THE DISCIPLINARY BOARD OF THE INTERNATIONAL CRIMINAL COURT

Original: French

Reference: DO/2013/04/DB-EA-decision
Date: 11 July 2013

Before: **Ms Aïcha Conde,** Chair
Me Eberhard Kempf, permanent member
Mr Jean-Yves Leborgne, ad hoc member

CASE: Mr Nicholas Kaufman v. Mr Emmanuel Altit

Public document
Decision of the Disciplinary Board

Counsel for Mr Emmanuel Altit:
Ms Natacha Fauveau Ivanovic

The Commissioner:
Ms Sue Carr

Factual and procedural background

1. Mr Kaufmann's complaint against Mr Altit

The Commissioner submitted a report to the Disciplinary Board on 20 March 2012 in accordance with articles 39(2) and 39(5) of the Code of Professional Conduct for counsel. The Commissioner's report referred to the complaint lodged by Mr Kaufmann, former counsel for Mr Callixte Mbarushimana. Mr Kaufmann alleged that on 12 October 2011, Mr Emmanuel Altit met with his client, Mr Mbarushimana, without informing him beforehand that he was going to meet with him or afterwards that he had done so, thereby breaching the provisions of article 28 of the Code of Professional Conduct for counsel, which in his view constituted misconduct within the meaning of article 34(1)(c).

In his complaint, Mr Kaufmann stated that article 28 of that Code did not draw a distinction between private visits and visits of counsel being considered and that Mr Altit could not be in possession of confidential information relating to his client, even were his client to decide to share such information with him.

According to Mr Kaufmann, this visit might have violated the privileged relationship between him and his client and might even have founded his client's decision to change counsel.

Mr Kaufmann further alleged that Mr Altit was seeking to be appointed in the *Mbarushimana* case and had boasted that he had been approached by the family to this end. He stated that when he informed Mr Altit that he was Mr Mbarushimana's counsel, Mr Altit asked him whether he could be his co-counsel, thereby providing further proof that the visit was intended to secure his appointment to the case.

Finally, Mr Kaufmann stated that after he withdrew from the case, Mr Altit again asked the Detention Centre whether he could meet with Mr Mbarushimana, thereby proving again that the visit was intended to secure his appointment to defend Mr Mbarushimana's interests.

2. Proceedings prior to the hearing of 19 September 2012:

The Commissioner's report was provided in English to the counsel concerned, Mr Altit, by letter of 22 March 2012 in which the Disciplinary Board reminded Mr Altit of his rights under article 40(1) of the Code. Following the appointment of the ad hoc member by the Paris Bar, of which Mr Altit is a member, the Disciplinary

Board decided by a written vote that disciplinary proceedings should be brought against Mr Altit since the results of the investigation conducted by the Commissioner and her analysis of article 28 of the Code of Professional Conduct for counsel appeared to be reasonable.

The French translation of the Commissioner's report and the accompanying items of evidence were e-mailed to Mr Altit on 26 July 2012. Following notice by e-mail on 22 June 2012 and by mail on 10 July 2012, the Disciplinary Board set 19 September 2012 as the date for the hearing and summoned Mr Altit by e-mail on 10 August 2012, setting the time-limit as 10 September 2012, in accordance with article 12(1) of the Internal Regulations of the Disciplinary Board and the Disciplinary Appeals Board. By e-mail of 29 August 2012, the Board summonsed Mr Harry Tjonk, Deputy Chief Custody Officer of the Detention Centre, to appear as a witness and informed the participants in the proceedings thereof.

On 30 August 2012, the Disciplinary Board decided that, owing to it being impossible for Mr Leborgne as ad hoc member of the Disciplinary Board to be in The Hague at 9 a.m. on 19 September 2012, the witness, Mr Harry Tjonk, would be examined *in camera* by Ms Aïcha Condé and Mr Kempf on the date and time set, but in the presence of Mr Altit and the Commissioner who were entitled to ask the witness questions, and to adjourn the public hearing to 1 p.m. on the same day.

