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Date: 6 September 2011

**THE PRESIDENCY**

**Before:** Judge Sang-Hyun Song, President  
Judge Fatoumata Dembele Diarra, First Vice-President  
Judge Hans-Peter Kaul, Second Vice-President

**Public**

*With Confidential Annexes*

**Response of the Registrar on the "Requête urgente portant recours contre la  
Décision du Greffier sur la radiation d'un conseil et sollicitant une suspension  
immédiate des effets de cette décision" dated 23 August 2011**

**Source:** The Registry

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

**The Office of the Prosecutor**

**Counsel for the Defence**

**Legal Representatives of the Victims**  
Mr. Hervé Diakiese

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants**  
**(Participation/Reparation)**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**

Ms. Silvana Arbia

**Deputy Registrar**

Mr. Didier Preira

**Counsel Support Section**

Mr. Esteban Peralta Losilla

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Pursuant to the order of the Presidency dated 26 August 2011<sup>1</sup> and Regulation 72.3 of the Regulations of the Court (RoC), the Registrar hereby submits her response to the “Requête urgente portant recours contre la Décision du Greffier sur la radiation d’un conseil et sollicitant une suspension immédiate des effets de cette décision” (“Application”),<sup>2</sup> dated 23 August 2011, as submitted by Mr. Hervé Diakiese (“Applicant”).

1. The Registrar respectfully submits that in the consideration and application of Regulation 71.1 (a) of the RoC in the case of the Applicant, at all material times, her decisions were taken within her jurisdiction<sup>3</sup>, with full respect for due process and propriety of established procedures, in conformity with the applicable legal texts of the Court and based on pertinent facts present, leading to reasonable and concretely founded administrative decision<sup>4</sup> to remove the Applicant from the list of counsel.

#### **Obligation of the Registrar to act in conformity with Regulation 71.1 of the RoC**

2. The creation, maintenance and management of the Court’s list of counsel falls within the purview of the Registrar<sup>5</sup>, with related decisions subject to judicial review before the Presidency in conformity with the legal texts of the Court.<sup>6</sup>
3. Regulation 71.1 (a) of the RoC imposes a positive obligation on the Registrar to “remove a counsel from the list of counsel where he or she [...] [n]o longer

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<sup>1</sup> Interim Decision of the Presidency, ICC-RoC72-01-/11.

<sup>2</sup> ICC-RoC72-01/11-1.

<sup>3</sup> See Rule 21.2 of the Rules of Procedure and Evidence (RPE); Chapter 4 of the RoC and Chapter 4 of the Regulations of the Registry.

<sup>4</sup> The Presidency has articulated the test to be applied in all cases where a request for review of an administrative decision of the Registrar is sought as follows: “It is recalled that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.”: See decision of the Presidency of the Court, dated 20 December 2005, ICC-Pres-RoC72-02-5 at para. 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, at para. 24. See also the decision of 10 July 2008, Case/filing no. ICC-Pres-RoC72-01-8-10 at para. 20.

<sup>5</sup> See applicable legal basis enumerated in *supra*, note 3.

<sup>6</sup> See *e.g.* Regulation 72.3 of the RoC.

meets the criteria required for inclusion in the list of counsel”.

4. Regulation 67 of the RoC sets some of the most important criteria that counsel must meet, to the satisfaction of the Registrar, before being granted admission to the list of counsel. In particular, Regulation 67.2 of the RoC establishes fundamentally important prohibitions concerning the conduct of counsel that if breached, bar admission to the list. The regulation reads as follows: “Counsel should *not* have been *convicted* of a *serious* criminal or *disciplinary* offence considered to be *incompatible with the nature of the office of counsel before the Court.*” [*italics added*]
5. When counsel has been admitted to the list and, since the date of admission, new facts emerge which demonstrate that the prohibitions clearly stipulated in Regulation 67.2 of the RoC have been breached, then for all intents and purposes the admitted counsel “no longer meets the criteria required for inclusion in the list of counsel”, and *must* be removed from the list of counsel pursuant to the clear and mandatory language of Regulation 71.1(a) of the RoC.<sup>7</sup>
6. In the assessment of Regulation 67.2 of the RoC against the facts of any given case, the Registrar must be satisfied that there is *de facto* a conviction, and that the latter is for a “serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court”.<sup>8</sup> In the respectful submissions of the Registrar, in the present case, these necessary conditions have unequivocally been met.
7. In her decision dated 19 August 2011 (“Decision Under Review”), the Registrar highlighted the facts and reasons surrounding the conviction and disbarment of the Applicant from his national bar in the Democratic Republic of the Congo (“DRC”), and the reasons why the disciplinary offence in question has reached

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<sup>7</sup> Regulation 71.1 (a) of the RoC reads: “The Registrar *shall* remove a counsel from the list of counsel where he or she: no longer meets the criteria required for inclusion to the list of counsel”. See note 25, *infra*.

