

**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

Case No. IT-13-93-Misc.1  
Date: 8 July 2013  
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 Howard Morrison, Chairperson  
Judge Khalida Rachid Khan  
Judge Burton Hall  
Ms. Colleen Rohan, ADC-ICTY  
Mr. Karim Khan, ADC-ICTY

**Registrar:** Mr. John Hocking

**Decision of:** 8 July 2013

**IN THE MATTER OF MR. TOMA FILA**

***PUBLIC***

**DECISION ON APPEALS TO THE DISCIPLINARY BOARD**

**Mr. John Hocking, Registrar**

**Mr. Toma Fila**

1. 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, (“Code of Conduct” or “Code” and “Tribunal”, respectively) is seised of appeals by Mr. Toma Fila and by the Registrar of the Tribunal (“Registrar”) against the confidential Decision of the Disciplinary Panel in the Matter of Mr. Toma Fila, case number DP-2-13, signed on 23 October 2012 and communicated to the parties on 25 October 2012 (“Decision”).

## I. PROCEDURAL BACKGROUND

2. On 9 February 2012 the Registrar filed confidentially a disciplinary complaint against Mr. Toma Fila, attorney at law practising before the Tribunal, alleging several violations by Mr. Fila of Article 35(i), (iv) and (v) of the Code of Conduct (“Complaint”). In particular, the Complaint alleged that (i) from 29 December 2008 through 15 January 2009 (“first period of alleged unauthorised practice”) and from 22 January 2010 through 30 November 2011 (“second period of alleged unauthorised practice”) Mr. Fila practised before the Tribunal while unauthorised to practise law, in violation of the Rules of Procedure and Evidence of the Tribunal (“Rules”), the Code of Conduct, and the Directive on the Assignment of Defence Counsel, IT/73/REV. 11 (“Directive”); (ii) provided false information to the Registry in his application pursuant to Rule 45 of the Rules (“Rule 45 application”); (iii) failed to disclose to the Registry the two periods of alleged unauthorised practice, as well as his position as advisor to a member of the Serbian government, coterminous with his representation of a client before the Tribunal; (iv) potentially violated Article 14 of the Code of Conduct by failing to inform his client of the potential conflict of interest arising out of his appointment as government advisor; (v) practised law before the Tribunal in violation of the Serbian Bar Statute; (v) made statements in interviews to Radio Television of Republika Srpska (“RTRS”) and “Vesti” newspaper in violation of Articles 3(v), 27(A) and 14(A) of the Code of Conduct.

3. On 25 October 2012 the Disciplinary Panel issued its Decision by which it found that Mr. Fila has engaged in professional misconduct in violation of Article 35(v) of the Code of Conduct for failing to disclose to the Registry his position as advisor to a member of the Serbian government and, by majority, that he has violated Article 35(i) of the Code by making the following statement in the RTRS interview: “[t]he main aim has been achieved, Serbia has been demonized”. It imposed on Mr. Fila the sanction of a public reprimand. The Disciplinary Panel dismissed the Complaint in all other respects.<sup>1</sup>

<sup>1</sup> Decision, paras 58, 73, 77-79, 92-93.

4. In a memorandum to the President of the Tribunal dated 6 November 2012 and stamped 8 November 2012 the Registrar gave notice of his intention to appeal the Decision to the Disciplinary Board within 14 days of notification to Mr. Fila of the translation of the Decision into B/C/S.<sup>2</sup>

5. In the same memorandum the Registrar indicated that by letter dated 31 October 2011 the President of the Association of Defence Counsel of the ICTY ("ADC-ICTY") informed the Tribunal that Ms. Colleen Rohan and Mr. Karim Khan had been elected by the ADC-ICTY to be appointed to the Disciplinary Board, pursuant to Article 48(D) of the Code of Conduct. The Registrar further noted the cases before the Tribunal in which Mr. Fila appears and has appeared in the past as counsel and requested that the Disciplinary Board be formed anew.

6. On 8 November 2012 Mr. Fila filed his appeal against the Decision of the Disciplinary Panel, challenging the Panel's findings regarding his appointment as advisor to a member of the Serbian government and regarding the RTRS interview on the basis that the Disciplinary Panel committed errors of law and errors of fact.<sup>3</sup>

7. On 14 November 2012 the President of the Tribunal appointed Judge Khalida Rachid Khan, Judge Burton Hall and Judge Bakhtiyar Tuzmukhamedov to the Disciplinary Board. On 21 November 2012 the President altered the composition of the Disciplinary Board, replacing Judge Bakhtiyar Tuzmukhamedov with Judge Howard Morrison.

8. On 26 November 2012 the Registrar filed his appeal against the Decision of the Disciplinary Panel. The Registrar challenged the Panel's findings that the conduct alleged in the Complaint did not constitute misconduct and its finding that Mr. Fila's misconduct in failing to disclose his appointment as an advisor to a member of the Serbian government was not a grave violation, submitting that the Disciplinary Panel erred in law, procedure and fact in its findings.<sup>4</sup>

9. On 23 January 2013 the Disciplinary Board issued an Order Determining Procedure and Setting Time Schedule by which it ordered the Registry, *inter alia*, to provide Mr. Fila with translations into B/C/S of the Registrar's Memorandum of 8 November 2012 and the Registrar's Appeal as soon as possible and allowed Mr. Fila to respond to the Registrar's Appeal within 21 days from the date he was served with the translations.

<sup>2</sup> Registrar's Internal Memorandum to the President of the Tribunal dated 6 November 2012 and stamped 8 November 2012 ("Registrar's memorandum of 8 November 2012").

<sup>3</sup> Case No. DP-2-13, Appeal of Mr. Toma Fila against the Decision of the Disciplinary Panel of 23 October 2013, submitted confidentially on 8 November 2012 ("Fila's Appeal").

<sup>4</sup> Case No. DP-2-13, Appeal of Disciplinary Panel Decision in Case DP 2-13, submitted confidentially on 26 November 2012 ("Registrar's Appeal"), paras 19-20.

10. On 14 February 2013 the Disciplinary Board dismissed a request filed by Mr. Fila on 1 February 2013 which sought to dismiss the Registrar's Appeal as late.<sup>5</sup> The Disciplinary Board found that pursuant to the disposition of the Decision of the Disciplinary Panel, the fourteen day deadline for filing of appeals ran for both Mr. Fila and the Registrar from the date of notification to Mr. Fila of the translation of the Decision into B/C/S, *i.e.* from 12 November 2012, and that the Registrar's Appeal was filed within the time limit set by the Disciplinary Panel.

11. On 26 February 2013 Mr. Fila submitted his Response to the Registrar's Appeal in B/C/S.<sup>6</sup> An English translation was filed on 28 February 2013.

## II. STANDARD OF REVIEW

12. The Code of Conduct does not define a standard for appellate review. Article 48(G) of the Code only provides that the Disciplinary Board shall not receive or consider any evidence that was not presented to the Disciplinary Panel, unless it considers that the interests of justice so require. In its earlier decisions, while not defining specifically a standard of review, the Disciplinary Board followed the appellate review standard applied by the Appeals Chamber in appellate proceedings before the Tribunal.<sup>7</sup> A comparative review of disciplinary proceedings in national jurisdictions reveals that in national jurisdictions appeals from decisions of disciplinary bodies tend to follow the general appellate proceedings.<sup>8</sup>

13. Pursuant to Article 25 of the Statute of the Tribunal, the Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.<sup>9</sup> Under this standard, where the Appeals

<sup>5</sup> *In the Matter of Mr. Toma Fila*, Case No. IT-13-93-Misc.1, Order on Mr. Fila's Request to Dismiss the Registrar's Appeal, issued confidentially on 14 February 2013.

<sup>6</sup> *In the Matter of Mr. Toma Fila*, Case No. IT-13-93-Misc.1, Response to Registrar's Appeal filed confidentially on 26 February 2013 ("Fila's Response").

<sup>7</sup> See *In the Matter of Mr. Boris Aleksić*, Case No. IT-03-67-T, Decision on the Appeal by the Registrar to the Disciplinary Board, 19 December 2011 ("Aleksić Decision").

<sup>8</sup> In France decisions of a disciplinary council are appealed before the Court of Appeal; the decisions of the Court of Appeal may be appealed in turn to the Court of Cassation following the civil procedure, Conseil Des Barreaux Européen/Counsel of Bars and Law Societies of Europe, *Summary of Disciplinary Proceedings and Contact Points in the EU and EEA Member States*, November 2004, p. 13. In Germany, decisions of the Lawyers' Disciplinary Court may be appealed before the Higher Lawyers' Disciplinary Court in accordance with the procedure of the Code of Criminal Procedure for appeals on questions of law and fact, §143 of Federal Lawyers' Act (*Bundesrechtsanwaltsordnung*), last amended by Article 8 of the Act of 6. 12. 2011, Federal Law Gazette (*BGBL*) I, p. 2515. In Hungary, decisions of the Disciplinary Council of Appeal may be appealed to the Court of the Capital City in accordance with the civil procedure, Conseil Des Barreaux Européen/Counsel of Bars and Law Societies of Europe, *Summary of Disciplinary Proceedings and Contact Points in the EU and EEA Member States*, November 2004, p. 19. In the United States most states require the appeal to go through the normal channels for appeal in that state, Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 *J. Legal Prof.* 229, 257 (2011).

<sup>9</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012 ("Lukić and Lukić Appeal Judgement"), para. 10; *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Judgement, 16 November 2012 ("Gotovina and Markač Appeal Judgement"), para. 10; *Prosecutor v. Ramush*

Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it articulates the correct legal standard and reviews the relevant factual findings of the Trial Chamber accordingly.<sup>10</sup> Regarding errors of fact the Appeals Chamber applies a standard of reasonableness and only substitutes its own findings for that of the Trial Chamber where no reasonable trier of fact could have reached the original decision.<sup>11</sup> A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.<sup>12</sup>

14. The Disciplinary Board finds it appropriate to apply the appellate review standard adopted by the Appeals Chamber.

### III. SUBMISSIONS AND DISCUSSION

#### A. The Registrar's Appeal

##### 1. Alleged procedural errors

###### (a) Submissions

15. The Registrar seeks the reversal of those parts of the Decision that dismiss the allegations in the Complaint, or in the alternative, that the matter be remanded, contending that the Disciplinary Panel erred procedurally by failing to undertake appropriate inquiries and investigation and by shifting the burden of proof to him.<sup>13</sup> He submits that it is not the complainant but the Disciplinary Panel who formulates the charges when it finds that there are "reasonable grounds" that counsel has committed misconduct<sup>14</sup> and that a complainant is not required to submit in advance all of the proof that may be needed for a finding of misconduct.<sup>15</sup> It is submitted further that where there are material questions of fact, the Panel is required to hold a hearing.<sup>16</sup> The Registrar also contends that the Panel misapprehended its mandate under Article 44 of the Code by finding that it did not

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*Haradinaj, Idriz Balaj, and Lahi Brahimaj*, Case No. IT-04-84-A, Judgement, 21 July 2010 ("*Haradinaj et al.* Appeal Judgement"), para. 9; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010 ("*Bošković and Tarčulovski* Appeal Judgement"), para. 9.

<sup>10</sup> *Lukić and Lukić* Appeal Judgement, para. 12; *Gotovina and Markač* Appeal Judgement, para. 12; *Haradinaj et al.* Appeal Judgement, para. 11; *Bošković and Tarčulovski* Appeal Judgement, para. 11.

<sup>11</sup> *Lukić and Lukić* Appeal Judgement, para. 13; *Gotovina and Markač* Appeal Judgement, para. 13; *Haradinaj et al.* Appeal Judgement, para. 12; *Bošković and Tarčulovski* Appeal Judgement, paras 13-14.

<sup>12</sup> *Lukić and Lukić* Appeal Judgement, para. 15; *Gotovina and Markač* Appeal Judgement, para. 14; *Bošković and Tarčulovski* Appeal Judgement, para. 16; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement"), para. 16.

<sup>13</sup> Registrar's Appeal, paras 21-22, 26, 27, 30.

<sup>14</sup> Registrar's Appeal, para. 26.

<sup>15</sup> Registrar's Appeal, para. 27.

<sup>16</sup> Registrar's Appeal, para. 28.

consider it appropriate to analyse a charge not expressly pleaded in the Complaint,<sup>17</sup> pointing to the Panel's power to commence an investigation *proprio motu* under Article 40(D) of the Code of Conduct.<sup>18</sup>

16. Mr. Fila responds that the Registrar's submissions are unfounded and unsupported by contemporary legal practice as they would lead to a situation where one and the same body would have to prove the allegations and decide whether these allegations have been established.<sup>19</sup> He contends that the Code of Conduct does not provide that the burden of proof rests with the Disciplinary Panel and that the Registrar fails to point to specific evidence that had to be but was not considered by the Panel.<sup>20</sup>

(b) Discussion

17. The Registrar's main argument—that the Disciplinary Panel committed a material error by failing to undertake appropriate inquiries and investigation and by improperly shifting the burden of proof to him—is based on Articles 44(A) and 46(A) and (D) of the Code of Conduct. In essence, it is submitted that because the Code envisages that the Disciplinary Panel shall conduct an investigation,<sup>21</sup> inquire into each particularised allegation and formulate charges if there are reasonable grounds that misconduct has been committed,<sup>22</sup> and hold a hearing if there are any material issues of fact,<sup>23</sup> the Panel's failure to undertake such activities is a material error and improper shifting of the burden of proof to the complainant.

18. In the view of the Disciplinary Board, the Registrar adopts too narrow an interpretation of the provisions of Articles 44 and 46 of the Code of Conduct. While the provisions cited by the Registrar require that the Disciplinary Panel conduct an investigation, inquire into the specific allegations, and if satisfied, formulate charges, Articles 44 and 46 of the Code also define the scope of such an investigation or inquiry. Pursuant to these provisions in the course of such investigation or inquiry the Disciplinary Panel shall, as a minimum, send the particulars of the alleged conduct to the respondent and invite him to provide an explanation,<sup>24</sup> or provide the respondent with the opportunity to file a reply,<sup>25</sup> which in the present case the Disciplinary Panel did.<sup>26</sup> While, pursuant

<sup>17</sup> Registrar's Appeal, para. 29, *referring to* Decision, paras 43 and 55.

<sup>18</sup> Registrar's Appeal, para. 29.

<sup>19</sup> Fila's Response, para. 4.

<sup>20</sup> Fila's Response, paras 5-6.

<sup>21</sup> Article 44(A).

<sup>22</sup> Article 46 (A).

<sup>23</sup> Article 46(D).

<sup>24</sup> Article 44(B)(i).

<sup>25</sup> Article 46(C).

to Articles 44 and 46, the Disciplinary Panel may undertake other steps, this decision is within the Disciplinary Panel's discretion and depends on the specific circumstances.<sup>27</sup> The provisions cited by the Registrar do not envisage a general obligation for the Disciplinary Panel to prove the allegations in the complaint beyond a reasonable doubt or to conduct an investigation on behalf of the complainant. They authorise the Disciplinary Panel to engage in fact finding when it deems this necessary for the performance of its functions under Article 47(A).

19. The Registrar submits further that the Disciplinary Panel is not limited to investigating misconduct expressly pleaded in a complaint, seeking to rely on Article 40(D) of the Code of Conduct. Article 40(D), first sentence, provides that “[c]omplaints concerning the conduct of a counsel or a member of his team relating to matters before the Tribunal and specified in Article 35 shall be submitted to the Chairperson of the Panel in accordance with Article 39.” Under the second sentence of Article 40(D) the Disciplinary Panel may commence an investigation *proprio motu* in cases “[w]here the Panel *itself* has reasonable grounds to suspect” that counsel has engaged in misconduct.<sup>28</sup> In the view of the Disciplinary Board, Article 40(D) outlines the two different mechanisms for initiating disciplinary proceedings: by complaint, in which case the complaint shall meet all requirements specified in the Code of Conduct, or by the Disciplinary Panel when it itself has reasonable grounds to suspect that conduct or actions taking place before it constitute misconduct. This provision, in the view of the Disciplinary Board, is not intended to exempt complainants from their obligations under the Code.