On 5 September 2012, Ms Fauveau Ivanovic informed the Disciplinary Board by e-mail that she had been appointed that same day by Mr Altit to represent his interests in this case and submitted that Mr Altit had not received Mr Kaufmann's complaint in French. She sought an extension of time to file submissions to "a later date" as she would not be available until 20 October 2012. After the Commissioner's report and the accompanying evidence had been sent to Ms Fauveau Ivanovic in French and English, the Disciplinary Board, in a decision of 6 September 2012, denied the request for postponement of the hearing and granted the request for an extension of the time to file submissions to 14 September 2012. The participants in the proceedings were provided with the French version of that decision on 10 September 2012 and the English version on 12 September 2012. On 14 September 2012, Ms Fauveau Ivanovic submitted her observations and accompanying evidence to the Disciplinary Board in French. Those documents were sent to the other participants in the proceedings on the same day. Since the translation of those observations and accompanying documents would not be available until early October 2012, the Commissioner informed the Disciplinary Board by e-mail on the same day that her understanding of those documents would be sufficient and that it was not necessary to adjourn the hearing.

In her submissions of 14 September 2012, counsel for Mr Altit sought, principally:

- an order for the hearing of 19 September 2012 to be held in camera;
- a finding that the provisions of the Code were not applicable to the Respondent in respect of his visit of 12 October 2011;
- "to find that the procedure pursued by the Commissioner failed to comply with the essential principles of equity, in particular the adversarial principle" and
- as regards the merits of the case, a finding that Mr Kaufmann's application be rejected since his visit of 12 October 2011 to Mr Mbarushimana was of a purely private and social nature and that the Code was not applicable to such visits.

The request for a finding that the procedure pursued by the Commissioner failed to comply with the essential principles of equity and the adversarial principle was based on the fact that the Commissioner:

- sent Mr Kaufmann's complaint to the Respondent on 21 December 2011, asking him to respond by 13 February 2012 at the latest, while the period laid down by article 37(1) of the Code of Conduct was 60 days (expiring on 20 February 2012);
- sent the Respondent's response of 13 February 2012 to Mr Kaufmann, who replied on 19 February 2012, attaching evidence, without the Commissioner having given the Respondent the opportunity to respond to Mr Kaufmann's reply. The Respondent therefore learned of Mr Kaufmann's reply only through the Commissioner's report of 20 March 2012.

Since the subject-matter of all the applications related to the substance of the case, the Disciplinary Board set them down for the hearing itself to be settled in the final decision thereof.

By e-mail of 17 September 2012, Ms Fauveau Ivanovic informed the Disciplinary Board that owing to an important medical appointment (without giving any further details) Mr Altit would be unable to attend the hearing of 19 September 2012. The Commissioner commented on that request in an e-mail dated the same day. In response to part K of the defence submissions of 14 September 2012 ("The means by which Mr Kaufmann came into possession of internal Registry e-mails"), the Commissioner submitted the exchange of e-mails of 13 and 19 February 2012 between Mr. Kaufmann, the Commissioner and Mr Altit's assistant.

3. Hearing of the witness Harry Tjonk (in camera)

As stated in its decision of 30 August 2012, the permanent members of the Disciplinary Board examined the witness Mr Harry Tjonk in the presence of the

Commissioner and Counsel for Mr Altit. His testimony may be summarised as follows:

The witness, the Deputy Chief Custody Officer, received Mr Callixte Mbarushimana's request dated 12 September 2011 seeking authorisation for a visit from Mr Altit as "prospective counsel". He was notified of the request by Mr Peralta, Chief of the Counsel Support Section, who stated that the visit had been or would be requested by Mr Mbarushimana and that Mr Mbarushimana did not want his then counsel to be informed of Mr Altit's visit.
Following the normal procedure, the Counsel Support Section was informed of the request and approved the visit. It took place on 12 October 2011 in the absence of Mr Mbarushimana's lead counsel and was not confidential.

Mr Altit subsequently requested a further visit, which the witness rejected.

The documents concerning Mr Altit's visit of 12 October 2011 were then presented to the witness for his detailed comments as follows:

a. "Request for the authorization to receive a visit of a prospective legal counsel", handwritten, signed and dated 12 September 2011 by Mr Callixte Mbarushimana.

