

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

Date: **23 August 2011**

THE PRESIDENCY

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

**URGENT APPLICATION APPEALING AGAINST THE REGISTRAR'S
DECISION ON THE REMOVAL OF A COUNSEL AND SEEKING IMMEDIATE
SUSPENSIVE EFFECT OF SAID DECISION
(PUBLIC APPLICATION WITH 15 CONFIDENTIAL ANNEXES)**

Source: Mr Hervé Diakiese

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

BACKGROUND

1. On Thursday, 18 August 2011 at 13.11, by e-mail sent by Ms Stephanie Godart, Legal Adviser to the Court, to Mr Luc Walley, spokesman for the legal representatives of victims team V01 before Trial Chamber I, and copied to the members of said team, the Applicant learned of the existence of a decision to strike him off the Bar which had been brought to the Chamber's attention.¹
2. By that same e-mail, it was suggested to the team that they take steps to have the Applicant's closing statement at the final submissions hearing presented by another counsel, in the event that the Registry, **which had already been informed of the decision**, should decide to remove the Applicant from the list of counsel.
3. On Friday, 19 August 2011, at 11.03, the Applicant received an e-mail entitled "[TRANSLATION] Urgent request for information" from the Chief of the Counsel Support Section, Mr Esteban Peralta.²
4. In that e-mail, the Applicant was requested to provide, no later than 14.00 that same day, his observations on and responses to the decision to strike him off the Bar and the fact that the Applicant had not informed either the Registrar or the Counsel Support Section of the situation.
5. On that same Friday, 19 August, at 12.03, the Applicant responded to the urgent request for information, and informed the Chief of the Counsel Support Section that he had only just learned of the decision via the e-mail sent to his team and the urgent request for information, and that he had been unaware of either the content of the decision or the facts alleged against him.

Furthermore, the excerpt from the official journal in question **had just been sent to him for the first time** by the Counsel Support Section.³

The Applicant submitted that this measure was part of a harassment and demonisation campaign directed against him by the President of the National Bar of the Democratic Republic of the Congo, with the sole objective of orchestrating a disciplinary procedure that would lead to his removal from the list of counsel acting before the International Criminal Court. By way of example, he cited the press release issued by the President of the National Bar Council urging the Court to cease its collaboration with the Applicant, in which he considered the

¹ See e-mail from the Chamber (Annex 1).

² See e-mail from the Chief of the Counsel Support Section (Annex 2).

³ *Idem*.

Court's disciplinary procedures to be "[TRANSLATION] lax", despite the fact that he had appointed a delegate to sit on the Court's Disciplinary Board.⁴

6. The Applicant further submitted that, in this respect, he had already informed the Registry on 28 February 2011 of his admittance to the Paris Bar and that, accordingly, regardless of the intrinsic examination of the nature of the acts which led to the maximum disciplinary sanction being pronounced against him, the Registry could have, at the very least, noted that he was a member of the Paris Bar and was still qualified to be included in the list of counsel.⁵
7. Furthermore, the Applicant submitted that he had not visited the Democratic Republic of the Congo since September 2009 and that **no record of these proceedings had ever been notified to him, including the disciplinary order expelling him** from the National Bar Council in the Democratic Republic of the Congo. By way of example, the excerpt from the official journal refers to a procedure in default of appearance;⁶ yet, it was not until Monday, 22 August 2011, when it was registered as a public document in the Court's system, that the Applicant had access to the letter from the President of the National Bar of the Democratic Republic of the Congo, dated 25 July 2011, informing the Trial Chamber of the decision to disbar him.
8. On 19 August 2011, at 16.49, the Counsel Support Section notified the Applicant of the Registrar's decision to remove him from the list of counsel.
9. Accordingly, the Applicant hereby submits to the Presidency of the International Criminal Court an application under regulation 72(2) of the Regulations of the Court for review of the Registrar's decision.

Prior to setting out his procedural and substantive arguments against the decision on his removal for which he is applying for a review, the Applicant hereby requests immediate suspensive effect of the Registrar's decision to remove him from the list of counsel.

⁴ Annex 3.

⁵ Annexes 4 and 5.