20. Furthermore, in the view of the Disciplinary Board, the Registrar takes the provisions he cites in his appeal in isolation and ignores other provisions of the Code which provide a useful guidance. For example, the functions of the Disciplinary Panel, as defined in the Code, include dismissing a complaint if it finds that the complaint does not meet the requirements of Article 42, rendering findings on each charge and, if applicable, imposing sanctions pursuant to Article 47. These functions are incompatible with the Panel bearing the burden of proof with respect to the allegations in the complaint. Other provisions of the Code also suggest that it is not for the Disciplinary Panel but for the complainant to provide sufficient information to establish the allegations in the complaint. For a complaint to be successful, it must first describe in sufficient

<sup>26</sup> Mr. Fila was made aware of the allegations against him and was provided with a copy of the Complaint by letter of the Chair of the Disciplinary Panel dated 29 February 2012. Mr. Fila submitted his explanation in response on 28 March 2012.

<sup>27</sup> Articles 44(B)(ii) and Article 44(C) provide that the Disciplinary Panel “*may*” undertake the activities listed in the respective articles; Article 46(D) provides that the Disciplinary Panel shall hold a hearing “*if* there are any material issues of fact raised in the pleadings or *if* the respondent requests the opportunity to be heard in mitigation” (emphasis added).

<sup>28</sup> Article 40(D) (emphasis added).

detail the alleged misconduct.<sup>29</sup> A complaint should not be misconceived, lacking in substance, vexatious, frivolous, or out of time.<sup>30</sup> Complaints which do not meet this standard may be summarily dismissed by the Disciplinary Panel. In the view of the Disciplinary Board, these provisions indicate that the obligations of the complainant are not limited to particularising allegations of misconduct, as submitted by the Registrar. These provisions translate into a requirement that the information contained in a complaint be such that, if not contradicted by the respondent, would be sufficient to establish the alleged professional misconduct. The Disciplinary Board, therefore, rejects the Registrar's submission that the Panel erred by improperly shifting the burden of proof to him and his submission that a complainant is not required to submit in advance all of the proof that may be needed for a finding of misconduct.

21. In light of the foregoing, the Disciplinary Board is satisfied that the inquiry undertaken by the Disciplinary Panel meets the minimum requirements of the Code of Conduct. The Board will consider whether the Disciplinary Panel erred in exercising its discretion not to conduct a further investigation or hearing when it considers the Registrar's specific challenges to the respective findings in the Decision.

## 2. Alleged errors in relation to the first period of alleged unauthorised practice

### (a) Alleged unauthorised practise

22. The Disciplinary Panel, adopting a literal interpretation of the phrase "admitted to the practice of law in a State" in Article 14(A)(i) of the Directive, found that Mr. Fila was not admitted to practise from 29 December 2008 through 15 January 2009. The Panel held, however, that no clear provision in the law of the Tribunal obliges counsel who ceases to satisfy the requirements of Article 14(A) of the Directive to immediately discontinue his participation as counsel and that the power to withdraw such counsel lies with the Registrar.<sup>31</sup> It found no violation of Article 35(i) of the Code of Conduct.<sup>32</sup>

### (i) Submissions

23. The Registrar requests the reversal of the Disciplinary Panel's conclusion, submitting that it ignores Articles 35(iii) and 35(v) of the Code of Conduct which impose liability for conduct involving, *inter alia*, misrepresentation and failure to disclose information regarding counsel's

<sup>29</sup> Article 41(B).

<sup>30</sup> See Article 42.

<sup>31</sup> Decision, paras 27-30.

<sup>32</sup> Decision, para. 31.

qualifications to practise before the Tribunal.<sup>33</sup> He contends that the Panel's conclusion does not comport with Rule 44(A) of the Rules and Article 35(i) of the Code which provides that violations of the Rules constitute misconduct.<sup>34</sup> The Registrar submits that it is incumbent upon counsel to maintain their qualifications and to notify the Registry of any change in their status and that absent such information the Registry is unable to withdraw counsel from the list pursuant to Article 14(E)(iii) of the Directive.<sup>35</sup> Finally, the Registrar submits that the Registry is aware of at least one filing made by Mr. Fila during the first period of alleged unauthorised practice, the existence of which was not cited in the Complaint, and requests the Board to consider in light of the new evidence whether Mr. Fila has committed misconduct.<sup>36</sup>

24. Mr. Fila responds that the Registrar's arguments are unfounded without addressing the specific submissions of the Registrar.<sup>37</sup>

(ii) Discussion

25. The Registrar challenges the Disciplinary Panel's finding, seeking to rely on Article 35(iii) and Article 35(v) of the Code of Conduct. Article 35(iii) defines misconduct as engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; Article 35(v), as providing inaccurate information or failing to disclose information regarding counsel's qualifications to practise before the Tribunal. None of these articles defines as professional misconduct the continuing representation of clients after counsel ceases to satisfy one or more requirements of Article 14(A) of the Directive. Neither the Code of Conduct nor the Directive impose on counsel an obligation to immediately cease representation of clients in such cases. While, as it will be discussed below,<sup>38</sup> counsel are obliged to disclose to the Registry information relevant to their qualifications to practice before the Tribunal, including information relevant to their admission to the practice of law in a State, pursuant to Article 14(E)(iii) of the Directive it is for the Registrar to remove counsel where counsel no longer satisfies the requirements of Article 14(A) of the Directive. Similarly, Rule 44(A) of the Rules lists requirements which counsel shall meet to be considered qualified to represent an accused before the Tribunal; the Rule does not provide for a specific obligation for counsel to cease representation if he or she is no longer admitted to the practice of law.

26. The Disciplinary Board is not satisfied that the Registrar has established an error in the Disciplinary Panel's finding that no clear provision in the law of the Tribunal imposes liability on

<sup>33</sup> Registrar's Appeal, paras 37, 42.

<sup>34</sup> Registrar's Appeal, para. 39.

<sup>35</sup> Registrar's Appeal, para. 38.

<sup>36</sup> Registrar's Appeal, paras 41, 43.

<sup>37</sup> Fila's Response, para. 7.

<sup>38</sup> See *infra*, paras 30-31.

counsel for continuing to represent clients when counsel ceases to satisfy the requirements of Article 14(A) of the Directive, and consequently, that there was no misconduct under Article 35(i) of the Code of Conduct. This argument of the Registrar is, therefore, dismissed.

(b) Alleged failure to disclose the first period to the Registry

27. The Disciplinary Panel, by majority, Mr. John Cubbon dissenting, found that Mr. Fila's failure to disclose to the Registry the fact that he had ceased to fulfil the requirements of Article 14(A) of the Directive during the first period of alleged unauthorised practice may constitute misconduct only where there is potential prejudice towards a client.<sup>39</sup> The majority found no prejudice to Mr. Fila's client, emphasising the limited period during which Mr. Fila was not authorised to practise law, the fact that this period included the New Year's holidays, that it was unlikely that he would have needed to engage in advocacy on behalf of his client during that time, and that Mr. Fila applied to be "resubmitted" to the list of attorneys before he was effectively withdrawn from the list.<sup>40</sup>

(i) Submissions

28. The Registrar seeks reversal of the Disciplinary Panel's finding discussed in the preceding paragraph,<sup>41</sup> submitting that Article 35(v) of the Code of Conduct imposes strict liability for failure to disclose information about counsel's qualifications to practise before the Tribunal and that the Code does not require prejudice.<sup>42</sup> He contends that there exists a clear potential for prejudice by virtue of the fact that Mr. Šainović was not represented by a fully qualified lead counsel during this period,<sup>43</sup> that he is aware of at least one filing by Mr. Fila on behalf of his client during this period, and that, accordingly, prejudice to Mr. Šainović appears to have occurred in fact.<sup>44</sup> Further, he submits that had the Registry been made aware that Mr. Fila was no longer qualified, he could have been removed from the case immediately, which would have resulted in prejudice to Mr. Šainović.<sup>45</sup>

29. Mr. Fila submits that the Registrar's arguments are unfounded.<sup>46</sup> He contends that while he was removed from the Directory of Attorneys-at-Law as of 29 December 2008 pursuant to a decision of the Governing Body of the Belgrade Bar Association of 28 November 2008, he applied

<sup>39</sup> Decision, para. 46.

<sup>40</sup> Decision, paras 46-47.

<sup>41</sup> Registrar's Appeal, paras 44-46, 50.

<sup>42</sup> Registrar's Appeal, para. 46.

<sup>43</sup> Registrar's Appeal, paras 47-48.

<sup>44</sup> Registrar's Appeal, para. 48.

<sup>45</sup> Registrar's Appeal, para. 49.

<sup>46</sup> Fila's Response, para. 7.

for readmission on 15 December 2008, *i.e.* two weeks before he was removed, and his application was approved on 12 January 2009.<sup>47</sup> He submits that he had no intention to stop practising law and that the Belgrade Bar Association was late in deciding on his application.<sup>48</sup>

(ii) Discussion

30. Article 35(v) of the Code of Conduct defines as professional misconduct providing inaccurate information or failing to disclose information relevant to counsel's qualifications to practise before the Tribunal. For a finding of professional misconduct under this article, therefore, the Disciplinary Panel must be satisfied that counsel has provided inaccurate information or has failed to disclose relevant information. The Disciplinary Panel found that Mr. Fila was not admitted to the practice of law in a State, as required by Article 14 of the Directive, from 29 December 2008 to 15 January 2009. Information about counsel's admission to the practice of law in a State falls within the meaning of information under Article 35(v). Mr. Fila did not provide this information to the Registrar until 2 August 2011, *i.e.* approximately two and a half years after the event.<sup>49</sup> The requirements of Article 35(v) were satisfied by the Disciplinary Panel's finding that Mr. Fila did not provide information to the Registrar about the fact that he was not admitted to the practice of law in a State at the relevant time.

31. The Disciplinary Panel, by majority, however, found no professional misconduct and held that failure to disclose this information may constitute misconduct only where there is potential prejudice towards a client.<sup>50</sup> The Panel cites no authorities in support and provides no reasons for its conclusion. Article 35(v) of the Code does not require a finding of actual or potential prejudice resulting from counsel's failure to disclose information. The Code of Conduct does not envisage any of the factors taken into account by the majority of the Disciplinary Panel<sup>51</sup> as relevant for establishing misconduct. While these factors are relevant to determine the gravity of the violation and, therefore, may be taken into account in deciding on the appropriate sanction, consideration of these factors is not necessary for a finding of professional misconduct.

32. The Disciplinary Board is satisfied that the Disciplinary Panel erred in law by finding that counsel's failure to disclose information regarding his qualification to practise before the Tribunal may constitute misconduct only where there is potential prejudice towards a client. The

<sup>47</sup> Fila's Response, para. 7.

<sup>48</sup> Fila's Response, para. 7.

<sup>49</sup> This information was disclosed to the Registry for the first time in Mr. Fila's Rule 45 application of 2 August 2011.

<sup>50</sup> Decision, para. 46.

<sup>51</sup> Namely, the limited period during which Mr. Fila was not authorised to practise law, that the withdrawal took place during the New Year holidays, that it was unlikely that he would have needed to engage in advocacy on behalf of his client during this period and that he applied to be "resubmitted" to the list of attorneys before he was effectively withdrawn, Decision, para. 46.

Disciplinary Panel's dismissal of the complaint of misconduct under Article 35(v) of the Code of Conduct for Mr. Fila's failure to disclose the fact that he had ceased to fulfil the requirements of Article 14(A)(i) of the Directive during the first period is reversed.

3. Alleged errors in relation to the second period of alleged unauthorised practice

(a) Alleged unauthorised practice

33. The Disciplinary Panel found that it was not proven beyond a reasonable doubt that during the second period of alleged unauthorised practice Mr. Fila was not admitted to the practice of law in a State as required by Article 14(A)(i) of the Directive and, consequently, that he had engaged in unauthorised practice before the Tribunal.<sup>52</sup> It found no violation of Article 35(i) of the Code of Conduct.<sup>53</sup>

(i) Submissions

34. The Registrar submits that this finding of the Disciplinary Panel is erroneous and should be reversed.<sup>54</sup> He submits that during the period from 22 January 2010 through 30 November 2011, counsel acted as government advisor, and consequently had requested and been granted temporary leave of absence from his domestic practice as attorney.<sup>55</sup> In the Registrar's opinion, the effect of this temporary leave was the suspension of counsel's right to practise law in his domestic jurisdiction, and, consequently, that he was no longer qualified to appear before the Tribunal according to Rule 44 of the Rules and Article 14 of the Directive, even if his admission to the domestic bar may not have been terminated.<sup>56</sup> In support of this, the Registrar refers to Decision 2100/2011 of the Serbian Bar Association dated 1 December 2011, which expressly allowed Mr. Fila "to resume his legal practice" after his temporary leave from the practice of law had been terminated upon his request.<sup>57</sup> The Registrar submits that according to Mr. Fila himself, his rights and obligations as an attorney were not in effect during the period of his temporary leave.<sup>58</sup>

35. Mr. Fila responds that the term "temporary leave" does not exist under Serbian law and that contrary to the Registrar's assertions his right to practise law in Serbia was never suspended during his temporary absence according to the applicable Serbian law.<sup>59</sup> He points out that this is the case for the period under discussion when he acted as advisor to a member of the government, but also

<sup>52</sup> Decision, para. 35.

<sup>53</sup> Decision, para. 36.

<sup>54</sup> Registrar's Appeal, paras 17(b), 56-58, 62.

<sup>55</sup> Registrar's Appeal, paras 17(b), 52, 54-55, 62.

<sup>56</sup> Registrar's Appeal, paras 55, 58-59, 62.

<sup>57</sup> Registrar's Appeal, paras 51, 53, 55, 59 (emphasis in original), 65.

<sup>58</sup> Registrar's Appeal, paras 52, 60.

with regard to periods when he held other advisory posts on an honorary basis.<sup>60</sup> In his opinion, his continuous status as lawyer is also evident from the available evidence.<sup>61</sup> He further submits that the Bar Association of Serbia and Serbian courts are the sole authorities to evaluate his status as a lawyer, and that a Serbian court had found him duly qualified when he represented a client contemporaneously with his role as government advisor during the second period of alleged unauthorised practice.<sup>62</sup>

(ii) Discussion

36. The evidence concerning Mr. Fila's status as a lawyer in the second period of alleged unauthorised practice may appear contradictory to a certain extent. The Serbian Bar Association's Decision 2100/2011 of 1 December 2011 explicitly permitted Mr. Fila "to *resume* his legal practice" after his temporary absence in the second period had expired.<sup>63</sup> However, based on the Serbian Bar Association's Certificate 1101/2011 of 28 July 2011, it is clear that Mr. Fila's status as a lawyer was continuous from 21 April 1967 until 28 July 2011 (except for the period from 29 December 2008 to 15 January 2009),<sup>64</sup> which confirms his status as a lawyer for most of the second period of alleged unauthorised practice. A letter by the Serbian Bar Association dated 12 December 2011 further confirms that Mr. Fila's status as lawyer had been continuous (except for the period from 29 December 2008 to 15 January 2009), and once more clarifies that under the applicable Serbian law his term of temporary absence during the second period did not constitute a termination of his practice as lawyer.<sup>65</sup> The Disciplinary Board notes that even in the Registrar's own submissions, Mr. Fila's admission to the Serbian Bar may not have been terminated during this period.<sup>66</sup> Rule 44(A)(i) of the Rules establishes the minimum requirements for qualifications of counsel appearing before the Tribunal, requiring them, in the pertinent alternative, to be "admitted to the practice of law in a State". Circumstances which do not change this minimum requirement of actually holding the status of a lawyer, such as periods of temporary leave, are not to be considered when making determinations under this sub rule. Considering further that the Serbian Bar Association is the competent authority to apply pertinent Serbian law in order to assess counsel's status as a lawyer, the Disciplinary Board concludes that it was reasonable for the Disciplinary Panel to conclude that, on the basis of the evidence before it, it had no reasonable grounds to doubt

<sup>59</sup> Fila's Response, paras 8 (*referring to* Article 30 of the "Law on Legal Practice"), 10-11.