The witness recognised Mr Mbarushimana's visit request, which he had mentioned previously. This was the document which was sent to Mr Peralta's office. The witness had added (by hand): "Please send to CSS. If they approve then M. Altit can have <u>one</u> visit to<u>gether</u> with a privileged defence team member." [emphasis in original].

b. E-mail from Mr Peralta dated 12 September 2011, 17:04. Mr Peralta wrote to Mr Tjonk:

> "Callixte Mbarushimana will have to tell us whether he wants Mr. Altit to come with another defence team member or not. If yes, I fully agree with Harry's comment. But if that is not the case, the meeting should be facilitated on a non-privileged basis. Furthermore, since this request comes from Callixte Mbarushimana himself, it is not up to us to inform the defence team: it is up to him to do it, if that is his wish".

c. Another e-mail to Mr Peralta, the date of which is not shown but which apparently contains the witness's response to Mr Peralta, was confirmed by the witness:

> "Dear Esteban,

Indeed Callixte Mbarushimana has the wish to see Mr. Altit alone (and he agreed to the non-privileged condition). He will speak to Mr. Altit (is already on his list of non-privileged telephone numbers) so that the latter can request a (non-priv.) visit."

The witness confirmed that after receiving Mr Peralta's e-mail dated 12 September, at 17.04, he went to see Mr Mbarushimana to put to him the question which elicited the response sent to Mr Peralta in the afore-cited e-mail. The witness also expressly confirmed that the requester of the visit, Mr Mbarushimana, had changed his mind and agreed to the visit being non-privileged. The witness added that a visit of a prospective counsel can be privileged only if it takes place in the presence of a member of the defence team.

d. The witness then confirmed that he had received the following e-mail from Mr Altit on 6 October 2011 at 13.22:

"From: Emmanuel Altit [mailto:emmanuel.altit@yahoo.fr]
Sent: 06 October 2011 13:22
To: Tjonk, Harry
Subject: The Hague

Dear Harry Tjonk,

We have already been in contact.

As you know, Callixte Mbarushimana would like to meet me.

I could go to The Hague on Wednesday 12 October and go to the prison that same day at 3 pm; Are the date and time convenient to you?

I would like my visit with Callixte to last at least one hour.

I have taken note that the interview I will have with Callixte Mbarushimana will not be privileged.

Could you please let me know what the procedure is. Do I simply turn up at the prison at the said date and time?

Thanking you in advance,

Sincerely,

Emmanuel Altit
Avocat à la Cour"

The witness confirmed that he sent the following response to Mr Altit that same day at 13.56:

"From: Tjonk, Harry

Sent: 06 October 2011 13:56
To: 'Emmanuel Altit'
Cc: Detention Visits
Subject: RE: The Hague

Maître Altit,

Your visit as prospective counsel has been booked Wed 12-Oct-11 from 15:00-16:45 and Mr. Mbarushimana will be informed.

For future visits, if you take the assignment as counsel, you can e-mail with detention.visits@icc-cpi.int […]."

The witness clearly stated that Mr Altit's visit could not be privileged. The witness added that a visit of a prospective counsel need not necessarily take place in the presence of a member of the defence team, but that if it was initiated by the prospective counsel, it would not be privileged.

Lastly, the witness stated that visits are either privileged or non-privileged. Privileged visits primarily include visits from counsel and legal assistants, and also visits from an ambassador or the Red Cross. Other visits are non-privileged, such as those from family members or investigators.

e. The witness then confirmed the following e-mail which he sent to Mr Altit on 28 November at 11.15:

"From: Tjonk, Harry
Sent: 28 November 2011 11:15
To: 'Emmanuel Altit'
Cc: All Detention Section; All Counsel Support Section
Subject: RE: Meeting

Dear Maître Altit,

In general Detention Section allows only one visit as 'Prospective Counsel'.

On 12-Oct-11 you have already visited Mr. Mbarushimana once as Prospective Counsel therefore your request for visit cannot be facilitated.

Please be informed that Mr. Mbarushimana has made a choice for new counsel. (As mentioned in a public filing which can be found on the ICC website.)

