invited the Appellant to provide his position on the application of the Code to a person who is not appearing as Counsel before the Tribunal.⁵ On 14 February 2011 the Appellant submitted a memorandum in response.⁶

5. The Panel received the Respondent's response to the Complaint on 25 March 2011 ("Response to Complaint"). The Respondent stood by his claim that Mr. Šešelj's health is at risk in

¹ Complaint, para. 3.

² Complaint, para. 4. See also Annex II. The Respondent is reported as having stated to Tanjug Agency (as published in *Politika* on 27 September 2010) that "Šešelj's health was seriously jeopardized, and that his medical treatment at The Hague Tribunal did not adhere to the basic medical principles." It is reported that the "Committee for the Defence of Šešelj" received an analysis from the Russian Academy of Sciences entitled "Stop Murder of Vojislav Šešelj – Special Operation of The Hague Tribunal for Murder of Šešelj is Entering the Final Stage". According to the article, the analysis by the Russian Academy reports that UNDU medical officer, Dr. Falke played a role in "the murder of Slobodan Milošević", and together with the then Commanding Officer of the UNDU, tampered with Milošević's blood analyses and withheld information about the results for several months. The analysis is also reported as stating that Dr. Falke was responsible for "forging other information, including keeping two files on issuing medicines".

³ Complaint, para. 4.

⁴ Complaint, paras 2, 4.

⁵ Letter from the Panel to the Appellant, 14 January 2011.

⁶ Memorandum regarding "Inquiry of the Disciplinary Panel Concerning the Application of the Code of Conduct", from the Appellant to the Panel, 14 February 2011 ("Appellant's Memorandum on application of Code").

the UNDU. He said that he made the comments in order to ensure that Mr. Šešelj receives the best medical treatment possible.⁷

6. With regard to the comments about Mr. Milošević's death, the Respondent submitted that he did not wish to comment on the Deputy Registrar's remark that he appears "to endorse the view expressed by certain Russian medical experts [...]".⁸ He asserted that what "appears to [the Deputy Registrar] and what does not appear to him cannot be a matter for a serious debate".⁹ He further stated that a lawyer's duty is to "deal with facts" as opposed to "precognition".¹⁰

7. On 9 May 2011, the Panel confidentially issued the Decision, dismissing the Complaint.

8. On 23 May 2011, the Appellant submitted a memorandum to the President of the ICTY and the President of the Association of Defence Counsel practicing before the International Criminal Tribunal for the former Yugoslavia ("ADC"), indicating his intention to appeal the Decision and requesting that a Disciplinary Board ("Board") be reconstituted pursuant to Article 48(D) of the Code.¹¹ The Appellant requested that the 14-day deadline pursuant to Article 48(B) of the Code start to run from the time the Board is fully constituted.¹²

9. On 27 May 2011, the President of the ICTY appointed Judge Fausto Pocar, Judge Bakone Justice Moloto, and Judge Guy Delvoie to the Board pursuant to Article 48(D)(i) of the Code.¹³ On 30 May 2011, the ADC indicated that Ms. Colleen Rohan and Mr. Karim Khan had been appointed to the Board for a two year term as of 26 October 2009.¹⁴ On 31 October 2011, the ADC President indicated that Ms. Rohan and Mr. Khan had been re-elected to be appointed to the Board for an additional two years.¹⁵

10. On 30 May 2011, the Appellant requested a deadline of 10 June 2011 to submit his appeal.¹⁶ On 10 June 2011, the Appellant submitted his appeal ("Appeal").

11. On 26 July 2011, the Board issued a confidential "Order Determining Procedure and Setting Time Schedule", finding that the Appeal was filed within the prescribed time limit.

⁷ Response to Complaint, p. 8.

⁸ Response to Complaint, p. 8.

⁹ Response to Complaint, p. 8.

¹⁰ Response to Complaint, p. 8.

¹¹ Memorandum regarding "Composition of the Disciplinary Board" from Appellant to President of the ICTY and President of the ADC-ICTY, 23 May 2011 ("Appellant's Memorandum regarding Composition of Board"), paras 3-4.

¹² Appellant's Memorandum regarding Composition of Board, para. 4.

¹³ Memorandum regarding "Composition of the Disciplinary Board" from President of the ICTY to the Appellant, 27 May 2011.

¹⁴ Memorandum regarding "Appeal to the Disciplinary Board" from the Appellant to the Board, 30 May 2011, para. 2.