<sup>60</sup> Fila's Response, paras 9-10.

<sup>61</sup> Fila's Response, para. 10.

<sup>62</sup> Fila's Response, paras 14-15.

<sup>63</sup> Registrar's Appeal, Annex I (emphasis added).

<sup>64</sup> Complaint, Annex 2.

<sup>65</sup> Complaint, Annex 6.

<sup>66</sup> Registrar's Appeal, para. 59.

the Serbian Bar Association's assessment that Mr. Fila held the status of a lawyer throughout the second period.

37. For the foregoing reasons, the Disciplinary Board concludes that the Registrar has failed to show that the Disciplinary Panel erred in fact in concluding that during the second period Mr. Fila was admitted to the practice of law in a State in accordance with Article 14(A)(i) of the Directive and Rules 44 and 45 of the Rules, and thus that he did not engage in misconduct under Article 35(i) of the Code of Conduct.

(b) Alleged failure to disclose the second period to the Registry

38. Based on its finding that it was not proven that by taking temporary leave Mr. Fila was not admitted to the practice of law during the second period of alleged unauthorised practice, the Disciplinary Panel concluded that it cannot make a finding that his failure to inform the Registry about his temporary leave during this period resulted in a failure "to disclose information regarding counsel's qualifications to practise before the Tribunal" pursuant to Article 35(v) of the Code of Conduct.<sup>67</sup>

(i) Submissions

39. The Registrar submits that this finding of the Disciplinary Panel is erroneous and should be reversed,<sup>68</sup> arguing that Mr. Fila was not admitted to practise during this period.<sup>69</sup> The Registrar contends that counsel's obligation to disclose information concerning their qualifications to practise before the Tribunal pursuant to Article 35(v) of the Code of Conduct is continuous and applies to the entire time during which they represent an accused before the Tribunal, not only when they submit a Rule 45 application.<sup>70</sup> The Registrar further submits that if Mr. Fila had properly disclosed the second period of alleged unauthorised practice, the Registry would have been able to enquire further into, and possibly avoid, any potential conflict of interest situation, as further discussed below.<sup>71</sup>

40. Mr. Fila responds that he cannot be reproached for not having informed the Registry that he did not hold the status of a lawyer during the second period, because he never ceased to be an attorney, including during the second period.<sup>72</sup>

<sup>67</sup> Decision, paras 50-51.

<sup>68</sup> Registrar's Appeal, paras 56, 63-65, 67-68.

<sup>69</sup> Registrar's Appeal, para. 65.

<sup>70</sup> Registrar's Appeal, paras 61, 66.

<sup>71</sup> Registrar's Appeal, para. 67, *see also infra*, paras 42 *et seq.* and 50 *et seq.*

<sup>72</sup> Fila's Response, para. 11.

(ii) Discussion

41. The Disciplinary Board found earlier that it was not unreasonable for the Disciplinary Panel to conclude that Mr. Fila was admitted to the practice of law in a State during the second period, as required by Article 14(A)(i) of the Directive and Rules 44 and 45 of the Rules. Consequently, the question whether Mr. Fila has violated his obligations pursuant to Article 35(v) of the Code of Conduct “to disclose information regarding counsel’s qualifications to practise before the Tribunal” by not informing the Registrar about an alleged interruption of his admission to practise law is moot, as no such interruption took place.

(c) Alleged errors in relation to Mr. Fila’s failure to disclose his appointment as government advisor

42. The Disciplinary Panel found that Mr. Fila’s failure to disclose to the Registrar his position of advisor to the Deputy Prime Minister of Serbia coterminous with his representation of an accused before the Tribunal constitutes professional misconduct under Article 35(v) of the Code of Conduct,<sup>73</sup> as Mr. Fila’s appointment gave rise to a significant risk of a conflict of interest.<sup>74</sup> The Panel found, however, that in the absence of evidence of any instruction from the Deputy Prime Minister, which would go contrary to Mr. Fila’s obligations towards his client and the Tribunal, Mr. Fila’s failure to disclose his appointment was not a grave violation.<sup>75</sup> The Disciplinary Panel also considered that Mr. Fila’s position as advisor may compromise his duty to the Tribunal to act with independence in the interest of justice under Article 14(A) of the Code of Conduct, but it did not analyse this charge as it was not expressly pleaded in the Registrar’s Complaint.<sup>76</sup>

(i) Submissions

43. The Registrar appeals the Disciplinary Panel’s assessment that Mr. Fila’s failure to disclose his appointment as advisor is in the nature of a mistaken judgement-call and therefore, not a grave violation warranting any sanction beyond a “public warning”.<sup>77</sup> He submits that the Panel based this conclusion on an erroneous test for conflict of interest, namely that the Registrar presented no evidence of any instructions from the Deputy Prime Minister that would go contrary to Mr. Fila’s obligations towards his client before the Tribunal.<sup>78</sup> In the Registrar’s submission a conflict of interest arises when duties are owed to multiple parties and there is a significant risk that the duties

<sup>73</sup> Decision, paras 56, 58.

<sup>74</sup> Decision, para. 56.

<sup>75</sup> Decision, para. 57.

<sup>76</sup> Decision, para. 55.

<sup>77</sup> Registrar’s Appeal, paras 19, 71, 79, 82.

<sup>78</sup> Registrar’s Appeal, paras 72-73.

may conflict.<sup>79</sup> He submits that the potential for conflict of interest in this case is great, as various sections of the Tribunal and parties to the Tribunal's proceedings need to liaise with the Serbian government.<sup>80</sup>

44. The Registrar takes issue with the Disciplinary Panel's findings that it cannot analyse any charge pursuant to Article 14(A) of the Code of Conduct concerning counsel's duty of loyalty that may be compromised by counsel's position as advisor, as it was not brought before it and refers to the Panel's *proprio motu* powers to commence an investigation and to formulate charges.<sup>81</sup> He further contests the finding of the Panel that he did not bring this charge in his Complaint, submitting that he did plead this charge in relation to counsel's assertion that he made certain media statements as a public figure or in his function as an advisor to a member of the Serbian government and that he had no duty towards the Tribunal in relation to these statements.<sup>82</sup> Consequently, the Registrar requests the Disciplinary Board, should it find that additional information is necessary to assess any issues relevant to a conflict of interest and questions of loyalty, to instruct the Panel to reconsider this decision and investigate the matter.<sup>83</sup>

45. Mr. Fila responds that the fact that he was an advisor to a member of the government did not need to be disclosed as it was in the public domain and that he neither could have concealed it from the Registrar nor did he have the wish to do so.<sup>84</sup>

#### (ii) Discussion

46. The Registrar appeals the Panel's assessment that Mr. Fila's failure to disclose his appointment as an advisor to a member of the Serbian government was not a grave violation, challenging in particular the Panel's finding that "the Complainant presented no evidence of any instruction from the Deputy Prime Minister that would go contrary to Respondent's obligation towards his client and the Tribunal". The Disciplinary Board notes that the Panel made this observation while considering the gravity of the violation of Article 35(v) of the Code of Conduct and not in order to determine whether a violation of Article 35(v) has been established. Relevantly, the Panel held that Mr. Fila's failure to disclose to the Registrar his appointment as a government advisor carried "a significant risk of a conflict of interest".<sup>85</sup> The Disciplinary Board fails to see how taking into account the specific circumstances of the case in determining the gravity of the

<sup>79</sup> Registrar's Appeal, para. 73.

<sup>80</sup> Registrar's Appeal, para. 74.

<sup>81</sup> Registrar's Appeal, paras 76-77.

<sup>82</sup> Registrar's Appeal, para. 78, *referring*, in particular, to paragraphs 83 and 84 of the Complaint.

<sup>83</sup> Registrar's Appeal, para. 83.

<sup>84</sup> Fila's Response, para. 12.

<sup>85</sup> Decision, para. 56.

established violation was not reasonable. The Disciplinary Board concludes that the Registrar has failed to show that the Disciplinary Panel erred in law when concluding that Mr. Fila's non-disclosure of his appointment as government advisor did not amount to a grave case of misconduct pursuant to Article 35(v) of the Code of Conduct.

47. The Registrar challenges further the Disciplinary Panel's findings that it could not analyse any charge pursuant to Article 14(A) of the Code of Conduct concerning counsel's duty of loyalty, as this charge was not explicitly pleaded in the Complaint. The Disciplinary Board held earlier that where disciplinary proceedings are initiated by a complaint, the information contained in the complaint need be such that, if not contradicted by the respondent, would be sufficient to establish the alleged professional misconduct.<sup>86</sup> It follows from this that in such cases it is for the complainant and not for the Disciplinary Panel to plead the charges pursuant to Article 46(A) of the Code of Conduct. On this basis, this submission of the Registrar is rejected.

48. The Registrar further alleges that he in fact pleaded the charge that Mr. Fila's position as advisor may compromise his duty of loyalty to the Tribunal pursuant to Article 14(A) of the Code of Conduct, referring to specific paragraphs in his Complaint.<sup>87</sup> The Disciplinary Board observes that the pleadings in these paragraphs are with respect to another matter, namely that Mr. Fila compromised his duty of loyalty towards the Tribunal by stating that he owes no duty to the Tribunal when making statements as a public figure, or alternatively, in his function as a government advisor. The pleadings cited by the Registrar do not allege that Mr. Fila's role as government advisor *per se* could compromise his duty of loyalty towards the Tribunal.

49. In light of the foregoing, the Disciplinary Board is not satisfied that the Registrar has established that the Disciplinary Panel's decision not to consider the charge of Mr. Fila's violation of his duty of loyalty under Article 14(A) of the Code of Conduct is erroneous in fact or in law.

(d) Alleged failure to inform client of the potential conflict of interest

50. The Disciplinary Panel rejected the notion that Mr. Fila potentially violated Article 14 of the Code of Conduct if he did not inform his client of his role as a government advisor and if he did not receive his client's consent. It found that even if this allegation is established the charge of professional misconduct would not be proven beyond a reasonable doubt.<sup>88</sup> The Panel found that in any event Mr. Fila had stated that he had informed his client of his appointment to which his client

<sup>86</sup> See *supra*, paras 17-20.

<sup>87</sup> Registrar's Appeal, paras 76-78, referring in particular to paras 83 and 84 of the Complaint.

<sup>88</sup> Decision, paras 59-60.

consented; the Disciplinary Panel also noted that the Registrar did not put forward any evidence in support of his assertion of potential violation of Article 14 of the Code of Conduct.<sup>89</sup>

(i) Submissions

51. The Registrar appeals this finding of the Disciplinary Panel, arguing that the potential for misconduct was the very reason why he requested the Panel to undertake an inquiry into the allegations.<sup>90</sup> He further submits that Mr. Fila did not present any evidence of his client's informed consent to Mr. Fila's dual role, or a signed waiver.<sup>91</sup> The Registrar requests that the Disciplinary Board reverse the Disciplinary Panel's finding and instructs the Panel to investigate whether Mr. Fila has obtained the informed consent of his client. In the Registrar's opinion, this would require more than a cursory assessment on the basis of self-serving statements of counsel submitted in these proceedings.<sup>92</sup>

52. In his response Mr. Fila reiterates that his client was informed of Mr. Fila's role as a government advisor and that he consented to it. Mr. Fila further submits that his role as a government advisor in Serbia on an honorary basis could in no way damage his client's interests before the Tribunal.<sup>93</sup>

(ii) Discussion

53. The Registrar submits that in his Complaint he asked the Disciplinary Panel to investigate further whether a violation of the Code of Conduct had occurred. For reasons set out earlier in this decision, the Disciplinary Board is of the view that the Registrar's understanding of the role of the Disciplinary Panel as an investigatory body is misconceived. The burden to prove misconduct beyond a reasonable doubt lies with the complainant.<sup>94</sup> The Board notes further that in his appeal the Registrar is repeating arguments he made before the Disciplinary Panel regarding its role in the disciplinary proceedings,<sup>95</sup> arguments which the Disciplinary Panel did not accept. In the view of the Disciplinary Board the Registrar has not established any error of law in the Disciplinary Panel's dismissal of the Registrar's submission that Mr. Fila potentially violated his duty of loyalty towards his client pursuant to Article 14 of the Code by not informing him of his advisory position, for the reason that only a potential violation was alleged. For the foregoing reasons, the Registrar's argument is dismissed.

<sup>89</sup> Decision, paras 60-61.

<sup>90</sup> Registrar's Appeal, paras 17(i), 56, 84-86.

<sup>91</sup> Registrar's Appeal, paras 75, 87.

<sup>92</sup> Registrar's Appeal, para. 88.

<sup>93</sup> Fila's Response, para. 13.

<sup>94</sup> See *supra*, paras 17-20.

<sup>95</sup> See Complaint, para. 62.

(e) Alleged errors in relation to findings on practising law in violation of the Serbian Bar Statute

54. The Disciplinary Panel dismissed the complaint of professional misconduct under Article 35(i) of the Code of Conduct for Mr. Fila's alleged practice of law before the Tribunal in violation of the Serbian Bar Statute during the first and second periods of alleged unauthorised practice,<sup>96</sup> noting that the Registrar did not refer to any disciplinary findings of the Serbian Bar Association against Mr. Fila or to evidence that Mr. Fila's practice before the Tribunal during the two periods falls within the scope of the applicable Serbian law.<sup>97</sup> For the same reasons the Panel also dismissed the complaint that by practising law before the Tribunal allegedly in violation of the Serbian Bar Statute Mr. Fila engaged in conduct that was prejudicial to the proper administration of justice which constitutes misconduct pursuant to Article 35(iv).<sup>98</sup> In this respect the Panel noted also that the Registrar did not tender any evidence of harm caused as a result of the alleged violation of the Serbian Bar Statute, as is required by case law.<sup>99</sup>

(i) Submissions

55. The Registrar requests that the Disciplinary Board reverses the Disciplinary Panel's findings outlined above, or, in the alternative, that it orders the Panel to conduct an investigation pursuant to Articles 44 and 46 of the Code of Conduct.<sup>100</sup> The Registrar submits that it appears that while Mr. Fila was not permitted under the Serbian Bar Statute to represent clients before the Tribunal during the second period, he continued to represent a client and appeared before the Appeals Chamber on six occasions.<sup>101</sup> The Registrar refers to rules of the Serbian Bar Statute which, in his opinion, Mr. Fila violated by these actions.<sup>102</sup> He contends further that the Disciplinary Panel's dismissal of the charge of misconduct despite what in his view was clear evidence that Mr. Fila had represented an accused, Goran Hadžić, before a Serbian court during the second period in violation of the Serbian law, is erroneous.<sup>103</sup> In the Registrar's submission, a clear indication that counsel has plainly violated domestic law suffices for the Disciplinary Panel to find a violation and a finding by another body is not required.<sup>104</sup> The Registrar submits that he was not given the opportunity to present evidence during a hearing under Article 46(D) of the Code of Conduct and that the Panel erred in dismissing the allegations without exercising its investigatory powers.<sup>105</sup> With respect to the

<sup>96</sup> Decision, paras 62-64.

<sup>97</sup> Decision, para. 63.

<sup>98</sup> Decision, paras 62, 65, 67.