In case there are any further questions I kindly refer you to the Counsel Support Section.

Kind regards, Harry"

f. The witness reported that in accordance with the Regulations of the Registry, privileged visits are supervised through a window but staff do not listen, and that for non-privileged visits, the door is open and what is said at the meeting can be heard.

g. Under examination by the Disciplinary Commissioner, the witness stated that only one visit from a prospective counsel is possible, the reason for or nature of the visit must be clearly explained, the request forms must be completed truthfully, and it is not the responsibility of the Detention Centre staff to ensure compliance with the Code of Professional Conduct for counsel. The witness added that there was nothing to suggest to him that Mr Altit's visit to Mr Mbarushimana was anything other than professional in nature and that this was never contradicted by Mr Altit, even after the witness had rejected his request of 28 November 2011 for a further visit as prospective counsel. In response to a question from the Chair of the Disciplinary Board, the witness stated that there was a separate form for visits from family or friends, in which the visitor must clearly state his or her relationship with the detained person.

h. Under examination by Ms Fauveau Ivanovic, the witness reported that Mr Altit's name was on Mr Mbarushimana's list of non-privileged telephone contacts from his arrival at the Detention Centre until late January 2011, at Mr Mbarushimana's request.

Ms Fauveau Ivanovic then presented the witness with the United Nations Standard Minimum Rules for the Treatment of Prisoners, namely that all conversations between counsel and client are absolutely confidential, and concluded that a client wishing to change counsel could not in fact do so at the ICC, because any conversation with a prospective counsel would be listened to. However, the Presiding Member intervened and clarified that the examination of the witness is restricted to issues of fact and may not address issues of law.

The witness then responded to questions from Ms Fauveau Ivanovic by stating that Mr Altit did not expressly mention in any of his e-mails his status of prospective counsel. The fact had been clear since Mr Mbarushimana's request; Mr Mbarushimana had confirmed this in the witness's presence and the witness had always assumed that Mr Altit visited Mr Mbarushimana as prospective counsel since he was listed as such on his list of telephone contacts.

In response to a question from Ms Fauveau Ivanovic, the witness stated that Mr Altit's name is on the list of non-privileged contacts and that the person's

relationship to the detained person is indicated on the list. There are other non-privileged contacts on the list, but the witness was unable to name them. The witness could not say whether Mr Mbarushimana received a visit in October-November 2011 from the lawyer who replaced Mr Kaufmann or from another counsel.

i. In response to a question from the Presiding Member, the witness added that the numbers to which outgoing telephone calls are made are recorded and that he supposed that there had been telephone contact between Mr Mbarushimana and Mr Altit prior to Mr Altit's visit of 12 October 2011, but that telephone conversations are not normally recorded. The witness undertook to e-mail a copy of the list of telephone calls and the list of non-privileged persons who could have telephone contact with the detained person.

A record of Mr Tjonk's testimony was later distributed to all participants in the proceedings.

4. The hearing of 19 September 2012

When the hearing opened, the Disciplinary Board denied Mr Altit's counsel's request that the hearing be held in camera.

As stated by counsel for Mr Altit in an e-mail of 17 September 2012, the Respondent did not attend the hearing of 19 September 2012. The Disciplinary Board therefore decided, *sine die*, to adjourn the case and thereby close the hearing of 19 September 2012 in order to enable the Respondent to appear in person.

5. The hearing of 19 April 2013

Mr Altit submitted that he knew the wife and family of Mr Callixte Mbarushimana, who had been extradited by France to the International Criminal Court. He claimed that Mr Mbarushimana had called him on 6 September 2011 when he was in Abidjan. In that connection, Mr Altit referred to the list of Mr Mbarushimana's telephone calls submitted by Mr Tjonk containing a call from the latter to Mr Altit's practice. That call had been transferred to Mr Altit's mobile telephone. Mr Mbarushimana asked him "if he could come to see him" He responded that that was not possible "for some time as I am particularly busy". However, he agreed to visit him if he was in The Hague anyway. That was the case in early October 2011, as Mr Altit was in The Hague to reach "agreement on a number of issues" in the case of his client Mr Gbagbo. He therefore took the opportunity to visit Mr Mbarushimana.