<sup>8</sup> Regulation 67.2 of the RoC.

the threshold of gravity “incompatible with the nature of the office of counsel before the Court” in violation of the strict prohibition stipulated in Regulation 67.2 of the RoC, and hence, created the grounds upon which the Registrar had to act pursuant to Regulation 71.1(a) of the RoC to remove the Applicant from the list of counsel.

8. It is trite knowledge in the legal profession – in the common law, civil law, as well as mixed legal traditions – that one’s disbarment from his or her national bar is the most serious disciplinary sanction handed down by the applicable governing professional body against a registered member. As such, resort to disbarment is not made lightly and the sanction is reserved only for cases involving the most serious disciplinary offences as ‘the punishment must fit the crime’ – this approach is equally adopted for the legal profession in the DRC.<sup>9</sup>
9. The Registrar respectfully submits that while the *Code of Professional Conduct for counsel*<sup>10</sup> (“Code”) is silent on what constitutes a serious disciplinary offence,<sup>11</sup> a review of the category of grave disciplinary offences as set by domestic jurisprudence, demonstrate that along with cases where counsel has for instance engaged in fraudulent activity and deception of clients,<sup>12</sup> *inter alia*,<sup>13</sup> practicing

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<sup>9</sup> See Article 87 of the *Ordonnance-loi n° 79-028 du 28/09/1979, portant organisation du barreau, du corps des défenseurs judiciaires et du corps de mandataires de l’État*.

<sup>10</sup> ICC-ASP/4/Res.1.

<sup>11</sup> Article 31 of the Code dealing with “Misconduct” does not define serious disciplinary proceeding or misconduct.

<sup>12</sup> Melnitzer, Re, 1992 CanLII 196 (ON L.S.D.C.), Date: 1992-03-26; Colmand, Re, 1998 CanLII 1956 (ON L.S.D.C.) dated 1998-10-22.

<sup>13</sup> In disciplinary matters in the civil law system of France, the *Conseil de l’Ordre du Barreau de Paris*, has given the designation of grave to the following non-exhaustive instances of professional misconduct, without providing a specific definition *per se*:

- Le fait de ne plus avoir de domicile professionnel, d’avoir abandonné ses obligations d’avocat, de ne plus répondre au téléphone ni aux correspondances, de ne plus tenir sa compatibilité et de ne pas se présenter aux audiences constituent des manquements graves, ceci par l’effet de leur répétition. (*Conseil de discipline, Formation de jugement No. 1, Dossier no. 25.58.39, 28 février 2006*).
- Le fait pour l’avocat de tromper le tribunal en confirmant les déclarations contraires à la réalité faites par son client et en les réitérant à son contradicteur ainsi qu’à la Commission de déontologie. (*Conseil de discipline, Formation de jugement No. 2, décision du 28 Mars 2006, dossier no. 25.7678*).
- Le comportement répétitif de l’avocat consistant à solliciter régulièrement des honoraires importants eu égard aux faibles moyes des clients sans accomplir totalement ou en omettant

while suspended<sup>14</sup> and continued and repeated neglect of professional ethical obligations figure amongst offences that professional bodies governing the legal profession have considered to be serious/grave, and which merit disbarment from practice. [emphasis added]

10. As stated in the Decision Under Review, in the present case, the *Conseil National de l'Ordre des avocats* of the DRC, in its decision of 10 March 2011, referenced: CNO/RDA/320, found that the Applicant had violated Article 101 of l'Ordonnance loi of 28 September 1979, concerning the prohibition on counsel who have previously been suspended to cease, *inter alia*, their practice and all related professional activity; to receive further clients; to engage in consultative activities and to practice before other jurisdictions. The *Conseil National de l'Ordre des avocats* further based its decision on the fact that the Applicant had failed to respect "les décisions des organes de l'Ordre et de s'abstenir de faire tout ce qui est susceptible de nuire à leur autorité"<sup>15</sup>. On the facts, the Applicant had acted contrary to these obligations and for his failure to do so, and given the repeated violations of his professional obligations, was ultimately disbarred from his national bar by the abovementioned decision of the *Conseil National de l'Ordre des avocats*. Under the circumstances, given the facts of the case and the serious nature of the disciplinary offence for which the Applicant has been

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d'accomplir les prestations pour lesquelles il a été honoré ; à refuser de répondre aux questions posées par l'Ordre relativement aux nombreuses réclamations dont il est l'objet ainsi qu'en refusant de répondre aux convocations du bâtonnier dans le cadre de procédures en contestation d'honoraire introduites par ses clients ; à encaisser à son compte personnel des sommes qui lui ont été confiées par ses clients soit pour effectuer des paiements de loyer soit pour payer des consignations dans le cadre des procédures. (*Conseil de discipline, Formation de jugement No. 2, décision du 28 Mars 2006, dossier no 25.7678. p.11*)

- Les fraudes fiscales répétées par l'avocat dans le versement de la TVA et le paiement de l'imposition dont il est normalement redevable. La gravité des faits est ici établie au regard de leur lien avec les manquements aux règles déontologiques et de leur répétition. (*Conseil de discipline, formation de jugement No. 1, dossier no. 25.3240, Décision du 28 mars 2006, p. 3s*).