<sup>99</sup> Decision, para. 66, *citing the Aleksić Decision*, para. 45.

<sup>100</sup> Registrar's Appeal, paras 89-90, 103, 104, 108.

<sup>101</sup> Registrar's Appeal, para. 95.

<sup>102</sup> Registrar's Appeal, paras 91-95, 102.

<sup>103</sup> Registrar's Appeal, paras 97-99, 102, 105.

<sup>104</sup> Registrar's Appeal, paras 100-101.

<sup>105</sup> Registrar's Appeal, paras 103-104.

Disciplinary Panel's dismissal of the allegation of misconduct under Article 35(iv) of the Code of Conduct, on the basis that Mr. Fila allegedly engaged in conduct that was prejudicial to the proper administration of justice by practising law before the Tribunal,<sup>106</sup> the Registrar argues that the reference to the case law regarding the actual harm requirement is misplaced, as the referenced case is distinguishable from the case at hand.<sup>107</sup> He also argues that in any event "clear instances of harm [...] exist" in the present case,<sup>108</sup> without elaborating on further.

56. Mr. Fila responds that the Serbian Bar Association is the sole authority to assess his status as a lawyer in Serbia and that a Serbian court had found him duly qualified when he appeared before it to represent Goran Hadžić during the second period of alleged unauthorised practice.<sup>109</sup> He submits that the Registrar does not state whether he has sought to obtain the views of the Serbian Bar Association on the matter or whether he has requested information about disciplinary proceedings initiated against Mr. Fila in Serbia.<sup>110</sup>

(ii) Discussion

57. The Disciplinary Board notes that the Registrar was able to obtain information from the Serbian Bar Association about whether Mr. Fila had violated any law of professional ethics in Serbia or whether there are any disciplinary proceedings initiated against him. Annexed to the Registrar's Complaint is a Certificate of the Serbian Bar Association dated 28 July 2011 that confirms that neither the Serbian nor the Belgrade Bar Association have conducted any disciplinary proceedings against Mr. Fila, and that Mr. Fila has not breached any provision of the "Codex of Professional Ethics" or the "Law on Attorneys".<sup>111</sup> This Certificate applies for the entirety of the first period and the first part of the second period up to 28 July 2011, including when Mr. Fila represented Goran Hadžić in a Serbian court before Goran Hadžić's transfer to the seat of the Tribunal on 22 July 2011. The Disciplinary Board further notes that the Serbian court before which Mr. Fila appeared on behalf of Goran Hadžić also found him duly qualified and did not raise any issues regarding his representation.

58. The Serbian Bar Association and the Serbian court are the competent authorities to apply the relevant provisions of Serbian law in assessing whether Mr. Fila was duly qualified and whether he has violated Serbian laws on professional ethics when representing Goran Hadžić in July 2011 or during any other period. The Registrar, who carries the burden of proof in these disciplinary

<sup>106</sup> See in particular Registrar's Appeal, paras 89-90, 105, 108.

<sup>107</sup> Registrar's Appeal, para. 106.

<sup>108</sup> Registrar's Appeal, para. 107.

<sup>109</sup> Fila's Response, paras 14-15.

<sup>110</sup> Fila's Response, para. 16.

<sup>111</sup> Complaint, Annex 2.

proceedings, as set out above,<sup>112</sup> has not submitted any other evidence to show a violation. He makes reference to isolated provisions of the Serbian Bar Statute which, in his opinion, Mr. Fila violated by his actions.<sup>113</sup> The Board notes that in this respect the Registrar merely repeats his submissions before the Disciplinary Panel<sup>114</sup> without identifying an error. By these submissions the Registrar is only presenting arguments on appeal that had been unsuccessful before the Disciplinary Panel. Hence, in the Disciplinary Board's view, the Registrar did not demonstrate that the Disciplinary Panel's dismissal of the alleged misconduct under Article 35(i) and (iv) of the Code of Conduct for violating the Serbian Bar Statute was erroneous.

59. The Disciplinary Board concludes that the Registrar has failed to show that no reasonable trier of fact could have dismissed the allegation that by practising law during the two periods Mr. Fila violated the Serbian Bar Statute and engaged in conduct that was prejudicial to the proper administration of justice, in violation of Article 35(i) or (iv) of the Code of Conduct.

#### 4. Alleged errors in relation to Mr. Fila's statements in his Rule 45 application

60. The Disciplinary Panel dismissed the allegation that Mr. Fila engaged in misconduct under Article 35(v) by providing false information in his Rule 45 application regarding his continuous status as a lawyer.<sup>115</sup> The Panel found that Mr. Fila's statement that his experience and practice as a lawyer is "almost 45 years long" would not be "straightforwardly incorrect" even if he did not practise law during the two alleged periods.<sup>116</sup> It found further that the statement that he has worked as a lawyer from 1967 until the day of his application must be viewed as qualified by the enclosed Certificate of the Bar Association of Serbia dated 28 July 2011, indicating that he was not registered with the Bar Association of Serbia during the first alleged period.<sup>117</sup> With respect to the second period of alleged unauthorised practice, the Panel found that in light of the letter of 12 December 2011 from the Serbian Bar Association stating that time on temporary leave is not considered as termination of the practice of law, Mr. Fila's statements that he was a lawyer during this period do not constitute inaccurate information.<sup>118</sup> While Mr. Fila failed to disclose the fact that he was on temporary leave from his law practice, the Panel found that paragraph 57 of the Complaint did not explicitly plead failure to disclose relevant information and did not analyse this issue further.<sup>119</sup>

<sup>112</sup> See *supra*, paras 17-20.

<sup>113</sup> Registrar's Appeal, paras 91-95, 102.

<sup>114</sup> Complaint, paras 25-26, 29-31.

<sup>115</sup> Decision, para. 44.

<sup>116</sup> Decision, para. 39.

<sup>117</sup> Decision, paras 40-41.

<sup>118</sup> Decision, para. 42.

<sup>119</sup> Decision, paras 38, 43.

(i) Submissions

61. The Registrar submits that the Disciplinary Panel erred in making the above findings.<sup>120</sup> He refers to the Panel's observations that some of Mr. Fila's statements in his Rule 45 application "may be misleading" and others "not straightforwardly incorrect"<sup>121</sup> and challenges the Panel's conclusion that such statements, when viewed in context, do not amount to inaccurate information under Article 35(v) of the Code.<sup>122</sup> The Registrar contends that Mr. Fila's suspension from the practice of law, in his view, effective at the time of Mr. Fila's Rule 45 application, was a material omission from his Rule 45 application which could cause serious harm.<sup>123</sup> He also submits that the Panel erred in law and fact in finding that the omission of information about Mr. Fila's appointment as a government advisor from his Rule 45 application did not constitute misconduct under Article 35(v) and Article 35(i) of the Code of Conduct.<sup>124</sup>

62. Mr. Fila responds that he did not provide any false or misleading information in his Rule 45 application.<sup>125</sup>

(ii) Discussion

63. The Disciplinary Board found earlier that the Registrar has failed to show that the Disciplinary Panel erred in concluding that during the second period Mr. Fila was admitted to the practice of law in a State in accordance with Article 14(A)(i) of the Directive and Rules 44 and 45 of the Rules.<sup>126</sup> The Registrar's challenges to the Disciplinary Panel's findings about Mr. Fila's failure to include this information in his Rule 45 application are, therefore, moot. With respect to the first period, the Registrar challenges the Disciplinary Panel's conclusions regarding Mr. Fila's statements in his Rule 45 application about his continuous status as a lawyer but he fails to identify any specific error of law or fact in the Disciplinary Panel's findings. He fails to point to specific evidence that the Panel failed to consider, to an error in the Panel's reasoning or to explain in any way why no reasonable trier of fact could have reached the conclusions reached by the Disciplinary Panel. In the view of the Disciplinary Board, the Registrar seeks to substitute his own assessment of the evidence with that of the Disciplinary Panel without identifying specific errors.

64. The Registrar also submits that the Panel erred in finding that the omission of information about Mr. Fila's position as a government advisor did not constitute misconduct under Article 35(i)

<sup>120</sup> Registrar's Appeal, paras 109, 122.

<sup>121</sup> Registrar's Appeal, paras 111 (*referring to Decision*, paras 39, 43), 112.

<sup>122</sup> Registrar's Appeal, paras 113-114. *See also Registrar's Appeal*, paras 116, 121.

<sup>123</sup> Registrar's Appeal, paras 115, 117.

<sup>124</sup> Registrar's Appeal, paras 119-120.

<sup>125</sup> Fila's Response, para. 17.

<sup>126</sup> *See supra*, para. 37.

of the Code of Conduct but he fails to point out to specific paragraphs of the Decision where the Panel made such findings.<sup>127</sup> The Disciplinary Panel noted that the Complaint alleged professional misconduct under Article 35(v) of the Code of Conduct and made findings under this article.<sup>128</sup> Contrary to the Registrar's submission, the Panel did not make findings under Article 35(i).

65. The Registrar submits further that the Panel erred in finding that the omission of information about Mr. Fila's appointment as advisor to the Deputy Prime Minister from his Rule 45 application is not a misconduct under Article 35(v),<sup>129</sup> but yet again he fails to cite to a paragraph in the Decision where the Panel made this finding. The Panel's findings which the Registrar cites in support of this allegation refer to Mr. Fila's failure to disclose information about his temporary leave, not about his appointment as advisor to the Deputy Prime Minister.<sup>130</sup> The Registrar's reference to the Decision, therefore, is inapposite.

66. With respect to the same allegation that Mr. Fila's omitted information about his appointment as a government advisor from his Rule 45 application, the Registrar finally submits that the Complaint expressly pleaded this allegation and that in any event the Panel had an obligation to act *proprio motu*.<sup>131</sup> The paragraphs of the Complaint, referred to by the Registrar, allege that Mr. Fila failed to include information in his Rule 45 application about his appointment as an advisor.<sup>132</sup> While it is not entirely clear from the Complaint whether this allegation was intended to be pleaded as a separate charge, the Disciplinary Board notes that in view of the Disciplinary Panel's finding that Mr. Fila's failure to disclose to the Registry his position as advisor to a member of the Serbian government constitutes misconduct under Article 35(v) of the Code of Conduct,<sup>133</sup> it was unnecessary for the Panel to make a separate finding on this allegation. The Registrar's arguments are, therefore, dismissed.

##### 5. Alleged errors in relation to interview in "Vesti"

67. The Disciplinary Panel found that a statement attributed to Mr. Fila in his interview to the print publication "Vesti"<sup>134</sup> may be in violation of Article 3(v) of the Code of Conduct. However, it dismissed the charge, taking into account Mr. Fila's submissions that he did not make this

<sup>127</sup> See Registrar's Appeal, paras 109, 119, 121.

<sup>128</sup> Decision, paras 37, 44.

<sup>129</sup> Registrar's Appeal, para. 119.

<sup>130</sup> Registrar's Appeal, para. 120 referring to Decision, paras 43-44.

<sup>131</sup> Registrar's Appeal, para. 120, referring to paras 32-34 of the Complaint.

<sup>132</sup> Complaint, paras 32-33.

<sup>133</sup> Decision, paras 56, 58.

<sup>134</sup> This statement reads: "Because the judges in The Hague would not even know how to act as referees in a simple football game. Most of them have no experience at all. The Appeals Chamber has seven judges, all of them youths aged around thirty".

statement.<sup>135</sup> The Panel held that the absence of evidence that Mr. Fila requested a retraction was not sufficient to prove the charges, especially as the benefits of such a retraction would be uncertain.<sup>136</sup>

(a) Submissions

68. The Registrar submits that the Disciplinary Panel erred in: (i) not finding that statements, identified in his appeal, attributed to Mr. Fila in his "Vesti" interview constitute misconduct; (ii) not finding that the failure by Mr. Fila to seek a retraction was evidence beyond a reasonable doubt that he did not object to the statements being attributed to him; and (iii) failing to hold a hearing and order that Mr. Fila seek a retraction.<sup>137</sup> He submits that the Registry did not find Mr. Fila's denial that he made those statements credible,<sup>138</sup> in light of his failure to request a retraction from "Vesti".<sup>139</sup> The Registrar emphasises that the statements in the "Vesti" interview remain in the public domain and cast aspersions on the Judges and the work of the Tribunal<sup>140</sup> and requests that the Disciplinary Board overturn the Panel's finding or, in the alternative, order a hearing.<sup>141</sup>

69. Mr. Fila responds that the Registrar seeks to restrict the freedom of speech of counsel appearing before the Tribunal<sup>142</sup> and that he has an erroneous understanding of the burden of proof in these proceedings.<sup>143</sup>

(b) Discussion

70. In his appeal, the Registrar lists several statements attributed to Mr. Fila in his "Vesti" interview and submits that the Disciplinary Panel erred in finding that these statements were not misconduct. The Disciplinary Panel found that one of the statements in "Vesti" may constitute misconduct but it was not proved beyond a reasonable doubt that Mr. Fila made this statement. The Registrar does not make specific submissions with respect to the other "Vesti" interview statements listed in his appeal. For this reason, the Disciplinary Board will not consider these statements further.

71. With respect to the statement in the "Vesti" interview which the Disciplinary Panel found may constitute misconduct, the Registrar disagrees with the Panel's conclusion that the benefit of a

<sup>135</sup> Decision, paras 74-75.

<sup>136</sup> Decision, para. 75.

<sup>137</sup> Registrar's Appeal, paras 123-124, 127, 130.

<sup>138</sup> Registrar's Appeal, para. 125.

<sup>139</sup> Registrar's Appeal, paras 125-126.

<sup>140</sup> Registrar's Appeal, para. 129.

<sup>141</sup> Registrar's Appeal, para. 131.

<sup>142</sup> Fila's Response, para. 18.

<sup>143</sup> Fila's Response, para. 19.

retraction which Mr. Fila could have sought would be uncertain. He contends that a retraction would have shown the public that "Vesti" misquoted Mr. Fila and it is likely that it would have removed the statements from continuous public view.<sup>144</sup> In the view of the Disciplinary Board, the arguments of the Registrar are speculative; he seeks to substitute his own assessment with that of the Disciplinary Panel without establishing that no reasonable trier of fact could have reached the conclusion reached by the Panel. The Registrar submits that the Disciplinary Panel erred in not conducting a hearing but he does not identify what issues, in addition to those addressed in the written submissions before the Panel, could have been addressed or what evidence could have been tendered during such hearing. In the circumstances, the Registrar has not demonstrated that the Disciplinary Panel erred in not conducting a hearing.

72. In his appeal, the Registrar lists statements made by Mr. Fila in response to a query from the Registry, to the effect that Mr. Fila is a public figure, entitled to state his opinion, and that the statements in his interview were made in his capacity as advisor to a member of the Serbian government.<sup>145</sup> The Disciplinary Board recalls that the Disciplinary Panel dismissed charges in the Complaint brought under Article 14(A) and 35(i) of the Code of Conduct for essentially the same statements, on the basis that these were statements made by Mr. Fila in his confidential response to the Registry to justify his position in the interview.<sup>146</sup> A party cannot merely repeat on appeal arguments that did not succeed before the Disciplinary Panel unless it can demonstrate that the Panel's rejection of those arguments constitutes an error.<sup>147</sup> The Registrar does not put forward any arguments to establish that the Panel's finding constitutes an error. The Disciplinary Board, therefore, rejects the Registrar's submissions concerning statements made by Mr. Fila in his response to the Registry.

73. The Registrar's appeal of the Disciplinary Panel's findings regarding Mr. Fila's "Vesti" interview is, therefore, dismissed.

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<sup>144</sup> Registrar's Appeal, para. 126.

<sup>145</sup> Registrar's Appeal, paras 124, 128.

<sup>146</sup> Decision, para. 76 referring to Complaint, paras 83 and 84.