Mr Altit did not recall who had informed him that his visit of 12 October would be a non-privileged visit as pointed out by the witness, Mr Tjonk, in his e-mail of 6 October 2011. Neither did he recall whether or not he had acted on that e-mail.

Mr Altit stressed that his visit of 12 October 2011 to Mr Mbarushimana was a friendly rather than a professional visit as it would have been completely out of the question, for reasons of time and availability, for him to have agreed to represent Mr Mbarushimana in addition to representing President Gbagbo.

Confronted with his e-mail request of 28 November 2011 to the Deputy Chief Custody Officer, the witness Mr Tjonk, to visit Mr Mbarushimana on 1 or 2 December 2011, Mr Altit indicated that he was to be in The Hague "that week of 1 or 2 December" on account of his client, Mr Gbagbo, being transferred to The Hague: "I know that I will be going to the prison to see President Gbagbo, and since I am aware that Mr Mbarushimana wanted to meet, this would be an opportunity and would save me time". Mr Altit recalled Mr Tjonk's negative response to that request but supposes that he did not react because he was too involved with the fate of his client Mr Gbagbo at that time.

When it was put to him that he had already visited the detained person at the Detention Centre in his capacity as counsel, that Mr Mbarushimana had asked him to visit as prospective counsel, while he claimed that his visit of 12 October 2011 had been purely private and friendly in nature and that that contradiction might have given rise to ambiguity, Mr Altit replied that it had not been up to him. He had not requested the visit, he had not described the visit as a professional visit by counsel to a prospective client and that "had I wanted to see … Mbarushimana to discuss a case, I would never have agreed to a non-privileged meeting, for a public meeting that anyone could overhear. … I am a lawyer, after all, and certain rules must be obeyed."

At the hearings of 19 September 2012 and 19 April 2013, the Disciplinary Board presented, among other documents, the transcript of the Skype meeting between Mr Kaufmann and Mr Altit of 23 October 2010 (Annex 6 of the "Observations of the Respondent" of 14 September 2012), the attestation of Mr Mbarushimana of 10 September 2012 (Annex 2 of the "Observations of the Respondent" of 14 September 2012) submitted by the defence and the full exchange of e-mails between 12 September and 28 December 2011 submitted by the Commissioner as Annex D to her report of 20 March 2012. All the participants in the proceedings were able to comment on those items of evidence and availed themselves of that right.

In view of the above,

The Disciplinary Board of the International Criminal Court

1. dismisses the procedural objection based on the notion of fairness of the proceedings
2. decides that there are no grounds for disciplinary action.

FOR THESE REASONS

The Disciplinary Board,

Dismisses the procedural objection based on the notion of fairness of the proceedings, pointing out, however, that the Commissioner had in fact failed to comply with the time-limit laid down by article 37(1) of the Code of Professional Conduct for counsel which grants the respondent a period of 60 days in which to respond to a disciplinary complaint, and that she apparently neglected to forward Mr Kaufmann's reply of 19 February 2012 and the accompanying documents to the Respondent to enable him to respond, thus ensuring compliance with the adversarial principle. However, such violations of the rights of the defence are not sufficiently serious as to cause the entire disciplinary procedure to be set aside. It was for the Respondent to argue that the Commissioner had failed to comply with the time-limit laid down by article 27(1) of the Code of Conduct and thus be granted the full period. He could even have submitted his response on 20 February 2012 on the basis that the time-limit did not expire until that date. As regards the fairness of the proceedings, the Respondent received Mr Kaufmann's reply of 19 February 2012 and the accompanying documents together with the Commissioner's report of 20 March 2012 and had had an opportunity to respond before the Disciplinary Board decided to initiate disciplinary proceedings.