⁶ Annexes 5 *bis* and 5 *ter*.

I. Grounds for the application seeking immediate suspensive effect of the Registrar's decision to remove the Applicant from the list of counsel

10. The Applicant submits that the proceedings which culminated in his removal from the list of counsel were **plainly precipitous, giving him less than three hours to arrange for his defence and choose a counsel**; under such circumstances he did not have an objective opportunity to prepare his defence. The Registry, however, was the first to receive the information concerning him and, moreover, was fully informed that the said decision of the National Bar Council of the Democratic Republic of the Congo had been issued by default, that is, in the absence of the Applicant and without his being invited to present arguments in his defence.
11. The Applicant considers that his right to a fair defence has been violated, since the Registrar initiated proceedings to remove a counsel from the list on the basis of a **decision issued by default** against that counsel. He was given **less than three hours** to prepare his defence, a move which clearly violates his right to a fair defence, even from the administrative standpoint, and completely contravenes the letter and spirit of the texts which govern the Court. Furthermore, article 6 of the European Convention on Human Rights, which enshrines **the right to a fair trial**, extends this right beyond judicial authorities *stricto sensu* and hence also applies it to proceedings initiated by administrative authorities – as the Registrar of the Court was supposed to act in the matter at hand.
12. The Applicant further submits that **the Court applies at the highest level the most impeccable international standards concerning the right to a fair trial**. For instance, this application to the Presidency for review allows the Registrar a **time period of 15 days to file a response** pursuant to regulation 72(3) of the Regulations of the Court.
13. Considering that, in the same circumstances, for the same proceedings, the Registrar is granted a time period of 15 days to submit her response, it appears blatantly unfair and imbalanced that the Applicant is only entitled to a **time period of less than three hours determined by the Registry, without any legal foundation or other justification for the urgency**.
14. However, one of the apparent reasons for this urgent request for information, which prompted the urgent procedure, is the fact that the Applicant is vested with a mandate from the Court in the *Lubanga* case, amongst others, and is due to present his final oral submissions on Thursday, 24 August 2011.

15. Accordingly, if the proximity of that hearing authorised the Registrar to shorten all statutory time limits for exercising the right to a defence, whereas the Regulations of the Court allow the Registrar 15 days from date of notification to exercise the same right, then the principles of parallelism of form, fairness and justice equally demand, or would at least justify, consideration of the Applicant's application as a matter of urgency.⁷
16. Considering, however, that, pending its final decision, the Presidency may immediately grant suspensive effect to the Registrar's decision in order to allow the Applicant to present his closing submissions and fully exercise the mandate vested in him by his clients before the Court.
17. The Applicant submits that the Registrar, while not denying her full knowledge of his admittance to the Paris Bar, makes no mention thereof and, strangely, considers only the decision of the National Bar Council of the Democratic Republic of the Congo as the established and well-founded justification for her decision on the incompatibility of retaining the Applicant on the list of counsel.
18. The Applicant submits that, if the interest of granting immediate suspensive effect to the Registrar's decision pending review by the Presidency is weighed against allowing the hastily issued decision to take effect, it will follow that, should the Presidency decide to reverse the Registrar's decision, the **Applicant will have suffered irreparable harm to his mandate for the legal representation of victims in *Lubanga* and in other proceedings, including *Mbarushimana*, where various orders and decisions are being issued in relation to which he is unable to guarantee that the views and concerns of the victims he represents will be expressed.**
19. The blatantly disproportionate consequences of a decision by the Registrar to remove a counsel from the list – an appealable decision issued hastily, and which is the subject of this application for review – justify the Presidency granting immediate suspensive effect, so as to be able to render an informed decision on the Applicant's application for review in the fullness of time.
20. Accordingly, in light of the foregoing, the Applicant respectfully requests the Presidency of the Court to make a ruling granting immediate suspensive effect to the Registrar's decision to remove him from the list of counsel, pending its final decision.