<sup>147</sup> See *supra*, para. 13.

## **B. Mr. Fila's Appeal**

### 1. Alleged errors in relation to findings about Mr. Fila's appointment as advisor to the Deputy Prime Minister

#### (a) Submissions

74. Mr. Fila challenges the Disciplinary Panel's finding that he has engaged in professional misconduct by failing to inform the Registrar that he was appointed as an advisor to the Deputy Prime Minister of the Republic of Serbia to allow the Registrar to conduct the necessary conflict of interest checks.<sup>148</sup> Mr. Fila submits that the fact that he was appointed to this position was disclosed publicly as he had appeared a number of times in the media in Serbia and in the region in his function as an advisor to the Deputy Prime Minister,<sup>149</sup> and that he, therefore, neither could nor had the intention of concealing this fact.<sup>150</sup> He further avers that it was him who informed the Registrar about his appointment as a government advisor in his response to the Registrar dated 30 September 2011<sup>151</sup> and that had he known that his appointment was in any way incompatible with his engagements before the Tribunal, he would have declined the advisory position.<sup>152</sup> Mr. Fila opines that his role as a government advisor has no relevance for his activities as an attorney before the Tribunal, and thus bears no risk of conflict of interest vis-à-vis the Tribunal, his client, or parties to proceedings before the Tribunal,<sup>153</sup> emphasising that this was an unpaid assignment "without any assigned tasks or specified scope of activities".<sup>154</sup> He submits that there is no evidence indicating that as an advisor he received any orders or engaged in any acts inconsistent with his duties towards his client or the Tribunal.<sup>155</sup>

75. The Registrar responds that Mr. Fila only informed him of his appointment as an advisor 20 months after he took up this position upon being requested to comment on media statements made by him and only to explain that he had no obligations towards the Tribunal as his attorney obligations were "dormant" as a result of this position and the temporary suspension of his ability to practise law in Serbia, and not to enable the Registrar to conduct a conflict of interest analysis.<sup>156</sup> In the Registrar's submission, by stating that he sought temporary leave from the practice of law in Serbia so as to avoid the impression of conflict of interest vis-à-vis his clients in Belgrade, Mr. Fila

<sup>148</sup> Fila's Appeal, paras 1, 3, 11.

<sup>149</sup> Fila's Appeal, paras 6-7, 10-11.

<sup>150</sup> Fila's Appeal, paras 7-8, 10.

<sup>151</sup> Fila's Appeal, paras 8, 11.

<sup>152</sup> Fila's Appeal, para. 9.

<sup>153</sup> Fila's Appeal, para. 8.

<sup>154</sup> Fila's Appeal, para. 8.

<sup>155</sup> Fila's Appeal, para. 10.

<sup>156</sup> Registrar's Appeal, para. 137.

contradicts his own assertions that his advisory position is irrelevant for his actions before the Tribunal.<sup>157</sup>

(b) Discussion

76. The Disciplinary Board notes that in his appeal Mr. Fila raises arguments which were unsuccessful before the Disciplinary Panel, for example, that his role as an advisor had no bearing on his practice before the Tribunal, in particular, considering that he performed his advisory duties without remuneration.<sup>158</sup> In his submissions to the Board Mr. Fila repeats the arguments he made before the Panel without demonstrating that their dismissal by the Panel constitutes an error that calls for the Disciplinary Board's intervention. In his appeal, Mr. Fila raises for the first time the argument that his advisory position did not involve "any assigned tasks or specified scope of activities".<sup>159</sup> This submission alone would not render unreasonable the Disciplinary Panel's finding that in light of the need of various sections of the Tribunal and parties to proceedings before the Tribunal to liaise with the Serbian government, Mr. Fila's appointment "gave rise to a significant risk of a conflict of interest which he should have brought to the attention of the Registrar".<sup>160</sup>

77. Mr. Fila's submission that there is no evidence showing that as an advisor he received any instruction or engaged in any action contrary to his duties towards his clients or the Tribunal ignores the fact that the Disciplinary Panel did not find that actual conflict of interest is required to trigger the disclosure obligations pursuant to Article 14(A)(viii) of the Directive, but that "*a significant risk of a conflict of interest*" was sufficient.<sup>161</sup>

78. With regard to Mr. Fila's pleadings that his appointment as government advisor was well known and in the public domain in Serbia, the Disciplinary Board observes that this fact cannot relieve Mr. Fila from his obligation to bring this appointment to the attention of the Registrar to enable him to conduct the necessary checks for conflict of interest. The Registrar cannot reasonably be expected to monitor domestic media for potential new roles of counsel practising before the Tribunal that may create conflicts of interest. The duty to bring such information to the attention of the Registrar rests with counsel.

79. The Disciplinary Board is cognizant of case law in disciplinary matters that considers any material delay in disclosing a relevant fact a failure to disclose pursuant to Article 35(v) of the Code

<sup>157</sup> Registrar's Appeal, para. 138.

<sup>158</sup> Fila's Response to Complaint, paras 16-17, 21, 23; Fila's Appeal, paras 8-9, 11.

<sup>159</sup> Fila's Appeal, para. 8.

<sup>160</sup> Decision, para. 56.

<sup>161</sup> Decision, para. 56 (emphasis added).

of Conduct.<sup>162</sup> In the present case, the delay in disclosing the relevant information is close to 35 months<sup>163</sup> and the disclosure was not carried out on counsel's initiative to allow the Registry to conduct the necessary conflict of interest analysis, but was made in correspondence between counsel and the Registry on another matter.

80. For the foregoing reasons, the Disciplinary Board concludes that Mr. Fila has failed to show that no reasonable trier of fact could have reached the conclusion that his failure to disclose to the Registrar his appointment as government advisor coterminous with him representing an accused before the Tribunal constitutes professional misconduct under Article 35(v) of the Code of Conduct.

## 2. Alleged errors in relation to interview to the RTRS

81. The Disciplinary Panel, by majority, Ms. Natacha Fauveau-Ivanović dissenting, found that the statement by Mr. Fila in his RTRS interview "[t]he main aim has been achieved, Serbia has been demonized" ("RTRS statement") is a violation of Article 3(v) of the Code of Conduct and constitutes misconduct under Article 35(i) of the Code of Conduct.<sup>164</sup>

### (a) Submissions

82. Mr. Fila contends that the Disciplinary Panel committed an error of fact by finding that the RTRS statement constitutes misconduct, submitting that the statement does not mention the Tribunal, does not state who has achieved the aim, how, when and by what means, and that it is unclear how the Disciplinary Panel associated the Tribunal and its Judges with this sentence.<sup>165</sup> Mr. Fila submits further that the majority restricted his right to freedom of expression, that international legal instruments guarantee the right of legal representatives to publicly criticise the administration of justice, provided that they do not overstep certain boundaries,<sup>166</sup> and that as a lawyer, thinker, and a public figure, he has a right to express his opinion on relevant social problems.<sup>167</sup> He requests that the Disciplinary Board seek the opinion of the International Association of Lawyers on the matter.<sup>168</sup> Finally, he submits that he perceives the Registrar's Complaint in this respect as an act of personal vendetta, as, in his submission, a procedure initiated against another lawyer participating in the same RTRS program who was subsequently appointed as defence counsel before the Tribunal

<sup>162</sup> *In the matter of Deyan Ranko Brashich*, Case No. DP-2-5-A, Decision in the Appeal by the Registrar to the Disciplinary Board, 23 March 2007, para. 29.

<sup>163</sup> Mr. Fila was appointment government advisor on 8 October 2008 (Fila's Response to Complaint, Annex) coterminous to his representation of his client before the Tribunal, and disclosed this information to the Registry in September 2011 (Complaint, Annex 3).

<sup>164</sup> Decision, paras 71, 73.

<sup>165</sup> Fila's Appeal, paras 12, 14.

<sup>166</sup> Fila's Appeal, paras 13-15, referring to instruments cited in the dissenting opinion of Natacha Fauveau-Ivanović.

<sup>167</sup> Fila's Appeal, paras 15, 18. See also Fila's Response, para. 20.

<sup>168</sup> Fila's Appeal, para. 16.

was discontinued when it became necessary to resolve the issue of legal representation of an accused.<sup>169</sup>

83. The Registrar responds that the Code of Conduct defines the standard of behaviour to which counsel must adhere when they agree to represent an accused before the Tribunal and that where counsel has accepted a Tribunal paid assignment he must temper his criticism.<sup>170</sup> He contends that reasonable limitations may be imposed on the freedom of speech and that when critical statements are made in public and are general in nature, restrictions of counsel's freedom of speech are in accordance with the European Convention of Human Rights ("ECHR").<sup>171</sup> With respect to Mr. Fila's submissions regarding another participant in the RTRS program, the Registrar submits that each matter is dealt with on the basis of the particular circumstances and emphasises that Mr. Fila has not acknowledged that there was anything inappropriate in his statement, has not sought a retraction and has been warned for making similar remarks on at least one prior occasion.<sup>172</sup>

(b) Discussion

84. The Disciplinary Panel found that Mr. Fila's RTRS statement was a serious attack on the integrity of the Tribunal and its Judges and was not supported by valid evidence. It found that the statement amounted to an act which counsel are obliged to avoid under Article 3(v) of the Code of Conduct.<sup>173</sup> Mr. Fila does not challenge the Disciplinary Panel's interpretation of this provision. He argues that the Disciplinary Panel erred in fact because the RTRS statement does not indicate whose aim has been achieved and that it is not clear how the Panel reached its conclusion. This argument is without merits. Contrary to Mr. Fila's submission, the Disciplinary Panel considered the fact that the statement does not make clear whose aim has been achieved by the alleged demonization of Serbia. It also considered the fact that the statement does not assert that this was the aim of the Tribunal itself.<sup>174</sup> The Panel found that the effect of the statement was that the Tribunal has been the vehicle for achieving this aim, an assertion which amounts to an act, which, counsel are obliged to avoid pursuant to Article 3(v) of the Code of Conduct.<sup>175</sup> The Disciplinary Board by Majority, Ms. Colleen Rohan and Mr. Karim Khan dissenting, does not find this finding of the Disciplinary Panel unreasonable. In the view of the Majority, Mr. Fila has failed to establish that the Disciplinary Panel, in its interpretation of the evidence, committed an error of fact which has occasioned a

<sup>169</sup> Fila's Appeal, para. 17.

<sup>170</sup> Registrar's Appeal, paras 140-141.

<sup>171</sup> Registrar's Appeal, para. 140, citing *Schöpfer v. Switzerland*, No. 56/1997/840/1046, Judgment of 20 May 1998 ("*Schöpfer*"), paras 31-32.

<sup>172</sup> Registrar's Appeal, para. 142.

<sup>173</sup> Decision, para. 71.

<sup>174</sup> Decision, para. 71.

<sup>175</sup> Decision, para. 71.

miscarriage of justice or that no reasonable trier of fact could have reached the conclusion reached by the Panel.

85. The Board will now address Mr. Fila's submission that the challenged finding of the Disciplinary Panel restricts his freedom of speech as guaranteed by international legal instruments. The Board notes that the right to freedom of expression is a fundamental human right enshrined in the international human rights treaties.<sup>176</sup> As accepted by Mr. Fila, the right to freedom of expression is not absolute.<sup>177</sup> Human rights treaties provide that the right to freedom of expression may be subjected to restrictions which are "prescribed by law" and "necessary in a democratic society", *inter alia*, for maintaining the authority and the impartiality of the judiciary.<sup>178</sup> Human rights bodies set up to apply the human rights treaties have developed extensive jurisprudence interpreting the protection of the right to freedom of expression. While the Tribunal is not bound by the findings of regional or international human rights bodies, the Board considers them as persuasive sources in delineating the applicable protections for freedom of expression in the context of the Tribunal's proceedings.<sup>179</sup>

86. The Disciplinary Board by Majority, Ms. Colleen Rohan and Mr. Karim Khan dissenting, notes that when assessing whether a restriction of a lawyer's freedom of expression is necessary in a democratic society the European Court of Human Rights ("ECtHR") has emphasised the critical position of lawyers in the administration of justice as intermediaries between the public and the courts, which explains the usual restrictions on the conduct of members of the Bar.<sup>180</sup> It has held that the courts, as the guarantors of justice whose role is fundamental in a State based on the rule of law, must enjoy public confidence and that given the key role of lawyers it is legitimate to expect them to contribute to the proper administration of justice and thus to maintain public confidence in it.<sup>181</sup> The ECtHR has held that while freedom of expression is secured to lawyers, who are certainly entitled to comment in public on the administration of justice, "account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper

<sup>176</sup> See Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"); Article 10 of the ECHR; Article 13 of the American Convention on Human Rights; Article 9 of the African Charter on Human and Peoples' Rights.

<sup>177</sup> See Fila's Appeal, para. 14.

<sup>178</sup> Article 10(2) of the ECHR. See also Article 19(3) of the ICCPR.

<sup>179</sup> See e.g. *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, paras 159-160; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 51; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović, 19 December 2001, paras 2-8.

<sup>180</sup> *Schöpfer*, para. 29.

<sup>181</sup> *Schöpfer*, para. 29. See also *De Haes and Gijssels v. Belgium*, Judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 234, para. 37.

administration of justice and the dignity of the legal profession".<sup>182</sup> The Majority notes that while the ECtHR has found that sanctions imposed on a lawyer for criticising a prosecutor in the courtroom for decisions taken in his capacity as a party to criminal proceedings violate the lawyer's rights under the ECHR,<sup>183</sup> it has found no violation of the right to freedom of expression of a lawyer sanctioned for publicly criticising the administration of justice.<sup>184</sup> The latter case involved a lawyer who was found guilty of a breach of professional ethics and fined to 500 Swiss Franks for raising in public complaints on the subject of pending criminal proceedings before exhausting the available remedies.<sup>185</sup> In that case the ECtHR took into account the fact that the complaints were raised in the media, that they were serious and of general nature, the tone in which the lawyer made his assertions, and the fact that at the time he gave the statements to the media the lawyer had not exhausted the available legal remedies, noting that when he subsequently filed an appeal, it was partially successful.<sup>186</sup>

87. The challenged finding of the Disciplinary Panel concerns a media statement that is very general in nature and contains a serious allegation. As noted by the Disciplinary Panel, the statement was not supported by any valid evidence. The Disciplinary Board by Majority, Ms. Colleen Rohan and Mr. Karim Khan dissenting, recalls that human rights treaties allow for restriction of the right to freedom of expression, *inter alia*, when this is necessary "for maintaining the authority and impartiality of the judiciary".<sup>187</sup> There is no requirement that the statement has caused prejudice to the administration of justice. In the view of the Majority, Mr. Fila's statement at issue in the present proceedings, is not an honest fact-based criticism on the Tribunal's jurisprudence or on any other issue related to the functioning of the Tribunal, to which no doubt counsel practicing before the Tribunal are entitled to,<sup>188</sup> but a direct attack on the authority and impartiality of the Tribunal capable of eroding the public confidence in it. By presenting the creation of the Tribunal as an enterprise aimed at demonizing Serbia, the statement invites a total

<sup>182</sup> *Schöpfer*, para. 33.

<sup>183</sup> *Nikula v. Finland*, Application No. 31611/96, Judgment of 21 March 2002, final 21 June 2002, paras 50-52, 56.

<sup>184</sup> *Schöpfer*, para. 31.

<sup>185</sup> *Schöpfer*, paras 16-17, 34.

<sup>186</sup> *Schöpfer*, paras 31, 32, 34.

<sup>187</sup> ECHR, Article 10(2).