The *Conseil National des Barreaux* has found a grave breach in the context of the following offences: the repetitive violations of the rules of professional conduct, fraudulent activities and extortion.

<sup>14</sup> Singer, Re, 1997 CanLII 1417 (ON L.S.D.C.) dated 1997-11-27. Ranieri, Re, 1993 CanLII 234 (ON L.S.D.C.) dated 1993-01-28. See also the decision of the *Conseil National de l'Ordre des avocats* of the DRC, dated 10 March 2011, referenced: CNO/RDA/320, which found that the Applicant had violated Article 101 of L'Ordonnance loi of 28 September 1979, for continuing to practice while suspended.

<sup>15</sup> See Decision Under Review, pages 1-2.

disbarred, the Registrar was satisfied that the prohibitions in Regulation 67.2 of the RoC had been breached, and that the Applicant no longer met the requirements for inclusion to the list of counsel and had to be removed from the list as required under Regulation 71.1(a) of the RoC.

### **Clear demarcation of proceedings**

11. The Registrar notes that in support of the Application, the Applicant has made submissions and appended a series of documents, which together have the effect of overwhelming the Application with irrelevant considerations, confusing the real issues at stake.
12. In the respectful submission of the Registrar, in an attempt to challenge a founded decision to remove him from the list of counsel, the Applicant attempts, albeit erroneously, to mesh his mandate and activities before this Court, mixing wholly separate disciplinary proceedings and facts as a shield against the Decision Under Review, by arguing that the Registry has in effect pursued him twice and punished him for the same facts while permitting him to continue to practice before the Court.<sup>16</sup>
13. A scrupulous and methodological review of the relevant documents appended to the Application will demonstrate that there is a clear demarcation between the different proceedings invoked by the Applicant, and that the decisions arising from each proceeding mentioned, have been taken based on separate legal basis, at different stages where the material facts and legal basis merged to justify a decision being delivered, and, for essentially different conduct of the Applicant.
14. Disciplinary proceedings were initially commenced against the Applicant pursuant to the disciplinary regime established under Chapter 4 of the Code back in June 2009. The catalyst for the triggering of disciplinary proceedings against the Applicant was the latter's failure to inform the Registrar

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<sup>16</sup> See Application, paras. 36 *ff.* See a *contrario* letter of the Registrar dated 28 April 2009, which clearly explains the differences as well as the appropriate link between the different proceedings in question.

“immediately [...] of any changes to the information he or she has provided that are more than *de minimis*, including the initiation of any criminal or disciplinary proceedings against” him as is required by Regulation 69.3 of the RoC.<sup>17</sup> The Registrar recalls that on 28 September 2008, the *Conseil de l’Ordre du Barreau de Matadi*, sitting as a disciplinary body, suspended the Applicant for 12 months for lack of deference, and the discourtesy shown towards its members;<sup>18</sup> that decision was upheld on appeal by the *Conseil National de l’Ordre des avocats* of the DRC. The Applicant had failed to inform the Registrar of this significant change to his status with his national bar as is required by Regulation 69.3 of the RoC and similar obligations placed upon counsel practicing before the Court.<sup>19</sup> In June 2009, the Registrar, acting pursuant to Article 34.4 of the Code submitted a complaint against the Applicant to Mr. Nigel Hampton Q.C., the then independent Disciplinary Commissioner of the Court; the latter, in August 2009 referred the matter to the Disciplinary Board pursuant to Article 41 of the Code. On 9 July 2010, the Disciplinary Board found the “facts alleged against the [Applicant] to be sufficiently serious to justify the imposition of a sanction” and sanctioned the Applicant with a public reprimand to be entered in the Applicant’s personal file.<sup>20</sup>

15. The aforementioned disciplinary proceeding and decision against the Applicant derive from a wholly separate matter and are based on separate facts and legal basis – arising from the Applicant’s failure to honor his obligations as specified by Regulation 69.3 of the RoC – and are not to be mixed or confused with the recent administrative decision of the Registrar to remove the Applicant from the list of counsel.
16. The most recent decision of the *Conseil National de l’Ordre des avocats* of 10 March 2011, referenced: CNO/RDA/320, published in the Official Journal of the DRC

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<sup>17</sup> See also obligations of counsel under Articles 7.3 and 24 of the Code, and the solemn undertaking executed by the Applicant pursuant to Article 5 of the Code.

<sup>18</sup> See the decision referenced: 021/OABM/BRBC/MK/2008, dated 27 September 2008.

<sup>19</sup> See *supra*, note 18.