Dismisses the defence request for a finding that the Code was not applicable to Mr Altit in respect of his visit of 12 October 2012. The defence claims that that Code applied only to counsel practising before the International Criminal Court, while Mr Altit, at the time of his visit Mr Mbarushimana on 12 October 2011, was "not practising before the Court, had not been assigned to any case and held no representation agreement before the Court". However, the Disciplinary Board points out that the Code applies to any visit made by counsel, acting in that capacity, to a detained

person in a case before the International Criminal Court. As the Commissioner stated in her report of 20 March 2012 at paragraph 10, the purpose of article 28 of the Code of Conduct is rightly "to protect the relationship of trust between client and counsel, and to prevent the undermining of that relationship through unauthorised interventions by other counsel and 'client fishing.'". Article 28 of the Code does not come into effect only once a representation agreement has been entered into between a client detained in a case before the International Criminal Court and his or her counsel, but as soon as that counsel is no longer merely prospective, since it is in his or her capacity as counsel that he or she visits a detained person, even before the representation agreement commences. Furthermore, the defence claimed that in October 2011, Mr Altit was not practising before the Court, had not been appointed to any case and held no representation agreement before the Court. However, the Board heard evidence from Mr Altit in person and he himself explained to the Board that he had taken advantage of his presence in The Hague on 12 October 2011 in the context of his representation of President Gbagbo and a meeting with the Chief of the Counsel Support Section, Mr Peralta Losilla, to visit Mr Mbarushimana at the same time. It is therefore not the case that on 12 October 2011 Mr Altit was not "practising before the Court". However, the Disciplinary Board is of the view (and agrees with the defence position set out in its observations of 14 September 2012, at paragraphs 72 *et seq.*) that article 28 of the Code does not apply to private or social visits that may be made by counsel to a detained person in a case before the International Criminal Court. Such visits are not privileged and are not covered by the lawyer-client relationship. Article 28 cannot be considered as granting counsel holding a representation agreement a degree of control over the private life of his or her client and power to prevent social visits being received in the event that the visitor is a lawyer and subject to the provisions of article 28 of the Code of Conduct.

Decides that there are no grounds for any disciplinary action for the following reasons:

The question at issue in the disciplinary case is as follows: Did Mr Altit visit the detainee, Mr Mbarushimana, with a view to becoming his counsel, failing to advise the detainee's then counsel, Mr Kaufmann, of that visit in breach of the obligations arising out of the provisions of article 28 of the Code of Conduct?

No decisive conclusions may be drawn from the transcript of the Skype conversation between Mr Altit and his colleague Mr Kaufmann. Indeed, that conversation, forwarded by e-mail in September 2012, occurred on 23 October 2010, one year prior to the events under consideration by the Disciplinary Board.

Although article 28 of the Code of Conduct obliges prospective counsel, when meeting with a detained person, to conduct that meeting only with the prior

permission of the selected counsel, that article does not prohibit social visits, that is, visits which are not of a professional nature, by a lawyer to a detained person. The purpose of a visit is not automatically professional merely because the visitor is a lawyer.

The fact that staff at the ICC Detention Centre, managed by the witness, Mr Tjonk, had considered that Mr Altit could only visit Mr M Mbarushimana in his capacity as counsel, that is to say, as prospective counsel, does not mean that that interpretation is correct.

While it is to be regretted that Mr Altit failed to point out to Mr Tjonk's staff, for the avoidance of doubt, that his visit was not professional in nature and that he was not acting as prospective counsel, that omission cannot in and of itself constitute the misconduct provided for by article 28 of the Code of Conduct.

The Board finds that Mr Tjonk informed Mr Altit that his conversation with the detained person would not be privileged and that Mr Altit was able to confirm, on the basis of that clarification, that the conversation would not be of a professional nature. He added, and the Board accepts, that had he been prospective counsel for the detainee, he would never have agreed to hold a non-privileged conversation with him.

Furthermore, Mr Altit was never appointed as counsel by Mr Mbarushimana, who stated that he had never "asked [him] to be [his] counsel", concluding that "he had not had to accept or refuse".

To conclude, absent any evidence that Mr Altit's visit to Mr Mbarushimana was of a professional nature, the Board considers that the obligations arising out of article 28 of the Code are not applicable to what must be considered to be a social and non-professional visit and that, consequently, there are no grounds for any disciplinary action against Mr Altit.

Ms Aïcha CONDE

Mr Eberhard Kempf

Mr Jean-Yves Leborgne