<sup>188</sup> See *Aleksić Decision*, para. 44, holding that the respondent in that case was "entitled to an opinion on the matter and should not be censured by the Tribunal as to his own opinion". The Majority notes that the *Aleksić* case is distinguishable from the present case. Firstly, the former involved allegations of misconduct under Article 35(iii) (for conduct "involving dishonesty, fraud, deceit, or misrepresentation") and under Article 35(iv) of the Code (for conduct "prejudicial to the proper administration of justice") which were dismissed by the Disciplinary Board as no evidence of the necessary intent to deceive or evidence of the effect of the conduct in question on the administration of justice was presented (*Aleksić Decision*, paras 44-45). The allegations in the present case are brought under Article 35(i) of the Code of Conduct for an alleged violation of a provision of the Code. Secondly and more importantly, in the *Aleksić Decision* the Disciplinary Board was satisfied that the respondent made the statement in question in his honest belief informed by an analysis prepared by another institution, cited in the news article at issue in the *Aleksić* case, and with the aim to ensure the provision of appropriate medical care to an accused (*Aleksić Decision*, paras 43-44).

public disregard for the Tribunal's judgments and decisions including for findings which establish through the judicial process that crimes within the jurisdiction of the Tribunal occurred in the former Yugoslavia in the 1990s. In the present circumstances, taking into account the nature of the statement, the very serious allegation made, the tone and the absence of any reason, fact or evidence offered in support, the Majority, Ms. Colleen Rohan and Mr. Karim Khan dissenting, finds that Mr. Fila has not demonstrated that by finding that by his statement Mr. Fila violated Article 3(v) of the Code of Conduct, the Disciplinary Panel impermissibly restricted his right to freedom of expression or that it made an error of law in reaching this conclusion.

88. The Disciplinary Board rejects Mr. Fila's request to seek the opinion of the International Association of Lawyers as Mr. Fila has not presented any arguments in support of his request and the Board finds this unnecessary in the circumstances.

89. Further, the Disciplinary Board rejects the Registrar's submission that where counsel have accepted a Tribunal paid assignment they must temper their criticism. The Code of Conduct applies equally to both Tribunal paid and privately retained counsel and there is no legal basis for distinction.

90. For the foregoing reasons the Disciplinary Board by Majority, Ms. Colleen Rohan and Mr. Karim Khan dissenting, dismisses Mr. Fila's appeal with respect to his RTRS interview.

#### IV. CONCLUSION

91. The Disciplinary Board reverses the Disciplinary Panel's findings in paragraphs 46 and 47 of the Decision dismissing the allegation of misconduct under Article 35(v) of the Code of Conduct for Mr. Fila's failure to disclose the fact that he had ceased to fulfil the requirements of Article 14(A)(i) of the Directive during the first period of alleged unauthorised practice and finds that these allegations have been established. By Majority, Ms. Colleen Rohan and Mr. Karim Khan dissenting, the Disciplinary Board confirms the Disciplinary Panel's findings in paragraphs 71 to 73 of the Decision. All remaining findings of the Disciplinary Panel's Decision are hereby unanimously confirmed.

#### V. SANCTIONS

92. The Disciplinary Board found that the Disciplinary Panel erred in law by finding that counsel's failure to disclose information regarding his qualifications to practise before the Tribunal

may constitute misconduct only where there is potential prejudice towards a client.<sup>189</sup> However, the Disciplinary Board is of the view that the sanction imposed by the Disciplinary Panel—public reprimand—appropriately reflects the totality of Mr. Fila's conduct. The Disciplinary Panel's legal error, therefore, has no impact upon the sanction imposed.

93. Ms. Colleen Rohan and Mr. Karim Khan, while dissenting from the Majority's conclusion to dismiss Mr. Fila's appeal with respect to his RTRS interview, are in agreement that the sanction imposed by the Disciplinary Panel appropriately reflects Mr. Fila's conduct for which he was found in violation of Article 35(v) of the Code of Conduct.

## VI. DISPOSITION

For the foregoing reasons, the **DISCIPLINARY BOARD**

**PURSUANT TO** Article 48 of the Code of Conduct

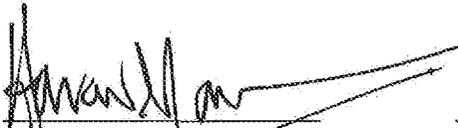
- (1) **GRANTS** the Registrar's appeal with respect to Mr. Fila's failure to disclose the first period of unauthorised practice to the Registry, reverses paragraphs 46 and 47 of the Disciplinary Panel's Decision, and finds Mr. Fila in breach of Article 35(v) of the Code of Conduct on this basis;
- (2) By Majority, Ms. Colleen Rohan and Mr. Karim Khan dissenting, **DISMISSES** Mr. Fila's appeal with respect to his RTRS interview;
- (3) Unanimously **DISMISSES** all remaining grounds of appeal submitted by the Registrar and by Mr. Fila;
- (4) Unanimously **CONFIRMS** the sanction of public reprimand imposed by the Disciplinary Panel; and
- (5) **INVITES THE DISCIPLINARY PANEL** to *publicly* file with the Registry the Disciplinary Panel's Decision.

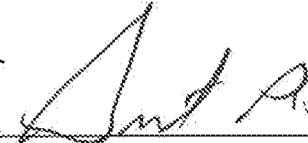
Pursuant to Article 47(G) and Article 48(K) of the Code of Conduct a copy of this decision and of the Disciplinary Panel's Decision shall be communicated to the ADC-ICTY and to the Serbian Bar Association.

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<sup>189</sup> See *supra*, para. 32.

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

  
Judge Howard Morrison  
Chairperson

  
Judge Burton Hall

  
Judge Khalida Rachid Khan

  
Ms. Colleen Rohan

  
Mr. Karim Khan, QC

Ms. Colleen Rohan appends a partially dissenting opinion.

Ms. Karim Khan appends a partially dissenting opinion.

Dated this eighth day of July 2013  
At The Hague  
The Netherlands

[Seal of the Tribunal]

## PARTIALLY DISSENTING OPINION OF COLLEEN M. ROHAN

1. I respectfully dissent from the Majority Decision finding that Mr. Toma Fila violated Article 3(v) and Article 35 of the Code of Professional Conduct for Counsel<sup>1</sup> when he expressed his opinion, in an “RTRS interview” that: “the main aim has been achieved; Serbia has been demonized.” Mr. Fila’s right to express that opinion is protected by his right to free speech under Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”) and Article 10 of the European Convention on Human Rights (“ECHR”). The *Schopfer* case<sup>2</sup>, relied on by the Majority of the Disciplinary Board, as justification for restricting Mr. Fila’s speech, is not binding on this Board. Even if it were, it is so factually distinct that it cannot be dispositive of the situation presented by the facts here. This Board’s own recent jurisprudence, moreover, holds that counsel cannot be disciplined for expressing honestly held opinions in public.<sup>3</sup>
2. I raise separately the Disciplinary Panel’s legal error regarding its interpretation of Article 3(v) of the Code. The Majority Decision does not address this topic. The Panel held that Article 3(v) imposes “a positive obligation on all counsel to protect the reputation of the Tribunal.”<sup>4</sup> That interpretation is a plain and significant legal error which affects not only the rights of Mr. Fila but the rights of all defence counsel who have ever been or ever will be subject to the Code at the ICTY. The error should be reached by this Board and the Disciplinary Panel’s new and erroneous interpretation of Article 3(v) rejected.

### I. Standard of Review on Appeal to the Disciplinary Board

3. The appropriate standard of review applied to this appeal in a disciplinary proceeding is articulated in paragraphs 12, 13, and 14 of the Majority Decision. As stated in paragraph

<sup>1</sup> Code of Professional Conduct for Counsel Appearing Before the International Tribunal, as amended 22 July 2009 [hereinafter “the Code”]. The Code is applicable only to defence counsel. Article 1, Definitions.

<sup>2</sup> *Schopfer v Switzerland*, No. 56/1997/840/1046, Judgement, 20 May 1998 [hereinafter “*Schopfer*”].

<sup>3</sup> *In the Matter of Mr. Boris Aleksic*, Case No. DP-2-11, Decision on Appeal of the Registrar to the Disciplinary Board, 16 December 2011; made public 17 February 2012 [hereinafter “*Aleksic*”].

<sup>4</sup> *In the Matter of Mr. Toma Fila*, DP-2-13, Decision of the Disciplinary Panel, 23 October 2012 [hereinafter “Panel Decision”, para 70]

14: “The Disciplinary Board finds it appropriate to apply the appellate review standard adopted by the Appeals Chamber [of the ICTY].”

**II. The Disciplinary Panel erroneously interpreted Article 3(v) of the Code in a manner which unlawfully restricts free speech and places an illegal and unwarranted burden on defence counsel to affirmatively “protect” the reputation of the Tribunal**

4. Article 3(v) of the Code provides, in relevant part: “counsel shall take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute.”<sup>5</sup>
5. The Disciplinary Panel interpreted this article to mean that “all counsel”<sup>6</sup> have the “positive obligation” to “protect the reputation of the Tribunal.” It found that this positive obligation “extends to counsel’s conduct outside of the Tribunal.”<sup>7</sup>
6. This interpretation is completely erroneous given a plain reading of the language of Article 3(v), not to mention the implications such an interpretation has for the right to free speech for defence counsel at the Tribunal.

**A. The Code does not impose the obligation on defence counsel to positively protect the reputation of the Tribunal**

7. Article 3(v) says nothing about counsel having the “positive duty” to protect the reputation of the Tribunal nor can it be fairly read as implying such a duty. The article relates only to counsel’s *personal* actions. A plain reading of Article 3(v) does not put

<sup>5</sup> The Code, Article 3(v).

<sup>6</sup> Since the Code governs only defence counsel, “all counsel” refers only to defence counsel.

<sup>7</sup> This interpretation of Article 3(v) and this finding were made in the context of the Panel rejecting Mr. Fila’s argument that when he made the statements at issue in this case, he was acting as a representative of the Serbian government; not as counsel before the Tribunal, and therefore was not bound by the Code. Panel Decision, paras 68-70. The same Article was relied on by the Panel to also sanction Mr. Fila for the content of his statements. The Panel’s interpretation of Article 3(v) is therefore of fundamental importance to the outcome of this case as well as the rights of all defence counsel at the ICTY.

counsel on notice, in any respect, that he or she must “wherever they are and in whatever context they act” positively protect the reputation of the Tribunal.<sup>8</sup>

8. Defence counsel attend legal conferences, speak at legal conferences, give press conferences, write books and write articles. Aspects of the Tribunal’s structure, function and jurisprudence are often discussed and criticized in the course of such activities. Under the Panel’s interpretation of Article 3(v) any counsel who criticizes the Tribunal or does not positively counter criticisms made by others when they are negative, can be found to have engaged in misconduct for failing to fulfill counsel’s “positive duty” to “protect the reputation of the Tribunal.”
  
9. Defence counsel are entitled to express their honestly held opinions about the Tribunal in public. This was the specific finding of this Board in the *Aleksic* case.<sup>9</sup> Nothing in the Code prohibits such speech or permits sanctioning it. The Panel’s interpretation of Article 3(v) violates free speech by finding that counsel’s only choice when speaking or writing about the Tribunal, regardless of counsel’s actual opinions, is to positively protect the reputation of the Tribunal.<sup>10</sup>
  
10. Adoption of the Panel’s interpretation of Article 3(v) also singles out defence counsel as guardians of the Tribunal’s reputation. No similar “positive obligation” is imposed on individuals working within the three organs of the Tribunal; the Chambers, Prosecution and Registry. There is no logical or legal reason for this distinction nor did the Panel cite to any.

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<sup>8</sup> Panel Decision, para 69

<sup>9</sup> *Aleksic*, para 44 [“Respondent is entitled to an opinion on the matter and should not be censured by the Tribunal as to his own opinions.”]

<sup>10</sup> There have been a series of news articles and editorials recently which are highly critical of some of the verdicts returned at the Tribunal. Under the Panel’s interpretation of Article 3(v) defence counsel are under the positive duty to protect the Tribunal’s reputation. Are counsel now required to write rebuttals to these articles? If counsel, attending a legal conference, hears a presentation which disparages the Tribunal in some respect, must counsel demand to take the floor to protect the reputation of the Tribunal, even if counsel happens to agree with the presentation?

11. The Tribunal also does not have the authority to impose an obligation on defence counsel to positively protect its reputation; whatever that means.<sup>11</sup> The Panel's finding that it does is incorrect and so overbroad that it includes conduct (or omissions) on the part of counsel which Article 3(v) was never intended to reach and which violate counsels' right to freedom of speech, freedom to hold opinions, and free association. The interpretation is erroneous. It must be rejected.

**B. The Panel's interpretation of Article 3(v) is plain error which must be reached by this Board even though not specifically raised by Mr. Fila on appeal**

12. Mr. Fila did not specifically argue in his appeal to this Board that the Panel engaged in legal error when it interpreted Article 3(v) as just discussed. He did, however, argue that the Panel engaged in errors of fact and errors of law in reaching its conclusions,<sup>12</sup> and that its Decision placed unlawful restrictions on his freedom of speech.<sup>13</sup>

13. The jurisprudence at this Tribunal recognizes the authority of the Appeals Chamber to reach and correct legal error even when the specific basis for finding such error was not raised by one of the parties. Hence, when a legal error is raised "even if the party's arguments are insufficient to support the contention of an error . . . the Appeals Chamber may conclude for other reasons that there is an error of law."<sup>14</sup>

14. Mr. Fila's Appeal generally and, in particular, his specific contention that the Panel's Decision denies him his right to the freedom to express his own opinions on relevant social problems are sufficient for this Board to reach and overturn the Panel's legal error in its interpretation of Article 3(v).

<sup>11</sup> Defence counsel, it appears, are supposed to speculate as to what "the reputation of the Tribunal" means; given it is a public institution; not an individual.

<sup>12</sup> Appeal of Mr. Toma Fila Against the Decision of the Disciplinary Panel, 23 October 2012, filed 8 November 2012 (hereinafter "Fila Appeal"), para 5

<sup>13</sup> Fila Appeal, paras 15, 18.

<sup>14</sup> This standard has been consistently applied throughout the jurisprudence at the ICTY. See *Prosecutor v Lukic and Lukic*, IT-98-32/1-A, Appeals Judgement, 4 December 2012, para 11; *Prosecutor v Gotovina and Markac*, IT-06-90-A, Appeals Judgement, 16 November 2012, para 11; *Prosecutor v Halilovic*, IT-01-48-A, Appeals Judgement, 16 October 2007, para 7; *Prosecutor v Limaj*, IT-03-66-A, 27 September 2007, para 9 [and cases cited therein].

15. It is also not in the interests of justice for the fundamental misinterpretation of an ethical code, which affects all defence counsel subject to that Code, to be permitted to stand. To the contrary, it is in the interests of justice to promote clarity, fairness and finality in the law so as to avoid future injustices and the potential for arbitrary application of Article 3(v).
16. This is of critical importance here, where the Panel's legal interpretation of Article 3(v) includes the finding that the application of the Code "does not cease to apply when a counsel leaves the courtroom, but only—but not entirely—when the counsel ceases to represent an accused before the Tribunal."<sup>15</sup>
17. This finding insinuates, although it does not clearly state, that defence counsel will continue to be ethically bound to protect the reputation of the Tribunal in perpetuity after their contact with the Tribunal has ceased. At minimum the finding is ambiguous enough that reasonable minds can differ as to its meaning; a circumstance which renders the Panel's interpretation vague. People of common intelligence must necessarily guess as to its meaning and differ as to its application.
18. When the acts at issue under Article 3(v) involve speech, the Panel's ambiguous interpretation as to when or if the Code may apply in the future can have only one impact; to create an illegal chilling effect on the exercise of free speech and the expression of honestly held opinions by defence counsel. There are no standards whatever as to what acts or omissions by counsel will constitute a failure to "positively protect" the Tribunal's reputation. That fact, on its own, illustrates the Panel's error in interpreting Article 3(v) as it has.
19. The Tribunal does not have the authority to muzzle defence counsels' honestly held criticisms of the Tribunal by requiring defence counsel to affirmatively protect its reputation. Imposing such an obligation precludes any criticism of the Tribunal by defence counsel, regardless of the basis or validity of that criticism. That is antithetical to

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<sup>15</sup> Panel Decision, para 70.

a democratic society and constitutes a denial of defence counsels' right to freedom of speech and the free expression of their opinions.