12. On 26 August 2011, the Respondent filed his response to the Appeal ("Response to Appeal").

II. IMPUGNED DECISION

13. The Panel dismissed the Complaint because it found that it did not have the authority to "treat and penalise" the Respondent as "Counsel" according to the regulations of the Code and the Disciplinary Regime Section available to it.¹⁷

14. The Panel found that the Code is designed to primarily deal with Counsel qualified under Rule 44 of the Rules on the basis of the language in the Preamble to the Code.¹⁸ It noted that one of the requirements under Rule 44 of the Rules is that Counsel must be admitted to the practice of law in a state or be a university professor.¹⁹ It further considered that the Rules do not permit an unqualified lawyer to independently represent an Accused before the ICTY or be put on the Rule 45(B) list of Counsel eligible to be assigned as legal aid funded Counsel.²⁰ It found that the Respondent is not admitted to the practice of law in Serbia or elsewhere and that he is therefore not "Counsel" as intended under Rule 44 of the Rules.²¹ It held that a person who is not assigned as "Counsel" cannot be compelled by the requirements of Rule 44(C), (which applies to both Rules 44 and 45 of the Rules *vis a vis* Rule 45(B)(i) of the Rules) simply by virtue of his assignment.²² It held that, in addition, an unlicensed lawyer cannot be penalized under Article 47(C) of the Code.²³

15. Having found that it cannot conclude beyond a reasonable doubt that the Respondent is "Counsel" as intended in the Code, the Panel went on to consider whether the Code applies to the Respondent *vis a vis* his role as a legal associate to a Self-representing Accused ("SRA").²⁴

¹⁵ Memorandum regarding "Appointment of ADC-ICTY Representatives to the ICTY Disciplinary Board" from President of the ADC-ICTY to President of the ICTY, 31 October 2011.

¹⁶ Memorandum regarding "Appeal to the Disciplinary Board" from the Appellant to the Board, 30 May 2011, para. 3.

¹⁷ Decision, para. 32.

¹⁸ Decision, para. 20. The Board notes that Rule 44 of the Rules sets out, *inter alia*, the qualification requirements for Counsel appointed by the Registrar to represent a suspect or an accused before the Tribunal but who does not receive legal aid funding. Rule 45 of the Rules sets out the qualification requirements for Counsel who are eligible to be assigned to an indigent or partially-indigent suspect or accused and legal aid funding. The qualification requirements for assigned Counsel are set forth in Rule 45(B) of the Rules. They include the requirements in Rule 44 of the Rules and three additional requirements.

¹⁹ Decision, para. 20.

²⁰ Decision, para. 20.

²¹ Decision, para. 20.

²² Decision, para. 20. The Board notes that Rule 44(C) sets out the rules and regulations to which counsel shall be subject in the performance of their duties. It includes, *inter alia*, the Code.

²³ Decision, para. 20. The Board notes that Article 47(C) of the Code sets forth the sentences available where a charge of professional misconduct has been proven beyond a reasonable doubt.

²⁴ Decision, para. 21.

16. The Panel found that since legal associates assisting SRA are not "Counsel" pursuant to the Rules but provide legal and other support, they are part of the "team" as defined by Article 34 of the Code.²⁵ Article 34 of the Code gives Counsel responsibility over the conduct of the team members.²⁶ The Panel concluded that the intended meaning of the Rules and the Code is that an accused electing to self-represent automatically undertakes supervisory responsibilities over his team.²⁷

17. The Panel then considered whether any obligations arose from the undertaking that the Respondent signed when he was assigned as legal associate to Mr. Šešelj.²⁸ It found that while by signing the undertaking, the Respondent agreed to be bound by the Statute, the Rules, and the Code, the undertaking failed to address the limitations in the sanctions specified in Sub-Articles 47(C) and (G) of the Code which it held are, for the most part, clearly intended to apply only to "Counsel".²⁹ The Panel found that it is lead Counsel, in this case the SRA, who is responsible for the conduct of his team members pursuant to Article 34 of the Code.³⁰ The Panel noted the Respondent's submission that the impugned statements were presented at the direction of the SRA and on his instruction.³¹ The Panel noted that during court proceedings in the *Prosecutor v. Vojislav Šešelj* on 2 November 2010, while discussing the subject of the Complaint, Mr. Šešelj commented that he is the only person who can institute disciplinary proceedings against his legal adviser and proceeded to repeat the same statements that are the subject of the complaint without being sanctioned by the Trial Chamber.³²

18. The Panel held that the risk that arises:

when one permits a non-lawyer, or a person who is not licensed or admitted to the Bar, to serve as a legal associate is that, having not been trained adequately on provisions regarding ethics, the legal associate or non-lawyer team member may engage in conduct which oversteps the bounds of propriety. The remedy is not to hold the non-counsel to standards on which he or she may never have been trained, but rather, as is set out in the Code of Conduct, to hold the lead counsel responsible for that conduct.³³

²⁵ Decision, para. 22.

²⁶ Decision, para. 22.

²⁷ Decision, para. 22.

²⁸ Decision, para. 23. The Board notes that the undertaking reads in its relevant part: "I hereby agree to be bound by the provisions of the Statute, the Rules of Procedure and Evidence of the ICTY, the Code of Professional Conduct for Defence Counsel appearing before the International Tribunal, the Rules of Detention, and any other rules and regulations of the ICTY and any judicial orders which may apply to me in my capacity of legal advisor/case manager in the defence team of Mr Šešelj. I further undertake to respect the confidentiality of all case-related information and documentation." See Appeal, Annex I for a copy of the undertaking signed by the Respondent.