<sup>20</sup> See Disciplinary Board decision (Public) dated 9 July 2010, referenced: DO-01-2010.



on 1 July 2011, disbarred the Applicant for, *inter alia*, failing to pay heed to the decisions of the national bar (*Conseil de l'Ordre du Barreau de Matadi*, and the *Conseil National de l'Ordre des avocats*) in 2008, in particular, by failing to seize all professional activity by continuing to practice before the International Criminal Court in violation of his 12 months suspension.<sup>21</sup>

17. As stated in the Decision Under Review, the Applicant was admitted to the list of counsel<sup>22</sup> in 2007 as a then, member in good standing of his national bar in the DRC. During the period of the suspension order, where the Applicant actively intervened in proceedings before the Court, the DRC authorities at the national level exercised sole and exclusive disciplinary authority over the Applicant. The Applicant was admitted to the Paris Bar only on 20 January 2011. This means that the Applicant continued to defy the suspension order rendered against him by the *Conseil de l'Ordre du Barreau de Matadi* in September 2008 as upheld by the *Conseil National de l'Ordre des avocats*, at least, in this interim period. In its March 2011 decision, the *Conseil National de l'Ordre des avocats* opined:

En l'occurrence, l'article 101 de l'Ordonnance-loi du 28 septembre 1979 dispose que l'Avocat interdit ou suspendu doit s'abstenir de tout acte professionnel et notamment de revêtir le costume de la profession, de recevoir la clientèle, de donner des consultations, d'assister ou représenter les parties devant les juridictions. Il ne peut en aucune circonstance faire état de sa qualité d'Avocat. Dans le cas d'espèce, Maître Diakiese Khuty a volontairement violé cette disposition qu'il n'a jamais prétendu ignorer, en sa qualité d'Avocat inscrit au tableau de l'Ordre depuis aux moins dix années. [...]

Au contraire, la sanction de douze mois de suspension lui ayant été infligée pour avoir bravé et lancé un défi aux organes de l'Ordre, Maître Diakiese Khuty a agi dans la même perspective de bravade, en dépit du fait que l'article 63 du Règlement intérieur cadre à son point 4 prescrit aux Avocats de respecter les décisions des organes de l'Ordre et de s'abstenir de faire tout ce qui est susceptible de nuire à leur autorité. [emphasis added]

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<sup>21</sup> See *supra*, notes 19 and 21.

<sup>22</sup> DSS/2007/57/DDP/sl.

18. In view of the fact that the Applicant had a prior disciplinary conviction of 12 months for, *inter alia*, discourtesy shown towards members of his national bar, and was, for all intents and purposes, a repeat offender, the *Conseil National de l'Ordre des avocats* in its March 2011 ruling found that in view of the repeated failure of the Applicant to respect his professional ethical obligations and the decisions handed down by the national bar in the DRC – most recently, for failing to respect the terms of the 2008 decision suspending the Applicant from practising for 12 months<sup>23</sup> – only the sanction of disbarment is appropriate given the context and history of the case. The *Conseil National de l'Ordre des avocats* proceeded and disbarred the Applicant.<sup>24</sup>
19. In the respectful submissions of the Registrar, a careful consideration of this latest ruling of the *Conseil National de l'Ordre des avocats*, the reasons and facts upon which it is based as well as its ultimate outcome, reveal that the Applicant no longer met the prerequisites stipulated in Regulation 67.2 of the RoC, and had to be removed from the list of counsel as mandated by Regulation 71.1(a) of the RoC.<sup>25</sup>
20. It is further submitted that it is *not* up to the Registrar to advise or order the Applicant to duly abide by the obligations placed upon him by the domestic ethical rules, regulations and decisions governing the legal profession that are applicable to him. The Applicant alone bears this important responsibility. Furthermore, the Registrar may only deny counsel the ability to represent victims, suspects or accused persons in proceedings before the Court in strict conformity with the legal regime as defined by the applicable legal texts of the Court. In the present case, and guided by the legal regime establishing the parameters within which the Registrar may act, it was not for her to deny legal

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<sup>23</sup> See footnotes no. 19 and 20, *supra*.

<sup>24</sup> See decision of the *Conseil National de l'Ordre des avocats*, of 10 March 2011, referenced: CNO/RDA/320, published in the Official Journal of the DRC on 1 July 2011.

<sup>25</sup> The language of Regulation 71.1 of the RoC is clear and unambiguous. When one of the conditions listed in subsections a) through d) of Regulation 71.1 are met, the Registrar *must* remove counsel from the list of counsel as captured in the mandatory language used in the provision through the use of the word : « shall » as opposed to « may ».

representation, but rather for the Applicant in conformity with the Code to refuse a representation agreement if the circumstances called for such a refusal.