7

II. PROCEDURAL MATTERS

21. The Applicant submits that the urgent proceedings conducted by the Registry in a matter as serious as removal from the list of counsel constitute a serious violation of his right to a fair defence.
22. The Applicant fully maintains his argument set out above that he ought to have been allowed the same period of fifteen days to which the Registrar will be entitled in the same proceedings before the Presidency.
23. In support of this assertion, the Applicant notes that, in respect of precisely the same facts regarding the disciplinary proceedings orchestrated against him by the national Bar authorities, the Registrar did not require him to comply with a particular time limit.
24. The Registrar sent the Applicant a request for explanation and observations on 13 March 2009, at a time when he was active in hearings at the Seat of the Court, and a response was provided to the Registrar in due course on 26 March 2009, there being no need to justify a particularly expedited procedure.⁸
25. Notwithstanding the impugned decision to strike him off the Bar in the Democratic Republic of the Congo, which is the subject of an application for review and annulment, received by the National Bar Council in the Democratic Republic of the Congo on 22 August 2011,⁹ the Applicant submits that to date he retains his status as a lawyer at the Paris Bar, which was duly notified to the Registry.¹⁰ Hence there was obviously no extreme urgency whatsoever to justify denying him the right to a reasonable amount of time to prepare his defence, for a matter of such extreme consequence as his removal from the list of counsel.
26. The penalty against him for serious misconduct considered to be incompatible with the nature of the Applicant's office of counsel before the Court is a substantive matter for which the Applicant ought to have been able to defend himself within a timeframe which is consistent with the right to a fair defence.

⁸ Annexes 6 to 9.

⁹ Annex 10.

¹⁰ Annexes 4 and 5.

III. SUBSTANTIVE MATTERS

27. The Applicant submits that:

1. the Registrar's decision breaches regulation 67(2); provides an erroneous interpretation of the Regulations of the Court.
2. the nature of the disciplinary offences alleged against him relates to the performance of duties entrusted to him by the Court with the Registrar's authorisation.
3. the decision transmitted by the President of the National Bar of the Democratic Republic of the Congo is not a final decision, has not yet exhausted all of the internal redress mechanisms and is subject to opposition and review proceedings before the highest judicial bodies of the Congo.
4. the Registrar's decision breaches article 21 of the Rome Statute, in particular article 21(1)(c), 21(2) and 21(3), as well as articles 4 and 12 of the Code of Professional Conduct for counsel.

III. 1. Breach of regulation 67(2) of the Regulations of the Court by the Registrar

28. In her decision, the Registrar maintains, on the one hand, that: "[TRANSLATION] a disbarment decision is made **after due consideration of the intrinsic and extreme gravity of the alleged breach** and that assessment of the gravity of this breach must, "[TRANSLATION] **in order to be credible and justified**, [...] be viewed by any sensible person assessing the matter as being founded at least on concrete facts, devoid of obvious errors or flaws **and issued pursuant to legal provisions generally accepted in democratic societies or within a legal system affording minimum safeguards of compliance with fair trial principles** such as are found, for example, in the relevant international or regional legal instruments.¹¹
29. On the other hand, however, the Registrar limits herself to noting the extreme gravity of the sanction, and to stating that this sanction also exists in the hierarchy of sanctions provided in the Code of Professional Conduct, **without ascertaining, however, whether the procedure which gave rise to this sanction is consistent with the principles generally accepted by democratic societies or by systems which afford minimum guarantees for ensuring fair proceedings.**

¹¹ Annexes 11 to 14, second recital, page 3 of the decision.