²⁹ Decision, para. 23. The Board notes that Sub-article 47(G) provides that a copy of a Panel decision shall be communicated to the ADC and "the professional body regulating the conduct of the respondent in his State of admission, or to the governing body of the university where counsel is a law professor".

³⁰ Decision, para. 23.

³¹ Decision, para. 23.

³² Decision, para. 24.

³³ Decision, para. 26.

19. The Panel noted that there are sanctions available where an SRA abuses or misuses the rights associated with representing himself.³⁴ It refused to act against “a non-Counsel legal associate” where the conduct of the “lead counsel”, in this case the SRA, has engaged in making similar public statements in the courtroom in the presence of the Judges of the Trial Chamber without sanction.³⁵

20. The Panel held that it is the “duty of the courts and the presiding judge to direct proceedings in such a manner as to ensure the proper conduct of the parties and above all the fairness of the trial – rather than to examine in a subsequent trial the appropriateness of a party’s statements in the courtroom”.³⁶ The Panel held that where the SRA has made the same statements as the legal associate in the presence of the Chamber without sanction, the Panel can only conclude that the Chamber has found that the statements do not warrant sanction under Rule 46 of the Rules or Article 34 of the Code and “therefore such statements do not constitute misconduct”.³⁷ The Panel noted that its role was not intended to usurp the decision making authority of a Chamber.³⁸

21. The Panel suggested that there were sanctions available outside its authority to regulate an unlicensed lawyer’s behaviour outside the courtroom.³⁹ One such suggestion was the revocation of the Respondent’s privileged status.⁴⁰

III. SUBMISSIONS OF THE PARTIES

A. Appellant’s Submissions

22. The Appellant submits that the Decision should be invalidated and that the Respondent should have been found to have engaged in misconduct pursuant to Rule 44(A)(vi) of the Rules and/or Article 35(iii)-(iv) of the Code on the basis that the Panel’s findings constitute errors of law.⁴¹

23. The Appellant submits that the Panel’s finding that only a licensed lawyer can be bound by the Code is not supported by the Rules or the Code and amounts to an error of law.⁴² According to the Appellant, the Panel’s finding that only a licensed lawyer can be bound by the Code is incorrect

³⁴ Decision, para. 27.

³⁵ Decision, para. 27.

³⁶ Decision, para. 28, citing *Nikula v. Finland*, no. 31611/96 (Sect. 4), ECHR 2002-II – (21 March 2002), para. 53.

³⁷ Decision, paras 27, 29. The Board notes that Rule 46 of the Rules sets forth the authority of a Judge or Chamber in relation to misconduct of counsel.

³⁸ Decision, paras. 27, 29.

³⁹ Decision, para. 30.

⁴⁰ Decision, para. 30.

⁴¹ Appeal, paras 12-13.

⁴² Appeal, para. 16.

because the Rules allow for university professors who do not have a law license to be assigned or appointed as Counsel.⁴³

24. The Appellant argues that the Code applies to the Respondent on the basis of his voluntary undertaking to be bound by it and that in light of the role of legal associates assisting SRA, they can “opt-in” and agree to be bound by the provisions of the Code where they seek to be granted privileges similar to those available to Counsel.⁴⁴ He submits that the Panel erred in law in finding that the Code’s sanctions cannot be applied to persons who are unlicensed lawyers because the application of the Code to legal associates of SRA is consistent with the jurisprudence of the Tribunal and sanctions can be applied *mutatis mutandis*.⁴⁵ He further submits that the Panel’s assertion that SRA act as supervisory Counsel is misguided.⁴⁶

25. The Appellant refers to the Tribunal’s jurisprudence on self-representation to demonstrate that Judges of the Tribunal consider that legal associates who support SRA should be bound by an enforceable code of conduct.⁴⁷ The Appellant submits that following the recognition of an accused’s right to self-representation, the Appeals Chamber endorsed the requirement that legal associates meet all Rule 44 qualifications.⁴⁸ He submits further that subsequently the Registry adopted the Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused, 28 September 2007 (“2007 Remuneration Scheme”), which at the time, required a legal associate to a SRA to, *inter alia*, be a member of the ADC, to undertake to respect the confidentiality of all Tribunal documents and to comply with the Code.⁴⁹ In this context, the Appellant cited the *Karadžić* Trial Chamber’s holding that advisers to SRA can only be answerable for their professional conduct if they are subject to an enforceable code because there is no lead Counsel to supervise them.⁵⁰ He further submitted that on appeal, the Appeals Chamber endorsed this view, stating that by requiring legal associates to be members of the ADC, the Registrar was attempting to ensure that legal assistants to SRA are subject to an enforceable code of conduct as a measure of

⁴³ Appeal, para. 17.

⁴⁴ Appeal, para. 12.

⁴⁵ Appeal, para. 12.

⁴⁶ Appeal, para. 12.