21. In view of the decision of the *Conseil de l'Ordre du Barreau de Matadi* of September 2008 suspending the Applicant from practice, and the subsequent decision of *Conseil National de l'Ordre des avocats*, which upheld the sanction on appeal, it was the Applicant who had the obligation to respect such decisions and refuse representation agreements during the period of his suspension.
22. The fact that a counsel may become a member of the bar of another country subsequent to a ruling temporarily suspending him from practice from his original bar, or that he is simultaneously a member in good standing with another bar is not necessarily relevant and does not vitiate the obligation of counsel to respect the disciplinary decisions rendered against him by his original bar as well as the professional duties and obligations that stem from such decisions.
23. The Registrar respectfully submits that, under Article 13 of the Code, it is counsel who can refuse a representation agreement, and counsel may do so without stating reasons.<sup>26</sup> Moreover, counsel engaged in legal representation of victims in proceedings before the Court may withdraw and terminate an existing representation agreement with leave of the Chamber seized of the case<sup>27</sup> when the circumstances justify such a request.
24. As it concerns the Applicant's most recent appointments to represent victims in proceedings before the Court,<sup>28</sup> the Registrar was only notified of the decision of *Conseil National de l'Ordre des avocats* disbarring the Applicant through an email received from the Chambers on 18 August 2011, attaching the March 2011 decision.<sup>29</sup> Equipped with this information, the Registrar promptly proceeded

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<sup>26</sup> Article 13.1 of the Code.

<sup>27</sup> Regulation 82 of the RoC.

<sup>28</sup> See *Prosecutor v. Calixte Mbarushimana*, Pre-Trial Chamber I, *Decision on the 138 applications for victims' participation in the proceedings*, ICC-01/04-01/10-351, dated 11 August 2011.

<sup>29</sup> See e.g. email dated 18 August 2011, sent on behalf of the Presiding Judge of Trial Chamber I, appended to the present as Annex A, where the Chamber seized of the case of the *Prosecutor v. Thomas*

and with full respect for the due process rights of the Applicant rendered a decision in keeping with her obligations under Regulation 71.1(a) of the RoC.

### **The limits of questioning the national proceedings and their outcome**

25. In the respectful submissions of the Registrar, the independence and professional integrity of national bars and how they conduct matters within their jurisdiction, including the disciplinary regime applied to their respective members, are to be strictly respected and given due deference.
26. In the application of the Registrar's discretion in the framework of Regulation 67.2 of the RoC, what is impermissible and should be avoided in the ordinary course is for the Registry – and the Court – to substitute its determination for that of the national bar as it concerns the substance and the conduct of domestic disciplinary proceedings.
27. In the application and appreciation of Regulation 67.2 of the RoC – as a basis upon which to trigger Regulation 71.1 (a) of the RoC – the Registrar can exercise extra caution when there is clear and substantiated evidence that manifest bad faith has resulted in 'malicious prosecution' or "witch hunting" by a national bar against a respective member; this is a rather high threshold to be met by concrete evidence in support of such serious allegations. The occurrence of such a case in and of itself is an anomaly and allegations to this effect have to be treated with utmost caution and care by the Registry and the Court.
28. In such rare cases where abuse of authority or unfair proceedings are alleged,<sup>30</sup> in the respectful submissions of the Registrar, the onus falls on the person claiming and relying on such allegations to prove them affirmatively and not on the Court – Registry or the Presidency – to demonstrate or determine them to be

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*Lubanga Dyilo*, (ICC-01/04-01/06), specifically requested the Registry to deliver an expedited decision on the status of the Applicant: "[...] Given that the relevant team of legal representatives has indicated (also this morning) that Mr Diakiese intends to present part of the victims oral closing submissions next week on 25 and 26 August 2011, Judge Fulford has asked me to indicate that a decision dealing with the status of Mr Diakiese should be issued as a matter of urgency so that the necessary arrangements may be taken in advance of the hearing next week" [Emphasis added]."

<sup>30</sup> See Application, para. 53.

true or otherwise. In the absence of sufficient submissions to this effect and failure to prove such allegations by the person making them, backed by substantiated proof, no such allegation can be entertained in the context of an assessment of Regulation 67.2 of the RoC as a basis for the application of Regulation 71.1 (c) of the RoC.

29. As abovementioned, the Registrar has a positive obligation to strictly apply the legal texts of the Court and take decisions within her purview guided by pertinent facts and with full respect for the due process rights of the person being affected by her decisions. In the present case, there was no evidence before the Registrar to doubt the sanctity or appropriateness of the findings of the *Conseil National de l'Ordre des avocats* of 10 March 2011– the governing body best placed to gauge the conduct of one of its members and the appropriate sanction to be applied in context – on the merits, or the process through which such findings were reached; a conclusion which, in view of the Registrar, remains unchanged by the submissions of the Applicant in his Application.