30. On the contrary, the Registrar automatically concludes that, since there has been disbarment, there must have been misconduct and that *ipso facto* it becomes incompatible for the Applicant to remain on the list.
31. Regulation 67(2) of the Regulations of the Court establishes as an assessment criterion not conviction *per se*, but **conviction for serious criminal or disciplinary offences**.
32. Accordingly, the Registrar is duty-bound to ascertain that the penalty is for **serious disciplinary offences** and that such offences are of sufficient gravity to cause incompatibility; hence, it is not the gravity, or lack thereof, of the conviction which creates a situation of incompatibility, but rather the gravity of the disciplinary offence, namely the commission of acts incompatible with the status of counsel before the Court.
33. Moreover, the Registrar's justification cited above fully supports this interpretation; that is why there are lawyers, on the list of counsel, who have incurred heavy sanctions, including the current President of the National Bar of the Democratic Republic of the Congo Mr Mbuy- Mbiye Tanayi (with a one-year suspension), **for whom the gravity of the acts rather than the gravity of the sanction prevailed when assessing the incompatibility of including or maintaining them on the list of counsel**.
34. The Applicant submits that to argue otherwise would amount to suggesting that a light or lenient penalty for serious disciplinary offences would waive the need to assess the intrinsic gravity of the said acts in respect of their incompatibility with maintaining counsel on the list; **likewise, a heavy and extreme penalty is not in itself proof and guarantee of the actual gravity of the alleged misconduct; particularly in respect of the assessment criteria developed so pertinently by the Registrar in her justification**.
35. The Applicant submits that if the Registrar had acted in accordance with her justification, she would have noted that the alleged serious disciplinary offence of which the Applicant is accused was simply the strict observance of the obligations incumbent upon him in respect of the duties entrusted to him at the Court through the Registry.

III.2 The nature of the disciplinary offences of which the Applicant is accused relates to the performance of duties entrusted to him by the Court with the Registrar's authorisation

36. The Applicant can but note and recall that the Registrar, in her letter of 28 April 2009,¹² allowed him to continue to act as counsel while the proceedings brought against him by his home bar association were ongoing. He is accused of NO OTHER VIOLATION than the wearing of robes to perform his duty as victims' representative.
37. To now take into consideration a decision sanctioning the Applicant, which was taken while he was performing his duty before the Court, with the Registrar being informed of the proceedings against him and allowing him to continue to perform his duties, would amount to the Registry going back on its word and penalizing him twice for the same acts, whereas no new element or fresh complaint has been brought against him, apart from the wearing of robes in Court in 2009.
38. In the recitals of her Decision, the Registrar corroborates the claim made by the National Bar Council of the Democratic Republic of the Congo that the Applicant failed in his duty to respect the bar association's decisions.
39. The Applicant notes that it follows from the said decision that the acts of which he is accused concern his service as counsel before the Court during the course of 2009 in the *Katanga* case and that these acts took place during the course of his suspension.
40. The Applicant submits that the Registrar, in her letter of 29 April 2011¹³ to the Applicant in response to the observations on the disciplinary proceedings brought against him, **stated that there existed a testimony of the President of the Matadi Bar arguing for the Applicant's rehabilitation after realising the manipulative nature of the disciplinary proceedings brought against him before he assumed his duties and that the Applicant had been admitted to the Kananga Bar Association where he was practising.**
41. Thus, the Registry allowed the Applicant to continue performing the duties which the Court had entrusted to him. The recipients of this letter included the President of the National Bar Council,¹⁴ who did not appeal against the Registry's stance.

¹² Annexes 6 to 9.

¹³ Annexes 6 to 9.

¹⁴ Annex 9.

42. Thus, by taking into account yet further proceedings based on the same facts, **the Registrar gives carte blanche to breaches of procedure** by local bar associations seeking to settle scores with lawyers. This regrettable precedent could seriously damage the Court's image and would be contrary to the spirit and letter of all the rules and regulations governing the Court.
43. Furthermore, the Registrar stated in this letter that imposing the penalty of suspension provided for under article 71(2) of the Regulations of the Court did not tally with the two specific alternative conditions which were not met in the present case.
44. In the unlikely event that the Applicant, although authorised by the Registrar, had refrained from fulfilling his mandate and duties on behalf of the victims, he would have been in serious breach of articles 17 and 18 of the Code of Professional Conduct for counsel which oblige him to see his mandate through to its conclusion, unless the Chamber relieves him thereof under the provisions of article 18.
45. Moreover, article 4 of the same Code of Professional Conduct for counsel, establishes the primacy of this Code over any other internal instrument governing professional ethics or conduct, which further obliged the Applicant to continue to act as counsel for victims so long as he was not relieved of that duty by the Court authorities.
46. The Applicant submits that the Registrar failed to gather sufficient information to enable her to find that the alleged breach of article 101 of the *ordonnance-loi* of 28 September 1971 consisted in reality of the fact that the Applicant was exercising duties duly conferred on him by the Court, unless it is to be inferred that the provisions of article 4 of the Code of Professional Conduct are entirely devoid of substance.
47. The Applicant submits that, in actual fact, the Congolese National Bar Association's decision, rendered by default furthermore, **accuses him of having complied with the Court regulations and with the spirit of the letter of 29 April 2011 sent to him by the Registrar.**
48. Furthermore, having better understood this principle, the Matadi Bar Association confined itself to issuing a reprimand following a further request from the President of the National Bar Council to initiate disciplinary proceedings by default against the Applicant.

