

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-RoC72-01/11
Date: 14 November 2011

THE PRESIDENCY

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

Public

Partly dissenting opinion to the ‘Decision 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”’

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

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section
Mr Esteban Peralta Losilla

Deputy Registrar
Mr Didier Preira

Other
Mr Hervé Diakiese
Trial Chamber I
Pre-Trial Chamber I

PARTLY DISSENTING OPINION OF JUDGE FATOUMATA DEMBELE DIARRA

I hereby append my partly dissenting opinion to the Decision of the majority of the Presidency dated 9 September 2011¹ denying the application of Mr Hervé Diakiese (hereinafter “applicant”)² to quash the decision of the Registrar removing him from the list of counsel (hereinafter “Impugned Decision”).³

I. PROCEDURAL HISTORY

1. I adopt the procedural history, as well as the summaries of the relevant parts of the Impugned Decision and arguments of the parties, as set out by the majority at paragraphs 1-7 and 9-24. I also agree with the majority in respect of its determinations on the issues of suspension (paragraph 8), procedural fairness (paragraphs 26-28), the legal status of the decision of the National Bar (paragraphs 35-36) and the relevance of the Paris Bar (paragraphs 37).
2. For the sake of clarity, the relevant aspects of the procedural history, as set out by the majority, are hereby set out in full:
 1. In March 2009, Mr Hervé Diakiese, counsel admitted to the list of counsel authorised to act before the Court (hereinafter “applicant”), was contacted by the Registrar in relation to his suspension for 12 months for discourtesy and lack of deference by the Bar Council of Matadi, which was upheld on appeal by the National Bar Council of the Democratic Republic of the Congo (hereinafter “National Bar”).
 2. On 28 April 2009, the Registrar wrote to the applicant expressing the view that although the suspension against him was sufficiently serious to violate the requirement of regulation 67(2) of the Regulations of the Court (hereinafter all references to regulations are to the Regulations of the Court, unless otherwise provided), he would not be removed from the Court’s list of counsel since he had subsequently been in good standing with the relevant bar authorities in the Democratic Republic of the Congo (hereinafter “DRC”). The Registrar noted, however, that another disciplinary action had commenced in the DRC against him for unlawful exercise of the profession of advocate and indicated that she may reconsider her decision following the outcome of this new disciplinary proceeding.
 3. On 19 August 2011, at 11.03, the Registrar contacted the applicant via email, informing him that she had received information that he had been struck off by the National Bar as a

¹ Decision 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”, ICC-RoC72-01/11-4.

² REQUETE URGENTE PORTANT RECOURS CONTRE LA DECISION DU GREFFIER SUR LA RADIATION D’UN CONSEIL ET SOLLICITANT UNE SUSPENSION IMMEDIATE DES EFFETS DE CETTE DECISION. (REQUETE PUBLIQUE AVEC 15 ANNEXES CONFIDENTIELLES), ICC-RoC72-01/11-1.

³ ICC-Roc72-01/11-1-Conf-Anx11; ICC-Roc72-01/11-1-Conf-Anx12; ICC-Roc72-01/11-1-Conf-Anx13; ICC-Roc72-01/11-1-Conf-Anx14.

disciplinary sanction. The Registrar invited the applicant to communicate his observations on this matter by 14.00 that same date, which the applicant duly did.

4. That same day, following the receipt of the applicant's observations, the Registrar removed the applicant from the list of counsel, considering that he no longer met the criteria for inclusion in the list of counsel prescribed in regulation 67(2), by virtue of having been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court (hereinafter "Impugned Decision").

5. On 23 August 2011, the applicant sought from the Presidency judicial review of the Impugned Decision, requesting also its immediate suspension (hereinafter "Application").
(footnotes omitted)

II. MERITS

3. 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.⁴

A. Regulation 67(2) of the Regulations of the Court

4. This dissent concerns the issue of whether the applicant has, in all the circumstances, violated the requirements of regulation 67(2) of the Regulations of the Court, particularly whether his actions were incompatible with the nature of the office of counsel before the Court. It focuses on the relevance of the letter sent by the Registrar to the applicant dated 28 April 2009 as described by the majority at paragraph 2 (extracted above).
5. I recall that the disciplinary offence which led to the applicant being struck off by the National Bar in 2011 was that of continuing to practice before the International Criminal Court (hereinafter "Court") after having been suspended by the National Bar:

15. The applicant further submits that the disciplinary offence of which he was accused by the National Bar consists only of performing the duties entrusted to him by the Court, with the authorisation of the Registrar. The applicant submits that the Registrar had previously noted that he had been suspended by the National Bar and that there were ongoing disciplinary

⁴ The standard of judicial review was defined by the Presidency in its decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24. See also the decision of the Presidency of 10 July 2008, ICC-Pres-RoC72-01-8-10, paragraph 20.

proceedings against him in the DRC for unlawful practice, but, by her letter dated 28 April 2009, she allowed him to continue to act as counsel before the Court. The applicant then notes that the disciplinary sanction of striking off is not based on any new alleged violation or acts by him, but is based only on the fact that during his aforementioned period of suspension, the applicant continued to perform his duties as a representative of victims before the Court (footnotes omitted).⁵

6. In respect of the nature of the applicant's disciplinary offence and its connection to the Registrar's letter dated 28 April 2009, the determination of the majority was that:

33. The applicant's argument that the conduct at the basis of his disciplinary offence was simply performing his functions before the Court as he had been permitted to do by the Registrar is misleading. By her letter of 28 April 2009, the Registrar did not purport to authorise the applicant to continue representing clients, but simply determined that he was not to be removed from the list of counsel. The applicant, from the date of 27 September 2008, could not have been unaware of his suspension, thus for a period of more than six months prior to the letter of the Registrar of 28 April 2009, the applicant independently decided to continue representing his clients before the Court. The applicant, therefore, could not have relied on the Registrar's letter as permitting him to continue representing clients. The Presidency also accepts the Registrar's submission that in respect of whether the applicant should have continued to act for clients, it was not up to her to advise or order the applicant, but for him to independently ensure that he was acting at all times in accordance with the professional and ethical obligations incumbent upon him by virtue of his membership of the relevant bar in the DRC (footnotes omitted).

- 7. In my view, the above analysis incorrectly characterises the effect of the Registrar's letter of 28 April 2009. By that letter, and with knowledge that the applicant was subject to a suspension by the National Bar, the Registrar determined that the applicant would not be struck off the list of counsel before the Court. It is true, as the majority notes, that the letter does not expressly authorise the applicant to continue representing clients before the Court, limiting itself to deciding that he could remain in the list of counsel. Given, however, that at the time of the letter, the applicant was engaged as counsel in a number of cases before the Court, the Registrar's letter, by remaining silent on what he should do in respect of those cases, gave the applicant the impression that remaining in the list of counsel was synonymous with continuing to represent his clients.**
- 8. Regulation 67(2) of the Regulations of the Court provides that "[c]ounsel 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". The disciplinary offence of which the applicant has been accused, namely continuing to represent his clients before the Court despite the suspension against him by the**

⁵ Decision 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", ICC-RoC72-01/11-4.

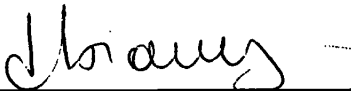
National Bar, cannot be considered “incompatible with the nature of the office of counsel before the Court” when, in fact, the core of the applicant’s “misconduct” has simply been his compliance with the Registrar’s implied instructions of 28 April 2009, which he reasonably understood to indicate that he may continue to represent his clients. Far from acting in a manner incompatible with the functions of counsel before the Court, he has pursued the diligent exercise of the functions of counsel in accordance with the instructions of the Registrar.

9. In my view, the Impugned Decision fails to take into account the relevant factor of the impact of the Registrar’s letter of 28 April 2009 and, once such factor is considered, the requirement of incompatibility established by regulation 67(2) is not satisfied. Accordingly, the applicant continues to meet the requirements for inclusion in the list of counsel.

I would grant the Application and set aside the Impugned Decision for the reason outlined above.

The Registrar is ordered to notify this decision to all parties and participants in the case of *the Prosecutor v. Thomas Lubanga Dyilo* and the case of *the Prosecutor v. Callixte Mbarushimana*.

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


Judge Fatoumata Dembele Diarra
First Vice-President

Dated this 14 November 2011

At The Hague, The Netherlands