#### **Irrelevance of admission to the Paris Bar**

30. In the interim decision of 26 August,<sup>31</sup> the Presidency ordered the Registrar, in her response, to include observations on the Applicant's submissions regarding his membership with the Paris Bar<sup>32</sup>. The Registrar is pleased to furnish the following observations in conformity with the Presidency's directions.
31. At the outset, the Registrar respectfully submits that for the reasons that follow, the issue of the Applicant's standing with the Paris Bar<sup>33</sup> is irrelevant, which if given weight, carries the risk of detracting away from the real issues at stake, which are central to a proper consideration of the Decision Under Review.
32. In paragraph 6 of the Application,<sup>34</sup> the Applicant advances the argument that his admission and current standing with the Paris Bar constitutes sufficient

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<sup>31</sup>Interim Decision of the Presidency, *supra* note 1.

<sup>32</sup> *Ibid*, at page 3.

<sup>33</sup> The Applicant was called to the Paris Bar on the 20th of January 2011.

<sup>34</sup> See also Application, para. 53.

reason for the Registry to continue to consider him qualified to be on the list of counsel, as created and maintained by the Registrar.<sup>35</sup> In the respectful submissions of the Registrar, this submission is without merit.

33. Firstly, it is to be emphasized that admission or active membership with a national bar is not a mandatory requirement for admission to the list of counsel. The applicable legal texts of the Court are devoid of any explicit provision which makes these conditions prerequisites for admission to the list of counsel. On the contrary, the 'system' in place for the consideration and admission to the list of counsel has been kept sufficiently tailored to allow duly qualified candidates – who possess the “relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings”<sup>36</sup> – who may or may not be a member of a bar, to apply for admission and if warranted, admitted to the list.<sup>37</sup>
34. Secondly, in the respectful submissions of the Registrar, in the present case, the deciding factor in determining whether the Applicant “[n]o longer meets the criteria required for inclusion in the list of counsel”<sup>38</sup> is not based on whether the Applicant still holds valid membership with a second bar – as is being advanced –, but whether the Applicant has been “convicted of a serious [...] disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court”<sup>39</sup> by any of the bar(s) or professional governing body, with disciplinary powers, with which the Applicant holds, or has held, membership. In the case of the Applicant, the relevant professional governing bodies with this authority at the national level are the *Conseil de l'Ordre du*

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<sup>35</sup> Rule 21.2 of the RPE.

<sup>36</sup> See Rules 22 and 90.6 of the RPE.

<sup>37</sup> For instance, in some jurisdictions judges are not a member of a bar, but an exclusive specialized body with the mandate to regulate and discipline judges. There are also instances where a sufficiently qualified candidate has acquired more than 10 years of experience in criminal proceedings – as required by the combined effect of Rule 22 of the RPE and Regulation 67.1 of the RoC – solely from working at the international level – say, at the *ad hoc* tribunals –, but without ever being admitted to a national bar. Such candidates can be admitted to the list of counsel.

<sup>38</sup> Regulation 71.1(a) of the RoC.

<sup>39</sup> Regulation 67.2 of the RoC.

*Barreau de Matadi* in the DRC (including the *Conseil National de l'Ordre des avocats*, which acts as the appellate body over decisions of the former) and the Paris Bar. More importantly, as established by the Decision Under Review and the within observations, the relevant authorities in the DRC have convicted the Applicant in March 2011 of a disciplinary offence,<sup>40</sup> which the Registrar has considered to be serious and incompatible with the nature of the office of counsel before the Court pursuant to Regulation 67.2 of the RoC.

35. Hence, even if a candidate seeking admission to the list of counsel is a member of several bars or is subject to the authority of several professional governing bodies, and yet has been convicted of a "serious [...] disciplinary offense considered to be incompatible with the nature of the office of counsel before the Court" by only one of them, that person would be barred from admission to the list of counsel. The same would be true for a person who has been admitted to the list of counsel, but has subsequently been found guilty of a serious disciplinary offence in violation of the prohibitions contained in Regulation 67.2 of the RoC by one of the bars in which he or she is a member.
36. For lawyers already admitted to the list of counsel, as is the case here, from the moment the prohibitions of Regulation 67.2 of the RoC have been breached, as determined by the Registrar, that lawyer "[n]o longer meets the criteria required for inclusion in the list of counsel", and "shall"<sup>41</sup> be removed from the list pursuant to Regulation 71.1 (a) of the RoC.
37. The Registrar notes in passing that candidates seeking admission to the Paris Bar, or any other French Bar must demonstrate that their professional record is devoid of any conduct which resulted in the issuance of, *inter alia*, disbarment from their national bar.<sup>42</sup> This mandatory regulatory prerequisite highlights the

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<sup>40</sup> For, *inter alia*, failing to pay heed to an earlier decision rendered in 2008, which prohibited the Applicant from engaging in all professional activity as a lawyer during a 12 months suspension; acts which occurred prior to the Applicant joining the Paris Bar in 2011.

<sup>41</sup> See footnote no. 25, *supra* on the mandatory language of Regulation 71.1 (a) of the RoC.

<sup>42</sup> See Art. 11 (5) of the *Loi n°71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*, where it is stated that « Nul ne peut accéder à la profession d'avocat s'il ne remplit les

importance the Paris Bar attaches to the seriousness of the sanction of disbarment.