III.3 The disbarment decision transmitted hastily by the President of the National Bar Council of the Democratic Republic of the Congo is not a final decision and has not yet exhausted all of the internal redress mechanisms

49. The Applicant notes that when this review application was submitted, his lawyers filed an application to set aside the proceedings which had been initiated without his knowledge¹⁵ (with acknowledgement of receipt and stamp of the national bar association), and in particular which had been notified to the Court without his knowledge. It is a universally accepted principle of law **that an application may be brought to set aside a decision rendered by default;** accordingly, such is the remedy which the Applicant has just sought.
50. At the same time as the Applicant, and in view of the flagrant irregularities that have blemished all of the disciplinary proceedings brought against the Applicant, the Principal Public Prosecutor of the Republic, the highest judicial authority in the DRC, was seized of the matter and will issue a ruling, by virtue of the powers vested in him, in a decision which we hope will have an immediate suspensive effect on the disbarment decision, and which will be transmitted as soon as possible to both the Presidency and the Registry.

III 4 The Registrar's decision breaches article 21 of the Rome Statute, in particular article 21(1)(c), 21(2) and 21(3), as well as article 4 of the Code of Professional Conduct for counsel

51. Article 21 of the Statute concerns the applicable law before the International Criminal Court. The strict provisions of article 21(3) of the Statute prohibit any interpretation of the law of the Court which might be blemished by adverse distinction founded *inter alia* on national origin or other status.
52. By basing her decision solely on the fact that an organ of the bar council to which the Applicant belongs rendered a decision of extreme gravity, without examining that decision in the light of the other accepted international norms safeguarding fundamental rights and procedural guarantees, the Registrar, through her decision, creates discrimination in that lawyers penalized through disciplinary procedures that are totally incompatible with the right to a fair trial because they belong to a bar which ignores those norms will be treated differently for the same acts for which a lawyer belonging to a bar which complies with the said norms will either receive no sanctions or less excessive sanctions.

¹⁵ Annex 10.

53. Likewise, the Registrar consolidates such discrimination by founding her decision solely on the fact that, at the time he was included in the list of counsel, the Applicant was a member of the Matadi Bar, thus under the jurisdiction of the Congolese Bar authorities. The Registrar failed to justify her decision on the issue of the Applicant's membership of the Paris Bar Association, refraining from ascertaining whether, for the same acts, the Paris Bar Association, of which the Applicant is a member, would have imposed a penalty of that nature on the basis of such clearly biased proceedings.¹⁶
54. The Applicant submits, therefore, that by taking her decision within such a context, the Registrar breached all of the provisions of article 21 of the Rome Statute and rendered a manifestly discriminatory decision, which leaves many counsel vulnerable to disciplinary procedures orchestrated to undermine their capacity to act as counsel before the Court.
55. In light of the foregoing, the Applicant urgently requests that the Presidency set aside the Registrar's decision on the aforementioned grounds.

For these reasons, and everything appertaining automatically and *de jure*,

May it please the Presidency of the Court:

-to grant the urgent application for the immediate suspension of the Registrar's decision to remove the Applicant from the list of counsel.

-to review the Registrar's decision and set aside all of its provisions for breach of article 21 of the Rome Statute, breach of regulation 67(2) of the Regulations of the Court, breach of articles 4, 17 and 18 of the Code of Professional Conduct for counsel, and breach of all other relevant provisions that the Presidency may see fit to invoke and apply automatically.

Dated this 23 August 2011
Mr Hervé Diakiese
Lawyer at the Paris Bar.

[signed]

¹⁶ Annex 15, information provided by the Applicant to the Paris Bar Association concerning the sanctions against him.