⁴⁷ Appeal, paras 18, 26.

⁴⁸ Appeal, para. 19, referring to *Prosecutor v Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Momčilo Krajišnik’s Request to Self-Represent, on Counsel’s Motion in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, 11 May 2007, para. 24; *Prosecutor v Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007, (“Second *Krajišnik* Decision”), para. 37.

⁴⁹ Appeal, para. 20. See 2007 Remuneration Scheme, para. 5.1(A).

⁵⁰ Appeal, para. 21, citing *Prosecutor v Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates, 28 January 2009, (“*Karadžić* Trial Decision”), para. 33. The Trial Chamber also considered this to be the reason why the 2007 Remuneration Scheme required that legal assistants to SRA be members of the ADC. *Ibid.*

control rather than to ensure a level of expertise.⁵¹ He notes the Appeals Chamber's comment that the Registrar could have sought to address concerns about confidentiality and codes of conduct in a more targeted manner, such as confidentiality agreements.⁵² The Appellant submits that he subsequently removed the ADC requirement.⁵³

26. The Appellant submits that the Tribunal's jurisprudence thus accepted and anticipated that the Code would apply to legal associates of SRA and that such an application is appropriately achieved by applying the Code *mutatis mutandis*.⁵⁴ He submits that the Panel adopted a restrictive approach which fails to take into account the unique circumstances of the Tribunal. Since there is no Defence Bar Association which would license attorneys to practice before the Tribunal and possess the ability to apply sanctions in a manner comparable to that of a domestic jurisdiction, the regulatory framework of defence operations is provided solely by the Rules, the Code, and as applicable, the Directive on the Assignment of Defence Counsel.⁵⁵ He submits that while the sanctions of Article 47(C) and (G) of the Code are "intended to apply 'for the most part' to Counsel, there are no compelling reasons why such sanctions cannot [...] be applied to legal associates (and other support staff) *mutatis mutandis* to the degree appropriate."⁵⁶ In support of this argument the Appellant claims that the fact that the sanction provided for by Article 47(G) does not apply to persons who act as Counsel before the Tribunal on the basis of being professors of law, rather than being licensed by a Bar Association, has not prevented the application of the Code in general.⁵⁷

27. The Appellant submits that the Respondent's signing of the undertaking was a voluntary choice made to obtain the benefits associated with being a recognised legal associate before the Tribunal which is a "'privilege' and not an 'entitlement' as confirmed by the Appeals Chamber".⁵⁸

28. The Appellant submits that the Panel inferred that if a "Chamber seized of a case does not regulate a particular type of conduct or speech before it, the Panel would be usurping the Chamber's authority if it were to sanction such conduct".⁵⁹ The Appellant argues that the Panel's reasoning

⁵¹ Appeal, paras 23-24, citing *Prosecutor v Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, ("*Karadžić Appeal Decision*"), para. 19.

⁵² Appeal, para. 24, citing *Karadžić Appeal Decision*, para. 19.

⁵³ Appeal, para. 25.

⁵⁴ Appeal, para. 27.

⁵⁵ Appeal, para. 28.

⁵⁶ Appeal, para. 29. Article 47(C) of the Code states, in relevant part, that a respondent found to have committed misconduct may be suspended from practicing before the Tribunal for an appropriate fixed period of time not exceeding two years and/or banned from practicing before the Tribunal. Article 47(G) states that a copy of the decision shall be communicated to the ADC and the professional body regulating the conduct of the respondent in his State of admission or to the governing body of the university where counsel is a law professor.

⁵⁷ Appeal, para. 29. The Board notes that this submission is incorrect because, Article 47(G), in fact, has application for both licensed-lawyers and professors of law.

⁵⁸ Appeal, para. 32, referring to Second *Krajišnik* Decision, para. 33, fn. 93.

⁵⁹ Appeal, para. 33.

represents a misapprehension about the purpose of a disciplinary regime and that the Panel's jurisdiction is independent of that of a Chamber.⁶⁰

29. Finally, the Appellant submits that it is untenable for the SRA to be exclusively held accountable for the conduct of his legal associates.⁶¹ He puts forward four reasons in support of this argument. First, he submits that the Trial Chamber in the *Karadžić* proceedings noted that Mr. Karadžić could not take responsibility for the entire defence team due to his status as a SRA.⁶² Secondly, the Appellant submits that SRA before the Tribunal cannot objectively fulfil the role of supervisory Counsel on a practical basis in light of their detention.⁶³ Thirdly, he submits that the Panel's finding that to be bound by the Code one needs to be licensed to practice law is in clear contradiction with their finding that a SRA is Counsel and thus bound by the Code and points out that none of the SRA before the Tribunal, Messrs. Karadžić, Tolimir, and Šešelj, are licensed lawyers.⁶⁴ Finally, the Appellant submits that Šešelj "has provided ample evidence that he cannot be relied upon to conform the conduct of his associates to that which is expected in accordance with the Code" and that "the only effective remedy is the direct application of the Code to SRA defence team members."⁶⁵