38. The Registrar reiterates that she has a positive obligation to strictly apply the legal texts of the Court through a scrupulous analysis and processing of the pertinent facts, free of extraneous considerations.

### **The Registrar fully respected the due process rights of the Applicant**

#### ***Opportunity to be heard***

39. The Applicant alleges that his due process rights were violated as he was not given sufficient time to advance his 'defence'.<sup>43</sup>
40. The Registrar fully pays homage to the principle of due process by affording persons who will be affected by her decision(s) an opportunity to be heard prior to delivering the decision(s) in question. The case of the Applicant was no exception. On Friday, 19 August 2011, as conceded by the Applicant<sup>44</sup>, the relevant services of the Registry invited him to submit observations on the decision of the *Conseil National de l'Ordre des avocats* of 10 March 2011. In its invitation, the Registry requested the Applicant to indicate the reasons why he did not notify the Registrar of the March 2011 decision as is required by Regulation 69.3 of the RoC, and further, to provide the Registry all observations he judges pertinent on the matter.
41. In view of the fact that the hearing reserved for closing arguments in the case of the *Prosecutor v. Thomas Lubanga Dyilo*<sup>45</sup> was imminent and was to commence at the onset of the following week, compounded by other pending matters which were *sub judice* in other cases before the Court with a direct link to the status of the Applicant,<sup>46</sup> the latter was invited to submit any observations he may have

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conditions suivantes : [...]N'avoir pas été l'auteur de faits de même nature ayant donné lieu à une sanction disciplinaire ou administrative de destitution, radiation, révocation, de retrait d'agrément ou d'autorisation », available online: <<http://www.legifrance.gouv.fr/texteconsolide/AKEAP.htm>>.

<sup>43</sup> Application, paras. 3, 4, 10 and 11.

<sup>44</sup> See Annex 2 to the Application, and para. 3 of the Application.

<sup>45</sup> ICC-01/04-01/06. The Applicant represents a group of victims in the said proceedings.

<sup>46</sup> See e.g. *Prosecutor v. Calixte Mbarushimana*, *supra* note 28.



on the decision of the *Conseil National de l'ordre des avocats* disbarring him from practice in the DRC the same day.<sup>47</sup>

42. With a view to fully guarantee and respect the due process rights of the Applicant, contrary to the submissions of the Applicant, the latter was in fact afforded an opportunity to provide his observations. The Applicant's observations were subsequently subjected to due consideration and careful scrutiny by the Registrar in the context of her assessment of Regulation 67.2 of the RoC and the applicability of Regulation 71.1 (a) of the RoC. Several important observations are to be made in this regard.
43. In response to the invitation by the Registry, the Applicant replied with a list of arguments, appended to the present observations as Annex B, which were deemed by the Registrar to be unpersuasive and/or irrelevant to her assessment of whether the prohibitions stipulated in Regulation 67.2 of the RoC have been violated, and whether the Applicant no longer met the criteria of inclusion to the list of counsel and had to be removed from the list pursuant to Regulation 71.1(a) of the RoC.
44. Apart from the unpersuasive nature of the Applicant's observations, the Registrar notes that he failed to request for an extension of time to submit his observation and that further, his response to the Registry's invitation to provide observations are devoid of any declaration to the effect that time-constraints limited his capacity to bring the necessary information to the attention of the Registrar. It is respectfully submitted that having failed, in the first place, to request additional time to submit his observations, the Applicant should not be permitted to invoke an allegation of insufficient time to provide observations *ex post facto* as a means to reverse a concretely founded decision of the Registrar.
45. Even in the event that the Applicant is successful in persuading the Presidency that he was afforded insufficient time to provide his observations on his

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<sup>47</sup> See *e.g. supra*, note 29 and Annex A.

disbarment, in his Application, the Applicant has put forth what he deemed to be his best arguments in support of maintaining his status on the list of counsel and his request to set aside the Decision Under Review. The Registrar respectfully submits that none of the arguments put forth by the Applicant in his Application can reasonably put into question the soundness of the Decision Under Review, which removed the Applicant from the list of counsel.

46. Lastly, the argument of insufficient time to reply as alleged by the Applicant – an allegation contested by the Registrar – should not be allowed to deviate from the core issues in question, which are reflected in the following queries: was the Applicant *de facto* and *de jure* disbarred from the national bar in the DRC by the decision of the *Conseil National de l'ordre des avocats* – an appellate disciplinary body – dated 10 March 2011? Does the conduct of the Applicant which gave rise to his disbarment reach the threshold of “serious [...] disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court” as stipulated in Regulation 67.2 of the RoC? Has the Applicant failed to provide any tangible, reasonable and appropriately persuasive argument that could ‘*estop*’ the mandatory application of Regulation 71.1(a) of the RoC at a juncture when he no longer meets the criteria for inclusion in the list of counsel? And, finally, has he failed to conclusively discharge the onus he carries to demonstrate his allegation that the disbarment by the *Conseil National de l'ordre des avocats* was done through the conduct of unfair proceedings? On the merits, the answer to these questions is unequivocally affirmative.