20. The Panel's legal error in the interpretation of Article 3(v) will have lasting impact. The legal error should be reached and corrected now.

**III. It is a violation of Mr. Fila's right to freedom of speech to penalize him under Articles 3(v) and 35 for his public expression of an honestly held opinion**

21. The Disciplinary Panel, by majority vote, found that Mr. Fila violated Article 3(v) and 35 of the Code of Conduct when he stated, during as "RTRS interview" that "the main aim has been achieved, Serbia has been demonized."<sup>16</sup>

22. The Majority of the Disciplinary Board upholds this finding. It agrees that Mr. Fila's statement does not refer to the Tribunal and does not state whose aim was achieved by the demonization of Serbia.<sup>17</sup> It finds, nonetheless, that the Panel was "not unreasonable" when it held that "the effect of the statement was that the Tribunal has been the vehicle for achieving this aim and that this assertion amounts to an act, which, pursuant to Article 3(v) of the Code of Conduct, counsel are obliged to avoid."<sup>18</sup>

23. I respectfully dissent from this finding.

24. As just discussed, the Disciplinary Panel's overly broad and ambiguous interpretation of Article 3(v) is erroneous. The Panel assessed the statements of Mr. Fila based on that erroneous interpretation. On that basis alone, the finding of misconduct regarding the "RTRS" interview statement should be overturned. An incorrect legal standard was applied when the Panel came to the conclusion that Mr. Fila's statement was misconduct under Article 3(v) and 35.

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<sup>16</sup> Panel Decision, para 78.

<sup>17</sup> Majority Decision, para 84.

<sup>18</sup> Majority Decision, para 84; Panel Decision, para 71.

25. Regardless of the interpretation of Article 3(v), however, Mr. Fila's statement was an expression of his political opinion or his honestly held belief. Counsel is not "obliged to avoid"<sup>19</sup> making public statements of honestly held political beliefs.<sup>20</sup> Defence Counsel have the right to free speech and to the free expression of opinions. Article 3(v) cannot legally be interpreted or applied in such a way as to deny that right to Mr. Fila or any other defence counsel.

26. As the Dissenting Opinion from the Panel's Majority Decision correctly emphasized:

"While the right to freedom of expression is not absolute, it is one of the fundamental human rights and is recognized as a cornerstone of all democratic societies. [citation omitted] Being fundamental to the functioning of the democratic societies, freedom of expression can only be limited in exceptional circumstances under strictly defined conditions provided by law. However in no case can these restrictions undermine the essence of the right."<sup>21</sup>

27. Article 19 of the ICCPR relating to freedom of opinion provides that:

- (1) "Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) for respect of the rights or reputations of others;
  - (b) for the protection of national security or of public order or of public health or morals.

28. Article 10 of the ECHR, relating to freedom of expression, provides that:

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<sup>19</sup> Majority Opinion, para 84

<sup>20</sup> *Aleksic*, para 44.

<sup>21</sup> Dissenting Opinion of Ms. Natacha Fauveau Ivanovic, para 2.

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

29. None of the potential restrictions on freedom of expression delineated in these instruments applies to Mr. Fila's statement. It is agreed that he did not name any particular individual nor even refer to the Tribunal in his statements. His statements did not disparage the reputation or rights of anyone.
30. Mr. Fila did not attack the authority or impartiality of the judiciary. At best, as the Majority holds, it was "not unreasonable" for the Panel to conclude that the effect of his statement was that the Tribunal had been a vehicle for achieving the stated aim. That is a political point of view which Mr. Fila is entitled to hold and express. Others may hold other views as to how the Tribunal has been used politically or otherwise. Mr. Fila's statement was not an attack on the Tribunal's actual authority or impartiality.
31. Mr. Fila's statement also was not an attack on the integrity of any specific case, verdict, judge or other individual at the Tribunal. It was an expression of an honestly held opinion—an opinion he stands by in his submissions to the Board. As he told the Board, all he said "was in line with his right as a lawyer, a thinker, and a public figure, to express his opinion on relevant social problems."<sup>22</sup>

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<sup>22</sup> Fila Appeal, para 18

32. In the *Aleksic* case Mr. Aleksic was charged with violating Articles 35(iii)<sup>23</sup> and 35(iv)<sup>24</sup> of the Code based on statements he made in the public press that the U.N. Detention Unit does not adhere to basic medical principles, that Vojislav Seselj's life was in serious jeopardy as a result, and referred to a Russian report alleging that the U.N.D.U. medical officer played a role in the murder of Slobodan Milosevic and tampered with a blood analysis from Mr. Milosevic.<sup>25</sup> Mr. Aleksic stated in his submission to this Board that he believed his comments to be true.<sup>26</sup>
33. This Board held that even if Mr. Aleksic's claims were unfounded, there was no evidence which established that he believed they were untrue when he made them or had the intent to deceive. As relevant to this case, this Board also emphasized that Mr. Aleksic was entitled to an opinion on the matter and should not be censured by the Tribunal as to his own opinion.<sup>27</sup>
34. The same holds true for Mr. Fila's statements which are far more circumspect than those attributed to Mr. Aleksic.
35. The Tribunal is a public, international institution. Healthy debate about the effect of its work is important to the positive development of international law as well as the continued development of a democratic society. That means, in our political debate, that unwise ideas must have a hearing as well as wise ones.<sup>28</sup> The interest in encouraging freedom of expression in a democratic society certainly outweighs any theoretical but unproven benefit of censorship.
36. As to this latter point, in *Aleksic* this Board pointed out, regarding the allegation that Mr. Aleksic's statements were prejudicial to the proper administration of justice at the

<sup>23</sup> Article 35 (iii) provides that it is misconduct for counsel to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

<sup>24</sup> Article 35(iv) provides that it is misconduct for counsel to engage in conduct which is prejudicial to the proper administration of justice before the Tribunal.

<sup>25</sup> *Aleksic*, paras 2, 5-6, 41.

<sup>26</sup> *Aleksic*, para 5.

<sup>27</sup> *Aleksic*, para 44.

<sup>28</sup> Testimony of Professor Alexander Meiklejohn to the United States Senate Judiciary Subcommittee on the Constitution, 1955; cited in *Figures of Speech: First Amendment Heroes and Villains*, William Bennett Turner (Polity Press, 2011), pg 131.

Tribunal, that there was, in fact, no evidence produced in the case to that effect, noting: “evidence of criticism without further evidence as to its effect on the administration of justice is insufficient.”<sup>29</sup>

37. The same is true in Mr. Fila’s case. There is no evidence in the record that Mr. Fila’s statements brought “proceedings before the Tribunal into disrepute.” In the absence of proof beyond a reasonable doubt that they did, no finding of misconduct under Article 3(v) should have been made or can be made.
38. Freedom of expression is secured to lawyers “who are certainly entitled to comment in public on the administration of justice . . .”, a fact the Majority recognizes.<sup>30</sup> Any restrictions on the exercise of that freedom must be proportionate and reach the right balance “between the various interests involved, which include the public’s right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession.”<sup>31</sup>
39. In this case sanctioning Mr. Fila’s public expression of a political opinion is wholly disproportionate to any valid, proven basis for restricting his speech under the ICCPR or the ECHR. To the contrary, it raises the very real danger of creating a chilling effect on future public expressions made by other defence counsel at the Tribunal. Can any counsel confidently assume, for example, that a serious public discussion of the mistakes and successes of the Tribunal can take place when the potential for ethical proceedings hangs over his or her head, depending on which political opinions or statements are seen as acceptable by the Tribunal and which are not?
40. The Majority relies on the *Schopfer* case in upholding the Panel’s finding of misconduct as to Mr. Fila’s statement. That reliance is misguided. The situation in *Schopfer* bears no resemblance to the situation presented in Mr. Fila’s case. In fact, the Majority’s list of general factors from *Schopfer*, theoretically permitting interference in counsel’s exercise

<sup>29</sup> *Aleksic*, para 45.

<sup>30</sup> Majority Decision, para 85, citing *Schopfer*, para 33.

<sup>31</sup> *Schopfer*, para 33, cited in the Majority Decision, para 85.

of free speech, are taken entirely out of their factual context and to that extent are misleading.<sup>32</sup>

41. Mr. Schopfer represented an accused in a criminal case. He submitted a motion in a legal proceeding regarding the legality of his client's arrest. While that motion was still pending, Mr. Schopfer called a press conference in his office and told the press that the district attorneys' offices responsible for prosecuting his client "flagrantly disregarded" human rights and had done so for years. He named the offices in question. He stated that he was speaking to the press about his client's case because it was "his last resort."<sup>33</sup>
42. Mr. Schopfer was quoted in the press as saying that he had had "enough" with the district attorneys making a "fool" of him and "thundered" that the "only recourse left to him" was to take the matter to the press.<sup>34</sup>
43. Mr. Schopfer was subsequently charged with ethical violations based on these statements. During the ethical proceedings it was found that (1) the statements regarding the press constituting his "last resort" were false as Mr. Schopfer had not, at the time the statements were made, pursued existing, normal legal remedies,<sup>35</sup> and (2) that Mr. Schopfer had also failed to submit his complaints regarding the district attorney to the public prosecutor's office which was the relevant supervisory body.<sup>36</sup> It was also noted that the "tone" of certain of his statements, to wit: "I won't let those gentlemen make a fool of me any longer," "left something to be desired."<sup>37</sup> Mr. Schopfer was accordingly sanctioned for making the comments to the press and appealed that sanction.
44. The *Schopfer* Court, in upholding the sanction, pointed out that Mr. Schopfer was not punished for denouncing human rights violations, but rather for the *manner* in which he did it. Specifically, he did so before exhausting available legal remedies, by making

<sup>32</sup> Majority Decision, para 85

<sup>33</sup> *Schopfer*, paras 8-10

<sup>34</sup> *Schopfer*, para 8

<sup>35</sup> *Schopfer*, para 28 [noting the Lawyer's Supervisory Board attached great importance to the fact that Mr. Schopfer chose to speak to the press before exhausting available legal remedies on behalf of his client]. In fact, when he later pursued the applicable legal remedies he won one of his client's complaints. *Schopfer*, para 17

<sup>36</sup> *Schopfer*, para 16

<sup>37</sup> *Schopfer*, para 16

factually false statements about the existence of those remedies, and by making unjustified statements which were likely to influence the criminal proceedings then pending in his client's case.<sup>38</sup>

45. It found, under Article 10 of the ECHR, that interference in Mr. Schopfer's right to free speech served the legitimate aim of maintaining the authority and impartiality of local legal authorities because he had disparaged the relevant canton's judicial authorities<sup>39</sup> and made his allegations while the criminal proceedings against his client were still pending. The latter factor, in the Court's view, could be regarded as an attempt to pressure the district attorneys dealing with the investigation of his client's case and, more generally, to impair the independence of the judiciary.<sup>40</sup>
46. For these reasons the Court found that Mr. Schopfer's statements fell within the narrow restrictions on free speech permitted under Article 10 and could be sanctioned.
47. Even then there are two dissenting opinions in the *Schopfer* case. Judge de Meyer found it was not necessary "in a democratic society" to sanction Mr. Schopfer's exercise of his right to free speech, stating:

"I find the criticisms made of him—that he had failed to observe discretion, engaged in covert publicity, indulged in cheap showmanship and used an immoderate tone—rather artificial and strained. I do not think they were sufficient to justify the interference in the present case with his freedom of expression on matters of public interest which particularly concerned him as a lawyer; namely the administration of justice and respect for human rights."<sup>41</sup>

48. The second dissenter, Judge Jambrek, pointed out that: "... matters of general concern relating to a trial may be reported and commented upon without necessarily interfering with the independent judicial process."<sup>42</sup>

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<sup>38</sup> *Schopfer*, para 17

<sup>39</sup> *Schopfer*, para 24.

<sup>40</sup> *Schopfer*, para 27.

<sup>41</sup> *Schopfer*, Dissenting Opinion of Judge de Meyer.

<sup>42</sup> *Schopfer*, Dissenting Opinion of Judge Jambrek.

49. Mr. Fila's statement had nothing to do with a specific trial, much less a pending trial. His statement has not and cannot be construed as an attempt to influence judicial authorities in pending cases. He named no names. He made no factually false assertions. There has been no allegation or any proof that he engaged in cheap showmanship or used an immoderate tone during the interview. There has been no proof of any kind that his statements brought the Tribunal into disrepute and certainly no proof beyond a reasonable doubt that occurred.
50. Mr. Fila's political opinion may not be a popular one but he is entitled to hold it and publicly express it. It is not necessary in a democratic society to interfere with his right to make the statement he made, there is no pressing need to do so and there has been no showing of any relevant or sufficient reason to justify any restriction on it.<sup>43</sup>
51. The Disciplinary Panel's erroneous interpretation of Article 35(v) of the Code must be overturned as plain error and clearly erroneous for the reasons stated.
52. I find no violation of Article 3(v), hence no violation of Article 35(i). Mr. Fila did not engage in misconduct in making the statements at issue. He cannot, consistent with his right to free speech under international law, be sanctioned for expressing his honestly held political views in public.



COLLEEN M. ROHAN  
Member of the Disciplinary Board

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<sup>43</sup> *Schopfer*, para 24; and see Dissenting Opinion of Ms. Fauveau-Ivanovic, paras 6-7 and cases cited therein.

**PARTIALLY DISSENTING OPINION OF KARIM A. A. KHAN QC**

1. The Disciplinary Panel is called upon to determine appeals by the Registrar of the ICTY and by Mr. Toma Fila against a decision of the Disciplinary Panel dated 23 October 2013. I find myself fully in agreement with the reasoning and findings of the majority of the Disciplinary Board save on one important issue: I do not find Mr. Toma Fila to have acted in breach of the Code of Professional Conduct for Counsel in relation to the interview he gave to RTRS. I would allow his appeal in that regard. I have been significantly assisted in coming to that view by the Partially Dissenting Opinion (“Partial Dissent”) of Disciplinary Board Member Colleen M. Rohan. I readily adopt her reasoning and am compelled to conclude that the statement for which Mr. Toma Fila was sanctioned by a majority decision of the Disciplinary Panel (“Panel Decision”),<sup>1</sup> did not violate Articles 3(v) and/or 35 of the Code of Professional Conduct for Counsel (“Code”).<sup>2</sup>
2. Given “the very real danger of [the Panel Decision] creating a chilling effect on future public expressions made by other defence counsel at the Tribunal”,<sup>3</sup> I am compelled to add my voice in support of various important findings contained in the Partial Dissent. The Disciplinary Panel’s condemnation of Mr. Fila’s broad, political statement<sup>4</sup> is based on a wholly erroneous interpretation of Article 3(v) of the Code. The Disciplinary Panel’s findings in this regard violate, in my view, Mr. Fila’s fundamental and internationally recognized right to freedom of expression<sup>5</sup> and constitute a clear legal error justifying appellate intervention.

**I. The Disciplinary Panel’s Erroneous interpretation of Article 3(v)**

3. As held in the Partial Dissent,<sup>6</sup> the Disciplinary Panel failed to interpret Article 3(v) of the Code in accordance with the plain meaning of the language of that provision. The Appeals Chamber of the International Criminal Court (“ICC”), in interpreting a provision of the code of professional conduct applicable to defence and victims’ counsel appearing before that institution (“ICC Code”),<sup>7</sup> held that it would undertake such interpretation

<sup>1</sup> In the Matter of Mr. Toma Fila, DP-2-13, Decision of the Disciplinary Panel, 23 October 2012.