30. The Appellant concludes by requesting the Board to: (i) invalidate the Decision; (ii) rule that the Code applies to legal associates and similar defence support staff assisting and supporting a SRA who have voluntarily signed an undertaking to be bound by the Code; (iii) rule that the Respondent has engaged in misconduct pursuant to Rule 44(A)(vi) of the Rules and/or Article 35(iii)-(iv) of the Code; and (iv) impose an appropriate sanction on the Respondent for his misconduct in accordance with Article 47 of the Code.⁶⁶

31. In the alternative, if the Board deems the Code not to be applicable to legal associates of SRA (and similar defence support staff), the Appellant respectfully seeks guidance from the Board on the measures to be adopted to hold such support staff accountable for conduct contrary to the basic principles of professional conduct and ethics without infringing upon the rights of a SRA to adequate facilities for the preparation of his defence.⁶⁷

⁶⁰ Appeal, para. 33.

⁶¹ Appeal, para. 36.

⁶² Appeal, para. 37, referring to *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, transcript p. 1493 (23 April 2010).

⁶³ Appeal, para. 38.

⁶⁴ Appeal, para. 39.

⁶⁵ Appeal, para. 40, referring to Mr. Šešelj's conviction for contempt of the Tribunal (Case No. IT-03-67-R77.2-A) and ongoing contempt proceedings against Mr. Šešelj (Case Nos IT-03-67-R77.3 [now concluded with a conviction] and IT-03-67-R77.4).

⁶⁶ Appeal, para. 45.

⁶⁷ Appeal, para. 46.

B. Respondent's Submissions

32. The Respondent submits that he stands by what he said and that he thinks that the medical care provided to Mr. Šešelj by the ICTY is poor and has led to a deterioration in his health.⁶⁸ He submits that the relevant people in the Registry are responsible for the poor medical care provided to Mr. Šešelj and other detainees and their conduct tarnishes the reputation of the Tribunal unless it is the Tribunal's objective to mistreat Serbs.⁶⁹ He submits that the Registry affords different treatment to OTP witnesses than to Mr. Šešelj.⁷⁰ He claims that Mr. Šešelj's legal advisers are being persecuted by the Registry which could lead to limitations on privileged communication which could make his defence more difficult.⁷¹ He further submits details as to why he thinks Mr. Šešelj is not properly cared for in the UNDU.⁷² Finally, he submits that his conduct did not breach the principles of professional conduct and ethics and that he "stood up to defend these principles".⁷³

IV. ANALYSIS

A. Preliminary Issues

1. Competence of the Board

33. As a preliminary matter, the Board observes that it is competent to determine the Appeal because the Appellant has the right to appeal a decision of the Panel pursuant to Article 48(B) of the Code. However, only in the event the Board finds that the Code applies, will it have the jurisdiction to consider a disciplinary remedy.

2. Application of Rule 44(A)(vi)

34. The Board recalls that the Appellant requests a ruling that the Respondent has engaged in misconduct pursuant to Rule 44(A)(vi) of the Rules and/or Article 35(iii)-(iv) of the Code. Rule 44(A) sets forth provisions on the "[a]ppointment, [q]ualification and [d]uties of [c]ounsel". It provides a list of requirements necessary for a counsel to be qualified to represent a suspect or an

⁶⁸ Response to Appeal, p. 1.

⁶⁹ Response to Appeal, p. 1.

⁷⁰ Response to Appeal, pp. 1-2. The Respondent refers to a witness who testified on 6 June 2011 that Mr. Milošević would probably still be alive if he had received "only 10 per cent" of the medical care he (the witness) received at The Hague. Response to Appeal, p. 1.

⁷¹ Response to Appeal, p. 2. The Respondent submits that while proceedings are not being instituted against the Registry and UNDU staff due to the "poor medical care provided" to Mr. Šešelj, the Registry removed Zoran Krasić, chief legal adviser to Mr. Šešelj and instituted disciplinary proceedings against the Respondent and Dejan Mirović. *Ibid.*

⁷² Response to Appeal, p. 2. The Respondent submits that one Dr. Zdravko Mijailović who examined Šešelj in 2009 said that some of the medication he had received at the ICTY could cause arrhythmia and no one in the Registry paid any attention to it. He further submits that Šešelj began suffering intense arrhythmia in 2010. He states that Mr. Šešelj's health was so bad in 2010 that he received electro-conversion treatment without his consent at a hospital.

⁷³ Response to Appeal, p. 2.

accused at the ICTY. Subsection 44(A)(vi) makes it necessary for a counsel to satisfy the Registrar that he or she "has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute". The Board considers that a plain and contextual reading of this provision demonstrates that Rule 44(A)(vi) is a qualifying rule as opposed to a disciplinary enforcement mechanism in case of professional misconduct. Accordingly, Rule 44(A)(vi) has no application in the context of the Complaint.