***Opportunity for appeals at the national level must be exhausted***

47. The Registrar notes that the *Conseil National de l'ordre des avocats* is the highest regulating body in the DRC, which serves as, *inter alia*, the ultimate appellate body over disciplinary decisions rendered by regional/locals bars in the country. Disciplinary decisions of the *Conseil National de l'ordre des avocats* are final and cannot be subjected to further appeals; a fact reaffirmed by the Bâtonnier National of the DRC in communications with the Registry.

48. While the Applicant in paragraph 50 of his Application claims that he has seized the *Procureur Général* of the DRC in an attempt to suspend the decision of the *Conseil National de l'ordre des avocats* of March 2011, apart from the fact that seizing the *Procureur Général* to challenge a final decision of the *Conseil National de l'ordre des avocats* has no force in law, it is important to highlight that it was in fact the *Procureur Général* himself who appealed before the *Conseil National de l'ordre des avocats* seeking a tougher sanction against the Appellant, ultimately resulting in the decision of 10 March 2011, disbarring the Applicant from practice in the country.<sup>48</sup> The Registry equally notes that the letter contained in Annex 10 of the Application, while it purports to challenge the decision of the *Conseil National de l'ordre des avocats* of March 2011, makes reference to no legal basis in doing so. Similarly, it is noted that the said letter is addressed to the President of the *Conseil National de l'ordre des avocats*, the head of the same body which disbarred the Applicant.
49. The Applicant's submissions in paragraphs 49 and 50 of his Application concerning the exhaustion of national remedies also appear to be inconsistent with explicit declarations he has previously made before the Court's Disciplinary Board. During the public hearings of the Disciplinary Board held in March 2010 in relation to a wholly separate matter,<sup>49</sup> the Applicant himself conceded that decisions of the *Conseil National de l'ordre des avocats* are enforceable notwithstanding any appeal<sup>50</sup>, and that in his country, "the disciplinary decisions can only appeal at the National Bar Council [*Conseil National de l'ordre des avocats*], and when a decision is given at that level, nothing else can be done."<sup>51</sup> [emphasis added]

<sup>48</sup> See decision of the *Conseil National de l'Ordre des avocats*, of 10 March 2011, *supra* note 24.

<sup>49</sup> See Decision of the Disciplinary Board of the International Criminal Court, dated 9 July 2010, DO-01-2010.


<sup>50</sup> See Decision of the Disciplinary Board of the International Criminal Court, dated 9 July 2010, DO-01-2010, para. 40, where it is stated that "[a]t the hearing, Mr. Diakiese also conceded that decisions of the Bar Council were enforceable notwithstanding any appeal"; see also Transcript of the Disciplinary Board hearing of 12 March 2010, at page 21, lines 6 *ff.*

<sup>51</sup> See Transcript of the Disciplinary Board hearing of 12 March 2010, at page 21, lines 19 *ff.*

50. Lastly, the Registrar further submits that the Applicant did not advance any argument regarding the lack of exhaustion of national remedies when afforded the opportunity to present his observations on the 19th of August 2011.
51. The Registrar duly took into account the most determinant considerations outlined above concerning the issue of exhaustion of national remedies prior to rendering the Decision Under Review.

### **Legal representation of victims**

52. Prior to taking her decision pursuant to Regulation 71.1 (a) of the RoC, the Registrar carefully considered the question of the legal representation of the victims to whom the Applicant had been assigned, and was satisfied that at a workable solution could *ultimately* be arranged so that the rights of the victims do not suffer any prejudice.<sup>52</sup> Similarly, mechanisms are in place and arrangements can be established to ensure continuity and to avoid a gap in legal representation should the Presidency uphold the Decision Under Review.<sup>53</sup>
53. Based on the aforesaid, the Registrar respectfully requests the Honorable Judges of the Presidency to reject the Application and uphold the Decision Under Review. The Registrar remains at the disposal of The Honorable Judges of the Presidency should further amplifications or information be required.




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Silvana Arbia  
Registrar

Dated this Tuesday, 6 September 2011

At The Hague, Netherlands

<sup>52</sup> See *e.g.* "Registry Report concerning the representation of participating victims formerly represented by Maître Hervé Diakiese" (ICC-01/04-01/10-387) dated 23 August 2011, where after the removal of the Applicant from the list of counsel, the Registry provided workable solutions to the Pre-Trial Chamber I on the assignment of legal representation to the Applicant's former victim-clients in proceedings before the Court. See similarly, the exchange of emails between the Registry and the legal officer of the Pre-Trial Division/Trial Chamber III dated 24 and 25 August 2011 respectively, appended to the present as Annex C.

<sup>53</sup> See *e.g.* *Ibid.*