<sup>2</sup> Code of Professional Conduct for Counsel Appearing Before the International Tribunal, as amended 22 July 2009.

<sup>3</sup> Partial Dissent, para. 39.

<sup>4</sup> The statement in question was: “the main aim has been achieved; Serbia has been demonized”.

<sup>5</sup> See Partial Dissent, paras. 1, 25-48.

<sup>6</sup> Partial Dissent, paras. 4-11.

<sup>7</sup> Code of Professional Conduct for counsel, ICC-ASP/4/Res.1.

“having regard to [the provision’s] ordinary meaning, its context as well as its object and purpose”.<sup>8</sup> The same approach commends itself here.

4. The Disciplinary Panel failed to interpret Article 3(v) of the Code in an appropriate and balanced manner “having regard to [the provision’s] ordinary meaning, its context as well as its object and purpose”. Article 3(v) states that it is a fundamental principle that “counsel shall take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute”. I fully concur with the finding contained in the Partial Dissent that the plain meaning of this provision “does not put counsel on notice, in any respect, that he or she must ‘wherever they are an in whatever context they act’ positively protect the reputation of the Tribunal”.<sup>9</sup> Indeed, such a positive obligation must be clearly and specifically articulated in the text of the Code.<sup>10</sup>
5. The broader context of the Code, as well as the specific context of Article 3, further reveals the fundamental interpretive error of the Panel Decision. The Preamble to the Code states “that counsel shall adhere to a Code of Professional Conduct in the performance of their duties”. Mr. Fila, when providing his opinion in the “RTRS interview”, was not performing any kind of professional duty remotely connected to the Tribunal. Similarly, the layout and structure of Article 3 of the Code is one of increasing specificity. The client has a right to legal assistance of their choosing (Article 3(i)), but whomever they choose must “maintain high standards of professional conduct (Article 3(ii)), which, in particular, require counsel “to act honestly, independently, fairly, skilfully, diligently, efficiently and courageously” (Article 3(iii)). Article 3(iv) then

<sup>8</sup> *Prosecutor v. Kenyatta*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled “Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence”, 10 November 2011, ICC-01/09-02/11-365 OA 3, para. 52.

<sup>9</sup> Partial Dissent, para. 7 (citing Panel Decision, para. 69).

<sup>10</sup> See, for example, Chapter XIII of the Canadian Bar Association Code of Professional Conduct (“Canadian Code”) (2009 version), entitled “The Lawyer and the Administration of Justice”, which sets out the following positive obligation of professional conduct: “The lawyer should encourage public respect for and try to improve the administration of justice.” With respect to actions that might bring the administration of justice or the legal profession into “disrepute”, the Canadian Code lists 7 particular instances in its Chapters and commentaries thereto – (1) acting incompetently (*Comment 10 to Chapter II (Competence and Quality of Service)*); (2) the manner of the lawyer’s conduct with respect to ‘outside’ non-legal interests (*Comment 3 to Chapter VII (Outside Interests and the Practice of Law)*); (3) unmeritorious legal proceedings/filings (*Comment 7 to Chapter IX (The Lawyer as Advocate)*); (4) additional harm to legal profession from a lawyer in public office failing to observe professional standards of conduct (*Comment 1 to Chapter X (The Lawyer in Public Office)*); (5) impact of a breach of the rule on fees and misunderstandings regarding fees (*Comment 3 to Chapter XI (Fees)*); (6) catchall provision regarding inappropriate means of offering/advertising professional services (*Comment 7(c) to Chapter XIV of (Advertising, Solicitation and Making Legal Services Available)*); and (7) impact of Statements or suggestions that the lawyer could or would try to circumvent the justice system (*Comment 2 to Chapter XIX (Avoiding Questionable Conduct)*).

focuses on a particularly important standard of conduct – the duty of loyalty to one’s client – and sets out that this principle is to be applied in tandem with counsels’ “duty to the Tribunal to act with independence in the administration of justice”.

6. It is only then that Article 3(v) of the code is reached. Article 3(v) of the code must be considered in the context of the fundamental duty of counsel to represent a client consistent with counsels’ obligations to the proper administration of justice before the Tribunal. Actions of counsel that may “bring proceedings before the Tribunal into disrepute”, such as through fee splitting, the physical abuse of a witness, lax confidentiality procedures, breaches of court orders and the like, all undermine a client’s right to the highest quality professional representation. Counsel may very rightly be sanctioned for any and all such breaches under the code.
7. The Disciplinary Panel’s interpretation of Article 3(v) falls squarely outside this specific context and extends the reach of the Code to “actions” over which the Code and Tribunal have no proper role or interest. Indeed, to interpret the code in such an overly broad manner may result in “over-reach” of a type that may do precisely that which the Panel was keen to avoid: Namely, bringing the Tribunal into disrepute and tarnishing its reputation. The right of free speech and freedom of expression is, of course, a qualified right, but restrictions imposed on that right must be established as necessary and proportionate in a free and democratic society. In assessing any restriction on the right to freedom of expression, one cannot lose focus of the reality that no comment was made by the appellant, Mr. Toma Fila, about any individual. No person was named and the remark was not even aimed at an organ of the court such as Chambers or the Office of the Prosecutor. Leaving aside the objective merits – or otherwise – of the remarks uttered, it would be churlish to deny that the language used by Mr. Fila to express his views can hardly be characterised as intemperate or immoderate. Indeed, it is not even clear that the focus of the comment was anyone associated with the Tribunal at all, rather than, for example a different institution such as the Security Council or even unspecified States or interests. Be that as it may, the impugned comments of Mr. Fila do not need to be further analysed, in my view, as they are clearly not of a type that could tarnish the reputation of the Tribunal in any real or discernable way.
8. Simply put, the object and purpose of Article 3(v), as well as the Code as a whole, is not to “protect the reputation of the Tribunal”, but to ensure first and foremost, that accused

persons are represented by independent, honest, competent, diligent and effective counsel who “act with independence in the administration of justice”<sup>11</sup> with respect to core professional duties such as the preservation of the confidentiality of information, professional courtesy and candour towards the Tribunal. Article 3(v)’s stricture on counsels’ actions is addressed to the realisation that primary goal. As noted in the Partial Dissent, “there is no logical or legal reason [...] nor did the Panel cite to any”, as to why only defence counsel, to the exclusion of staff members of the organs of the Tribunal, should be tasked as “guardians of the Tribunal’s reputation”.<sup>12</sup> Indeed, this is not the object and purpose of Article 3(v) or the Code itself. The Disciplinary Panel’s interpretation regarding the scope and purpose of Article 3(v) constitutes a clear legal error in my view.

## II. The Disciplinary Panel’s impermissibly vague interpretation of Article 3(v)

9. As held in the Partial Dissent, the Disciplinary Panel’s finding of a positive obligation on defence counsel to preserve the reputation of the Tribunal is “overbroad”<sup>13</sup> with respect to the conduct or omissions covered, and appears to require counsel “to speculate as to what ‘the reputation of the Tribunal’ means”.<sup>14</sup> A judgment of the Supreme Court of the United States (“Supreme Court”) sheds light as to how Article 3(v) should best be approached.
10. In *Gentile v. State Bar of Nevada*,<sup>15</sup> the Supreme Court of the United States found that the Nevada Supreme Court’s interpretation of a Nevada Supreme Court code of conduct rule prohibiting an attorney representing a client in a pending case from making extrajudicial statements to the press that he or she knows or reasonably should know have ‘*substantial likelihood of materially prejudicing*’ the legal proceeding, was void for vagueness. The Nevada Supreme Court Rule in question (Rule 177(3)) contained a ‘safe harbor provision’ that “provides that a lawyer ‘may state without elaboration ... the general nature of the ... defense’” “notwithstanding”<sup>16</sup> the general prohibition on extrajudicial statements that breach the stated ‘substantial likelihood’ standard.

<sup>11</sup> Code, Article 3(iv).

<sup>12</sup> Partial Dissent, para. 10.

<sup>13</sup> Partial Dissent, para. 11.

<sup>14</sup> Partial Dissent, fn. 11.

<sup>15</sup> 501 U.S. 1030 (1991).

<sup>16</sup> *Ibid.*, p. 1048 (ellipses in original).

## 11. The Supreme Court held that:

*Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide " 'fair notice to those to whom [it] is directed.' " [...]. A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.<sup>17</sup>*

## 12. The Supreme Court went on to note that:

*The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, [...] for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, [...] but whether the Rule is so imprecise that discriminatory enforcement is a real possibility. The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.<sup>18</sup>*

13. The Disciplinary Panel's interpretation of Article 3(v) of the Code and its application to the case of Mr. Fila presents exactly those dangers identified by the Supreme Court of the United States. Mr. Fila - and all defence counsel subject to the Code - are not provided 'fair notice' and must guess at the 'contours' of the Disciplinary Panel's interpretation of Article 3(v) – namely, what does the "reputation" of the Tribunal mean, what actions are required, and in what circumstances? Which are to be avoided, in order to "protect the reputation of the Tribunal"? It also begs additional questions, by what standard must defence counsel evaluate whether an "action" might breach Article 3(v) ('clear and convincing'; 'substantial likelihood'; 'mere risk' or something else?). Further, the spectre of discriminatory enforcement of Article 3(v) raised by the Supreme Court of the United States is indeed 'a real possibility' were such a vague interpretation to be adopted. Such vagueness would stifle counsel and other individuals who have been counsel from robustly and honestly giving their views relating to the work of the Tribunal or its place in

<sup>17</sup> *Ibid.*, pgs. 1048-49 (emphasis added) (internal citation omitted).

<sup>18</sup> *Ibid.*, p. 1051-49 (internal citations omitted).

international justice and the international legal and political order. The quality of public discourse would be diluted, in my view, if counsel and former counsel were to refrain from rendering their views, analysis or perspectives to the wider public out of fear that if those views were considered unwelcome, they could be targeted with disciplinary proceedings.

### III. The Disciplinary Panel's interpretation and application of Article 3(v) violates Mr. Fila's fundamental freedom of expression rights

14. The freedom of expression guaranteed pursuant to Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights may be constrained or limited, to some extent, in relation to counsel's submissions or conduct when inside the courtroom. Principally, the tone of pleadings and oral submissions must not be intemperate, offensive or deliberately designed to insult or disparage an individual without cause. Those submissions are made within contours set by the Chamber and the Code of Professional Conduct. The Chamber may caution or advise counsel when and if the Chamber considers that submissions go beyond – or are in danger of going beyond – acceptable limits. There is, additionally, a second realm of possibilities that must inform and, if necessary, restrain and guide counsel. That is where counsel is acting as such outside the court room's physical confines. For example, in instances such as, dealing with other court users such as the Registry outside of a court session, or with witnesses in the field or acting directly in relation to a case before the Tribunal. The Code provides guidelines and helps sets the parameters of acceptable conduct in this scenario as well. In circumstances, however, where an individual who is or has been counsel is speaking in a different capacity (whether as an academic, political commentator, expert legal analyst or concerned citizen) the code does not come into play. It is simply inapplicable in such circumstances. It was not envisaged for this purpose and extending its ambit in this manner is, in my view, without support and constitutes an error of law.

15. As properly found in the Partial Dissent,<sup>19</sup> the European Court of Human Rights ("ECtHr") case relied on by the Majority of the Board in upholding the Panel Decision, *Schopfer v Switzerland*,<sup>20</sup> is factually inapposite. Properly considered it can lend little

<sup>19</sup> Partial Dissent, paras. 40-43.

<sup>20</sup> No. 56/1997/840/1046, Judgement, 20 May 1998.

support to the issue at hand. The Majority of the ECtHR held that attorney Mr. Schopfer made public statements that were deemed to be 'unjustified' against the judicial authorities in a criminal case in which he was defence counsel without having pursued other available legal avenues and "which were likely to influence [the] pending proceedings" against his client.<sup>21</sup> The situation of Mr. Fila is wholly different, as succinctly outlined in the Partial Dissent.<sup>22</sup>

16. The *Schopfer* case elucidates the outer bounds of acceptable and reasonable restrictions on the fundamental freedom of expression rights of members of the bar outside the courtroom. The finding of the Disciplinary Panel with respect to Mr. Fila go well beyond the *Schopfer* principles and improperly restrain Mr. Fila's right to state a political opinion that is unconnected to any particular concluded or pending proceeding before the Tribunal - and which no reasonable observer could interpret as an attempt to influence the administration of justice in pending cases.
17. As explained by the United States Supreme Court in the seminal First Amendment case *New York Times Co. v. Sullivan*,<sup>23</sup> the court considered the "*case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials*".<sup>24</sup> The American Bar Association adhered to the essence of the above free expression principle outlined in *Sullivan* and adopted the 'actual malice' standard in promulgating the provision of its Model Rules of Professional Conduct pertaining to statements of members of the Bar regarding public legal officers:

Rule 8.2 Judicial And Legal Officials

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge,

<sup>21</sup> *Ibid.*, para. 17.

<sup>22</sup> Partial Dissent, para. 49 ("Mr. Fila's statement had nothing to do with a specific trial, much less a pending trial. His statement has not and cannot be construed as an attempt to influence judicial authorities in pending cases. He named no names. He made no factually false assertions. There has been no allegation or any proof that he engaged in cheap showmanship or used an immoderate tone during the interview. There has been no proof of any kind that his statements brought the Tribunal into disrepute and certainly no proof beyond a reasonable doubt that occurred.")

<sup>23</sup> 376 U.S. 254 (1964) (holding that in order for a public official to successfully bring a claim of defamatory falsehood pertaining to his or her official conduct the official must prove the statement was made with "actual malice" -- i.e. with knowledge that the statement was false or with reckless disregard as to whether it was false or not).

<sup>24</sup> *Ibid.*, p. 270.

adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.<sup>25</sup>

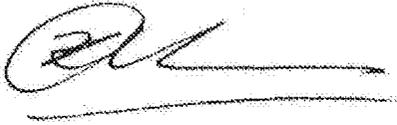
18. Similarly, Comment 4 to Chapter XIII (“The Lawyer and the Administration of Justice”) of the Code of Conduct of the Canadian Bar Association, while imposing certain restrictions on the manner in which a member of the Bar may issue criticism of a tribunal – “the lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit” – prefaces this restriction by clearly stating that “proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers”.<sup>26</sup>
19. It should rightly be a high threshold, in a democratic and open society, before criticism of a judge or a court by a member of the bar may result in professional sanction. Mr. Fila’s statement of personal political belief engages no valid public interest – the proper administration of justice or otherwise – that would require the curtailment of his freedom of expression rights. As noted in the Partial Dissent, there has “been no proof of any kind that his statements brought the Tribunal into disrepute”.<sup>27</sup>
20. For the reasons stated above, and as additionally contained in the Partial Dissent of Ms. Rohan I find:
- a. That the Disciplinary Panel’s fundamental error in the interpretation of Article 3(v) of the Code must be overturned;
  - b. That Mr. Fila did not violate Article 3(v) and Article 35 of the Code; and
  - c. Therefore that Mr. Fila engaged in no misconduct under the Code when making the statements in question.
  - d. In all other respects relating to the Appeal of the Registrar and other grounds of Appeal of Mr. Fila, I join in the reasoning of the majority.

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<sup>25</sup> American Bar Association, Model Rules of Professional Conduct, as amended 12 August 2012.

<sup>26</sup> Canadian Bar Association, Code of Conduct, as amended in 2009 (emphasis added).

<sup>27</sup> Partial Dissent, para. 49.

A handwritten signature in black ink, consisting of a stylized initial 'K' followed by a long horizontal stroke.

KARIM A. A. KHAN QC

Member of the Disciplinary Board