B. Merits of the Appeal

1. Whether the Respondent entered into a Valid Agreement to be bound by the Code

35. The Board agrees with the Panel's conclusion that the Code is intended to apply only to Counsel who are appointed or assigned pursuant to Rules 44 or 45 of the Rules, respectively. The Appellant does not dispute this reasoning. Rather, he submits that the Code should apply to the Respondent *mutatis mutandis* on the basis of his undertaking to be bound by it.⁷⁴ Accordingly, the issue becomes whether, notwithstanding the fact that the Code is intended to apply only to Counsel, a legal associate to a SRA can be bound by agreement.

36. The Board recalls that the relevant portion of the undertaking states:

I hereby agree to be bound by the provisions of the Statute, the Rules of Procedure and Evidence of the ICTY, the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal, the Rules of Detention, and any other rules and regulations of the ICTY and any judicial orders which may apply to me in my capacity of legal advisor/case manager in the defence team of Mr. Šešelj. I further undertake to respect the confidentiality of all case-related information and documentation.⁷⁵

37. The Board considers that the Respondent does not dispute that he voluntarily agreed to be bound by the provisions of the Code. The agreement was a condition precedent to the Respondent's assignment as legal associate to Mr. Šešelj by which the Registrar granted him privileged access to Mr. Šešelj and access to confidential material.⁷⁶ In his capacity as legal associate, the Respondent agreed to take on some of the functions of Counsel and at the same time by signing the undertaking, he agreed to take on the obligations of Counsel as set forth in the Code, *i.e.* those relevant to his capacity of legal associate.

⁷⁴ Appeal, paras 12, 16-17.

⁷⁵ See Appeal, Annex I.

⁷⁶ Appellant's Memorandum on application of Code, para. 6.

38. As a person not qualified pursuant to Rules 44 or 45 of the Rules, the Respondent may not have been trained in the ethical obligations of Counsel. However, it does not follow that the Respondent would be unable to understand the obligations and duties as set forth in the Code relevant to his capacity of legal associate, and to appreciate the standards expected of him in this regard. Moreover, he has not made such a claim. Thus, the Board, by majority, finds the Respondent entered into a valid agreement to be bound by the Code.⁷⁷

39. The Board observes that due to matters of practicality, certain provisions in the Code cannot apply to legal associates to SRA. For example, a legal associate to a SRA would not be "personally responsible toward the Tribunal for the conduct and presentation of a client's case" pursuant to Article 23 of the Code because he is not responsible for the conduct and presentation of the SRA's case. A legal associate's role is merely to assist the SRA in his defence. He does not have rights of audience. On the other hand, the Board considers that *mutatis mutandis* other provisions of the Code can apply to legal associates. For example, a legal associate to a SRA can be expected to maintain confidentiality and engage with witnesses appropriately pursuant to Articles 13 and 28 of the Code, respectively.

40. At issue in the current case is whether a legal associate to a SRA can be held responsible for conduct pursuant to Article 35 of the Code which defines "professional misconduct for counsel". The Board is of the view that a legal associate to a SRA can be expected to abide by the requirements of Article 35(iii)-(iv) of the Code. The fact that the Respondent is not a trained lawyer does not interfere with his ability to behave honestly and avoid conduct that is fraudulent or "prejudicial to the proper administration of justice" pursuant to Articles 35(iii) and (iv) of the Code, respectively. Therefore, the Board is of the view that the Panel's finding to the contrary amounts to an error of law.

2. Whether the Respondent's Conduct Infringed Article 35(iii) and/or (iv) of the Code

41. The Board recalls that the Appellant submits that the Respondent stated to the media that "the medical treatment of Mr. Šešelj in the [UNDU] does not adhere to 'basic medical principles' and that the latter's health is seriously jeopardised as a result."⁷⁸ He further submits that the Respondent "appears to endorse the view that the UNDU's Medical Officer played a role in the murder of Slobodan Milošević, and that the UNDU allegedly tampered with a blood analysis of Mr. Milošević."⁷⁹ The Appellant submits that "[t]he allegations attributed to [the Respondent] in the

⁷⁷ Board Member Karim Khan dissents on this point. See his appended Separate Opinion.

⁷⁸ Complaint, para. 3, referring to Annex I.

⁷⁹ Complaint, para. 3, referring to Annex I.

media concern the Registry greatly as they are unfounded and likely to diminish public confidence in the Tribunal.”⁸⁰ He submits that the statements violate Article 35(iii)-(iv) of the Code.⁸¹

(a) Article 35(iii) of the Code

42. According to Article 35(iii) it is professional misconduct for Counsel to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation”. The Black’s Law Dictionary 2004 defines “deceit” as “the act of intentionally giving a false impression” and “a false statement of fact made by a person knowingly or recklessly with the intent that someone else will act upon it”.⁸² It defines a “dishonest act” as a “fraudulent act”, meaning “conduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude”.⁸³ It defines “misrepresentation” as “[t]he act of making a false or misleading assertion about something, usu[ally] with the intent to deceive”.⁸⁴ The Board considers that the common element of these terms is that conduct must have been intentionally dishonest. Accordingly, to establish an infringement of Article 35(iii) of the Code, the Appellant must prove beyond a reasonable doubt that the Appellant’s conduct was intentionally dishonest.

43. The Board recalls that the Tanjug news article (“Article”) at issue in the Complaint reports that the Respondent said that Mr. Šešelj’s medical treatment in the UNDU does not “adhere to the basic medical principles”. According to the Article, the Respondent appears to rely on the analysis from the “Russian Academy of Sciences” (“Russian Analysis”) as support for this statement. The Russian Analysis claims that the UNDU Medical Officer played a role in “the murder of Slobodan Milošević” and together with the previous Commanding Officer of the UNDU “tampered with Milošević’s blood analyses”.⁸⁵

44. The Board notes that as submitted by the Appellant “it is a matter of public record that Mr. Milošević’s death was not caused by any malfeasance on behalf of the Tribunal”.⁸⁶ The Board further notes the Appellant’s submission that the Registry consistently ensures that a high level of medical care is delivered to all detainees under the authority of the Tribunal and subjects the medical care at the UNDU to regular audits by the ICRC.⁸⁷ There is no evidence to suggest that Mr. Šešelj’s medical treatment would not adhere to basic medical principles. However, even if the Respondent’s statement is thus unfounded, the Appellant has not tendered any evidence to establish

⁸⁰ Complaint, para. 4.

⁸¹ Complaint, para. 4. The Board notes that the Appellant’s submission that the statements also violate Rule 44(A)(vi) of the Rules has been disposed of in para. 34 above.

⁸² Black’s Law Dictionary 2004, p. 435.

⁸³ Black’s Law Dictionary 2004, pp. 501, 687

⁸⁴ Black’s Law Dictionary 2004, p. 1022.

⁸⁵ Complaint, Annex II.

⁸⁶ Complaint, para. 4, referring to “Report to the President, Death of Slobodan Milošević”, prepared by Judge Kevin Parker, 30 May 2006, pp. 4, 40. (available at http://www.icty.org/case/slobodan_milosevic/4#custom2)

that the Respondent had the necessary intent to deceive. The Board notes that the Respondent submits he believes the statement to be true and that he said it in order to ensure Mr. Šešelj's health care is appropriate.⁸⁸ The Board considers that the Respondent is entitled to an opinion on the matter and should not be censured by the Tribunal as to his own opinion. Without evidence of the requisite mental intent, the Board is not satisfied beyond a reasonable doubt that the Respondent infringed Article 35(iii) of the Code.

(b) Article 35(iv) of the Code

45. Article 35(iv) of the Code states that it is professional misconduct for Counsel to "engage in conduct which is prejudicial to the proper administration of justice before the Tribunal". The Board considers that evidence of criticism of the UNDU, without further evidence as to its effect on the administration of justice, is insufficient to establish prejudice. The Appellant has not tendered any evidence on the effect of the Respondent's comments on the administration of justice. Moreover, there is no evidence that the comments have affected Mr. Šešelj's proceedings before the Tribunal in particular or any other proceedings before the Tribunal more generally. In fact, there is some evidence that Mr. Šešelj's similar remarks on the same issue had no effect on the proceedings in his case.⁸⁹ Accordingly, the Board is not satisfied beyond a reasonable doubt that the Respondent's conduct infringed Article 35(iv) of the Code.

46. The Board wishes to stress that the determination of this appeal is made solely in relation to the specific facts of this case and is not intended to have any effect on contractual relationships governed by similar undertakings between the Appellant and other parties.

⁸⁷ Complaint, para. 4.

⁸⁸ Response, pp. 1-2.

⁸⁹ See Decision, para. 24, referring to *Prosecutor v Vojislav Šešelj*, 2 November 2010, T. pp. 16436-16438.

3. Disposition

47. The Appeal is dismissed.

Board Member Karim Khan appends a separate opinion.

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

Dated this sixteenth Day of December 2011
At The Hague
The Netherlands



Judge Fausto Pocar
Chairperson

[Seal of the Tribunal]

SEPARATE OPINION OF KARIM A. A. KHAN QC

1. I concur with the majority's decision to dismiss the Complaint; however, I respectfully disagree with my colleagues that the undertaking signed by the Respondent represents a valid and enforceable contract binding the Respondent by the Code.

2. The Code is designed to apply to qualified Counsel who are appointed or assigned pursuant to Rules 44 or 45 of the Rules, respectively. The Code's purpose is to ensure that Counsel who appear before the Tribunal adhere to standards of professional conduct in the performance of their duties.¹ These standards are connected to Counsel's standing before the Tribunal, their education, and their training. For many Counsel, some of the standards in the Code are already requirements of their home jurisdictions' professional regulating body or university's governing body. The Code reflects the fact that Counsel who appear before the Tribunal come from various jurisdictions, and that it is therefore in the interests of justice for all Counsel to "adhere to the same Code of Professional Conduct".² As a code regulating the professional conduct of Counsel, the Code does not envisage the regulation of conduct of non-Counsel, in particular conduct of untrained lawyers who are appointed as legal associates to SRA.

3. The Appellant has sought to regulate the Respondent's conduct as a legal associate to a SRA who is not a qualified Counsel or a trained lawyer by requiring him to sign an undertaking agreeing to be bound by the Code. The majority decided that although the Respondent is neither Counsel nor a trained lawyer, a person who takes on some of the obligations of counsel can voluntarily agree to be bound by the provisions of the Code and that the Code will thereby be binding on him *mutatis mutandis*. I agree that, in principle, it is open for such a person to agree to conduct himself in accordance with standards of professional conduct that would otherwise be applicable only to Counsel. However, I find that the undertaking in this case is not capable of reflecting such an agreement by the Respondent to be bound by the Code with the potential of giving rise to disciplinary measures.

4. The Appellant ought to make the standards of professional conduct expected of a person untrained in the ethical obligations of Counsel as explicit as possible. Certainly far more specific and certain than the imprecise and rather circuitous undertaking signed in the present case. I consider that the undertaking signed by the Respondent is vague as to what exactly is expected of him in his capacity of legal associate. It is apt to recall the operative portion of the agreement which is central to the present appeal. It is set down below:

¹ Preamble to the Code.

² See; Preamble to the Code and Article 3 of the Code "Basic Principles".

I hereby agree to be bound by the provisions of the Statute, the Rules of Procedure and Evidence of the ICTY, the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal, the Rules of Detention, and any other rules and regulations of the ICTY and any judicial orders which may apply to me in my capacity of legal advisor/case manager in the defence team of Mr Šešelj. I further undertake to respect the confidentiality of all case-related information and documentation.³

5. The ambit of the agreement, purporting to bind an individual who was neither a member of the Bar, nor had attained the seniority or experience to be a full professor of Law, not on the list of Counsel and not a member of the ADC is as imprecise as it is circuitous. It amounts to an agreement to be bound by the Code to the extent that the legal assistant may be bound. It did not detail in what respects the Code applied to the Respondent and in which respects it did not apply. Findings of disciplinary breaches and disciplinary offences against legal assistants (some of whom may wish to become members of the Bar) can have serious consequences. They may fall to be disclosed to national Bar Associations in due course and even prevent admission to a Bar. In my view, it is right that in light of this, the obligations and duties of legal assistants and the consequences of breach of these duties and responsibilities be clearly specified. The Registrar, with the greatest of respect, was in a far better position, in my view, to have avoided this difficulty by specifying exactly how or in what way the Respondent was bound, and to have detailed the extent of his responsibilities and the exact consequences that could arise in the event of a breach. The Registrar did not proceed in this matter.

6. Whilst, it is true, that the Code is referenced in the undertaking signed by the Respondent, I consider that the Respondent's signature represents nothing more than a promise to abide by the Code as opposed to a valid agreement. The enforceable terms of a valid agreement need to be precise. The undertaking presented to the Respondent for signature and signed by him is not. It needed to specify obligations and, critically, the consequences of breaches of the Code, so as to enable an enforceable method of disciplinary oversight. It cannot be right in my view, that the Respondent (or this Board) be required to go through the Code or other documents and fathom out which parts apply to a legal assistant and which parts apply only to legal assistants who are not legally qualified or Professors of Law.

7. In addition, I consider that by asking the Board to discipline the Respondent in light of his agreement to be bound by the Code, in effect, the Appellant is seeking to expand the Code unilaterally in contravention of the amendment procedure set forth in Article 6(A) of the Code which requires the supervision of the President and consultation with the permanent Judges, the

³ See Appeal, Annex I.

ADC, and the Advisory Panel.⁴ By circumventing this procedure, the Appellant has excluded debate among the relevant bodies within the Tribunal that have an interest in ensuring that the Code is amended and administered fairly.

8. I would suggest that the Appellant has three options available to ensure that legal associates to SRA are accountable for basic principles of professional conduct. First, the Appellant could require that all legal associates to SRAs meet the qualifications of Counsel pursuant to Rule 44 and / or Rule 45 of the Rules. Secondly, for persons who are not qualified Counsel pursuant to the Rules, the Appellant ought to make standards required of legal associates to SRA clearer. Both the standards of professional conduct and the consequences of breaching those standards ought to be set out explicitly in the undertaking. The Appellant might also consider organising training on the ethical and professional obligations expected of them. Finally, it would also be available to the Appellant to seek a formal amendment to the Code pursuant to Article 6 of the Code.

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

Dated this sixteenth Day of December 2011
At Nairobi
Kenya



Karim A. A. Khan QC

⁴ Article 6(A) of the Code reads: "Under the supervision of the President, amendments shall be promulgated by the Registrar after consultation with the permanent Judges, the Association of Counsel and the Advisory Panel."